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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
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INTERPRETING THE 14TH AMENDMENT

With respect to “The 14th,” May, page 36, I was disappointed to find such a one-sided caricature of jurisprudence in the late 19th century.

As a glance at the historical record makes clear, the U.S. Supreme Court did not “consistently rule” against business regulations. In fact, the court sustained a wide variety of business and land use regulations. The liberty of contract doctrine, set forth in *Lochner v. New York* (1905), was rarely invoked by the Supreme Court. Moreover, there is a substantial body of recent scholarship that has treated the famous *Lochner* decision more positively than was previously the case.

*James W. Ely Jr.*
Nashville, Tennessee

It is to the 14th Amendment that we owe our liberties. Before its passage, individual liberties were at the mercy of the states. In 1860, Abraham Lincoln did not appear on the ballot in most Southern states. The Founding Fathers thought Justice Clarence Thomas was someone’s property and counted him as three-fifths of a person. It is regrettable that after 150 years there are those who seek to limit the amendment’s scope and remove our liberties.

George Sly
Wantage, New Jersey

EXECUTIVE QUESTIONS

The *ABA Journal* reports in “Trump and the Constitution,” May, page 11, that the University of Washington has created a new course, “Executive Power and its Limits.” Why wasn’t this course developed when President Barack Obama threatened to take away the federal funding of schools if they did not provide transgender restrooms in compliance with his executive order?

President Donald Trump threatens to withhold federal funding to states if they do not comply with federal immigration laws passed by Congress, and people then begin questioning the president’s power to do so.

The creation of this course at this time appears to be an anti-Trump campaign supported by a public university, funded with taxpayer dollars.

*Stanley S. Pratt*
Yakima, Washington

CORRECTION

“Make Me a Match,” June, page 48, should have stated that Mayer Brown has undergone three mergers in the last 15 years.

The *Journal* regrets the error.
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Price of Liberty

Lawyers demonstrate patriotism through helping others and expanding access to justice

On July 4th, we commemorate the founding of our great nation. So now is a good time to remember that, as John Adams famously remarked, we are “a government of laws, and not of men.”

As America celebrates its 241st anniversary, we, as lawyers, should reflect on the vital role our profession has played in the building, governance, and preservation of our democracy.

From its inception, the United States was led by lawyers. Of the 56 signers of the Declaration of Independence, 25 were lawyers; as were 32 of the 55 framers of the Constitution.

Throughout our country’s history, lawyers have been at the forefront of the growth, strength, and integrity of America. Attorneys wrote treaties that ended wars, kept the peace and promoted trade. They battled for the freedom, rights and education of people who could not fight on their own. Most may not be household names, but their accomplishments are known worldwide.

Robert Livingston, a drafter of the Declaration of Independence, helped negotiate the Louisiana Purchase in 1803, which nearly doubled the size of the country and opened it to westward expansion.

Thaddeus Stevens, a congressman, fought tirelessly for the abolition of slavery. In 1851, he successfully represented a group of slaves who fled to safety in Pennsylvania as they faced a treason charge in the Christiana Riot case. During the Civil War, he encouraged Abraham Lincoln to issue the Emancipation Proclamation. And after the war, he helped develop what became the Fourteenth Amendment.

Justice Robert H. Jackson, when asked by President Harry S. Truman, took a leave from the Supreme Court to prosecute Nazi war criminals in the Nuremberg trials. Adhering to the rule of law and the legal process, Nuremberg was a major step in the development of international humanitarian law.

Thurgood Marshall argued before the Supreme Court in Brown v. Board of Education and won a unanimous decision, which held that racial segregation in public schools was unconstitutional.

But it still is not enough. Too many Americans do not have adequate access to justice. Wealth and income play an oversized role in our system and too often determine who wins and who loses.

People who cannot afford bail are held for long periods of time before trial even when they pose no flight risk or danger to society. Some jurisdictions have resorted to imposing fees on all phases of the justice system, from receiving a public defender to paying for your own incarceration and even ankle-monitoring device. When defendants cannot pay these fines and fees, they are incarcerated in what amounts to a modern-day debtor’s prison.

Public defender offices are overwhelmed and underfunded and cannot adequately handle the caseloads given to them. When it comes to access to civil justice, the situation is worse. More than half of individuals with low-incomes who seek civil justice assistance are turned away due to a lack of resources. Their cases are child custody, domestic violence, eviction, disaster relief and veterans’ benefits.

We, as a society, must do better.

Please enjoy your Independence Day celebrations with family and friends. Please ask them to remember that patriotism is more than just flag waving. It is a dedication to our nation’s principles and a commitment to our fellow citizens. We are lawyers. These are our values. We took an oath. This is what we do.
TRANSFORMING A POLICE DEPARTMENT

Attorney finds rewards and challenges as a federal monitor

AS THE CO-PRACTICE GROUP LEADER for government contracts, investigations and international trade at Sheppard, Mullin, Richter & Hampton in Washington, D.C., Jonathan Aronie has had a lot of interesting cases over the course of his career. But there’s one he calls “the most challenging and most rewarding case I have handled.”

In 2015, Aronie was a member of a team appointed by the U.S. District Court for the Eastern District of Louisiana to monitor the New Orleans Police Department as part of a Department of Justice consent decree.

“The greatest skill I bring to this is I listen,” he says. “That’s true in my corporate work but even more important here. You cannot pretend to listen.”

The NOPD had what Aronie calls a “long and notorious reputation” of police misconduct. In July 2012, the DOJ and the city of New Orleans issued what was essentially a request for proposals for law firms interested in taking on an oversight job to help the department reform. Twelve teams submitted their credentials, and that group was winnowed down to five that were interviewed by the public in the Mercedes-Benz Superdome, in what Aronie calls a “fascinating” interview process. His team prevailed: Aronie is the lead monitor on the case, along with fellow Sheppard Mullin partner David Douglass. Former police chiefs and academics round out the team.

“We provide technical assistance. We regularly review all the police uses of force. We review a lot of data,” Aronie explains. The team also publicly reports on its findings. But this isn’t just paper pushing. Aronie and others ride along with law enforcement, walk into people’s houses and “get a real sense of what policing is about” for this city of more than 380,000. “When I took the job, I promised that I was not going to monitor from my desk,” he says. “I needed to understand what people need and what reform would look like.”

During that time, he says, he’s seen how bad policing can affect communities—both citizens and police officers. “We’ve been in situations that have caused me to cry when I left the scene. Not because I have been in fear, but because of the hopelessness of the situation.”

While certain cases he’s encountered have
Originalism and Its Discontents

Play draws appellate judges to weigh in on Scalia legacy

AS THE STAGE PLAY

The Originalist opens, the audience finds Justice Antonin Scalia (actor Edward Gero) comparing opera—which the justice famously loved—to his judicial philosophy. “There’s a sanctity to the score. The notes are the notes,” he says. “That is precisely my view of the Constitution.”

Over the next 90 minutes, the audience at the Pasadena Playhouse near Los Angeles gets to hear Scalia defend that view at length with a young, liberal Harvard Law School clerk named Cat (Jade Wheeler) as his foil.

What ensues is a robust debate over the course of the play as the justice and his clerk spar over originalism itself and a slew of major rulings. The two never come to an agreement, but the play shows them developing a mentoring relationship that some might find unlikely. By the end, they like and respect each other. Sort of.

“God, it’s stunning ... to discern the blind spot in a brilliant intellect,” Cat says while trying to convince her boss to soften his dissent in U.S. v. Windsor.

More debate and more lawyers followed the April matinee performance, as jurists who knew Scalia joined a post-show panel to discuss the justice’s legacy. Judges Alex Kozinski, Stephen Reinhardt and Paul Watford of the 9th U.S. Circuit Court of Appeals at San Francisco held a robust discussion and Q&A after the play. Playwright John Strand joined them.

Kozinski, who knew Scalia personally, said the play captures some of the justice’s personality very well. Scalia was brilliant, affable and funny, he said, sometimes self-deprecating and “really, absolutely sure that he was right.”

And Kozinski believes Scalia changed American law, although perhaps not in the way he’d wanted, by legitimizing originalism. “Before Justice Scalia became a justice, those kinds of arguments were largely laughed aside,” said Kozinski.

For Watford, the play was partially about clerkships—a view perhaps influenced by the fact that he once clerked for Kozinski.

The experience taught him that clerks who challenge their judges can be valuable. “It’s not so much that someone else is going to change your mind per se, but you want to maintain an open mind,” he said. “And it really does help, I think, to have a law clerk who is willing, as with the actress on stage, to push back.”

Reinhardt, whom some might call a flaming liberal, used his time to denounce originalism. He was careful to point out that he didn’t intend to demean Scalia as a person. “To say that ‘I have some communication with the original founders and I know what they meant’ is to me an unusual degree of arrogance,” he said.

The Originalist premiered at Washington, D.C.’s Arena Stage in 2015, before Scalia’s death. Strand said the justice never saw the play, though some members of his large family did.

He said Gero did meet and become friendly with Scalia while researching the role. And Justice Ruth Bader Ginsburg attended, Strand said, which led the audience to watch her rather than the play.

—Lorelei Laird

Opening Statements

made him feel hopeless, Aronie and his team are hopeful about what this work is doing for the city of New Orleans, its police force and the attorneys working on the consent decree. The team’s May 5 report found that the average monthly number of uses of force dropped from 126 in 2015 to 102 in 2016.

The experience has been so powerful that Aronie urges other lawyers to look at taking on such projects. “The rates are so low that we think of this work as public interest, even though it is not pro bono,” he notes. (It’s unclear what role consent decrees will have in the new administration’s DOJ. In April, Attorney General Jeff Sessions called for a federal review of the agreements with police departments.) For all the work his team has done, Aronie is clear that it is the police officers who deserve the credit. “We help. But they prevent problems before they occur.”

—Margaret Littman
Startup Story
Black, female lawyers build their own success

YONDI MORRIS-ANDREWS RECALLS the exact moment she decided to leave her position as a contract attorney at a BigLaw firm.

“I was in a meeting at a large law firm, and at the end of the meeting, one of the partners said, ‘OK, slaves, get back to work,’” recounts Morris-Andrews, who is African-American.

For Morris-Andrews, it was more than just a bad word choice: It was an indicator of a more systemic problem. At that moment, she knew it was time to leave.

That night, Morris-Andrews logged on to Twitter and in 140 characters announced that she was ready to start her own law firm.

“When I said it, I wasn’t really serious. I was just venting,” says Morris-Andrews. But her tweet resonated, and her friend Keli Knight immediately responded that she was also ready to strike out on her own. Mutual friend Jessica Reddick joined the conversation, and the three lawyers—all in their 30s—decided to form the Knight, Morris & Reddick Law Group, also known as KMR. The firm has offices in downtown Chicago and Los Angeles. KMR specializes in real estate, corporate law, estate planning and entertainment law.

“We pared our services down to the practice areas that we enjoyed, which inherently brought like-minded and complementary clients,” Knight says.

The partners also run KMR Legal Staffing, providing law firms and corporations with attorneys, paralegals and general office support for engagements ranging from document review to short-term and permanent placements. Having worked as a contract attorney, Morris-Andrews knew there were opportunities in that area.

Regarding legal staffing, Knight says, “What’s fulfilling is that we are able to offer work opportunities for people who may not have them otherwise.”

The trio built their businesses from the ground up, figuring out who their clients were and how to find them. Running a law firm has been a continuous learning curve and has also meant nonstop communication—with one another and their clients.

“It varies day by day; that is just the life of an entrepreneur. Things come up at all hours, and we have to make ourselves available to resolve any matter that presents itself,” Reddick says.

Despite the challenges, KMR has managed to thrive in a tough legal climate. And the team is grateful for the support they’ve received along the way, including meeting an early booster during a chance encounter on an elevator.

“I always make it my practice to be in networking mode,” Morris-Andrews says of her encounter with John Adams, who is a descendant of the country’s second president. The two stayed in touch, and later, Adams suggested she start her own firm.

“He would sit down with us and go over corporate documents. He became a mentor to us and was a very selfless person,” says Morris-Andrews, adding that Adams stated that he was aware of the historical oppression of African-Americans in this country, and he wanted to help. Adams, who works in corporate law, even surprised them with some seed money.

Hard work and support from mentors, friends and family have been the keys to their success. The partners recognize that being a woman- and minority-owned law firm sets them apart, and it sometimes means closer scrutiny.

“Obviously, this is a male-dominated field,” Reddick notes. “It is really important that we put out good work so that our reputation can stand on its own.”

So far, so good. KMR plans to expand by opening its third office in the nation’s capital, which also happens to be Reddick’s hometown.

—Cristin Jordan
Beyond a Wall
Along the Texas-Mexico border, immigration lawyer Kimi Jackson deals with matters of life and death

FOR MANY PEOPLE seeking asylum in the United States, the often-harrowing journey ends in a detention facility along the Texas-Mexico border. Here, new challenges await. Do they have a legal case to fight deportation? Can they prove it? Will the judge believe them? And, ultimately, is there anyone who can help them?

That’s where the South Texas Pro Bono Asylum Representation Project comes in. Located in Harlingen, Texas, ProBAR is an ABA-sponsored project that helps asylum-seekers and other detained immigrants by providing and coordinating legal assistance and services in South Texas detention facilities.

Kimi Jackson is ProBAR’s director, and she has dedicated her career to providing legal services to underserved communities. Jackson also oversees ProBAR’s Children’s Project, which assists youngsters detained while attempting to cross the border without a parent. Jackson and her staff of 80, including 14 lawyers, provide services such as legal representation, general orientation and pro se assistance.

Let’s just jump right into the tough stuff: The political controversy right now involving Mexico, immigration and the border. How is this affecting ProBAR?

Our work has become more difficult because the Department of Homeland Security is less willing to exercise favorable discretion, meaning it’s more unlikely for people to be released from detention on bond. More people have to fight their case from within the detention facility.

Do you think the political climate is resulting in fewer asylum-seekers trying to cross the border?

Asylum-seekers by definition are fleeing violence and danger in their home countries. People who flee for their lives are not deterred by the political climate. Honduras, for example, is the most dangerous country in our hemisphere. Imagine that you are a Honduran mother. If your 12-year-old daughter were being pursued by a gang member who wanted to make her his girlfriend and who threatened to rape or kill her if she refused, and your government had no ability to protect her, you would likely do whatever you could to get her to a safer place.

I imagine that, at times, your work can be incredibly depressing. How do you stay motivated over the long term and maintain the stamina of the staff you manage?

There are a lot of clients who don’t win. There are people who are not going to be able to stay, and we know that some of them may end up getting deported to their home country and even killed there. But we have to celebrate the victories. Last week, a ProBAR client who had previously won asylum received his green card, and he came by to thank us and to tell everyone how much this means to him. We are here because we want moments like that. We want to make a difference in someone’s life, and we want someone to be safe because of our help.

How did you get started in public service law?

My parents instilled in me the desire to pursue a career that I found meaningful. For me, that meant that I wanted to do work that would help make the world a better place. I decided that if I went to law school and became an attorney, it would give me tools to make a positive impact. My first job out of law school was working with Colorado Legal Services in the migrant farmworker division. We addressed the needs of farmworkers in the context of employment issues and immigration issues.
Are you a native Spanish speaker?
No. I studied Spanish in high school and college, and I’ve been using it for my work ever since. I also spent time backpacking in South America and volunteering for a nonprofit organization in Bolivia.

That sounds amazing!
It was. In 2008, I took a break from practicing law to pursue my dream to travel. After eight months in South America, I went to Japan and taught English. Then I got a volunteer position on Peace Boat, which is a ship that travels around the world engaging in educational activities. I was a volunteer photographer and web reporter. It was a wonderful experience. We traveled the circumference of the world in three months. I had been planning to go back to Japan to start teaching again, but then the Fukushima disaster happened, and my school was only 50 miles from Fukushima, so I came home.

Were you worried about taking such a long break from practicing?
Not really. There were people who said that if you take this time off, you won’t be able to get back to your career. I just didn’t listen to them.

What’s a typical day like for you?
I don’t think I have a typical day, and that’s one of the things I love about my job. Recently, our children’s office moved to a larger space, and that process required negotiating a commercial lease and working with an architect to design a flexible, comfortable workspace. One day I might be creating budgets for grant renewals, and another day I am working with our management team to address changes and growth. So it’s always different. Our staff brings so much energy and passion to their work. They could all be doing something else, but they want to be here, helping people in their greatest time of need.

What are some of ProBAR’s biggest day-to-day challenges?
One of the challenges we face is hiring and retaining lawyers. There’s no law school here. There are no large law firms. Young lawyers often prefer to live in a more urban area; and if they’re married, they have to think about employment for their spouse. We can’t change these things, but lawyers who do come here find that they have a tremendous opportunity to make a real difference in people’s lives.

What do you do to unwind?
One of my hobbies is vegetable gardening. The work that we do at ProBAR is emotionally demanding. We work with a lot of survivors of trauma, and we often see the uglier side of life. I believe that in order to be able to continue to do this kind of work over the long term, a person needs balance and to have a hobby that isn’t related to law. For me, nurturing plants is calming and healing.

—Jenny B. Davis
Stop Apologizing for Who You Are

By Hilary Preston

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 both life’s challenges and work’s demands. Visit workingmother.com for more.

SEEMINGLY ENDLESS NUMBERS OF ARTICLES have been written about the keys to a successful legal career, each with a twist but many, many commonalities: embrace hard work, find a mentor/sponsor and make yourself useful to him or her, specialize in something strategic and valuable, build strong relationships with your clients, etc. Those are all very valuable pieces of advice. But I wanted to write about something slightly different—something that, when I reflect on my own career, was critically important not only to advancing my career and building my practice but also to keeping me sane and, most of the time, very happy in life.

I had to learn to stop apologizing for who I am and stop trying to fit a mold that didn’t work for me.

As an example: When I was coming up for partner, I had a baby and a toddler at home. My husband and I had just relocated our family to the suburbs and decided to try having him stay home with the kids full time. To be able to get home in time to see my young kids and help with the chaos of dinner and bedtime for kids that age, I had to leave the office at 5:15 p.m. every day. I did that, for nearly two years, with very rare exceptions. I am not suggesting this is an act of bravery by any stretch, and it is a small point. But in New York City, that is pretty much midafternoon for most senior associates coming up for partner. But I knew that was the right choice for me. Lots of well-meaning people told me that was a huge mistake, and that I would never be considered dedicated to my practice and, therefore, could not make partner.

I was willing to take that risk, because I was not willing to miss out on those fleeting early years with my kids. And I knew the work would get done; it just might need to be after the kids were asleep. I respect that people make different choices about how they want to design their lives and where they draw a line in the “balance” between work and life. I’m not advocating one choice or another; my point is only that if your choice looks a bit different from whatever the “norm” is at your firm or company, don’t shy away from that. Be confident in your own choices. To be successful in the long term—because it truly is a marathon and not a sprint—we have to design our careers in a way that works for our lives, not the other way around.

In addition, a useful byproduct comes out of being honest about what matters. You find out quickly who is truly supportive of your success and who is not. I had the great fortune of having mentors who continued to give me prominent roles on cases despite the fact that I happened to be out of pocket for a few hours in the early evening. And I had a firm that recognized at the most senior levels that many people—both men and women—needed this kind of flexibility at some point in their careers. There were certainly detractors. And some more passive-aggressive partners would make a habit of calling me about 5:14 every day with an “urgent” request. But if I had not had the supporters, I would have left. And I would be writing this not as a partner at Vinson & Elkins but as a part of another firm or company. Because it still would have been the right choice for me.

No one succeeds in this profession on their own: no one. We need the support of others—from clients to those senior to you to those junior to you, staff, everyone—so be kind to them. And where you can, be real with them. You will build more meaningful connections and, therefore, true support, which we all need in this challenging profession. When you build those connections and the trust that comes with them, you can succeed without apologizing for who you are.

Hilary Preston is a partner in the New York City office of Vinson & Elkins. She is co-chair of the firm’s intellectual property practice group and a member of the firm’s management committee.
Hearsay

$118,000

The median annual salary for lawyers, which continues to slip compared to other professions. Figures released in May 2016 by the Bureau of Labor Statistics show attorney salaries are lower than the median for information systems managers, pharmacists, advertising managers and nurse anesthetists, among others. The data tracks only salaried positions and does not include solos or law firm equity partner compensation.

Source: bls.gov (May 2).

Did You Know?

The auction system on oversold flights can be traced back to a 1976 Supreme Court case, in which the now defunct Allegheny Airlines bumped Ralph Nader. In Nader v. Allegheny Airlines, the court held that if a passenger had a confirmed ticket, the airline was committing a fraudulent act by bumping him. In response, the industry developed the auction system.

Source: nytimes.com (April 17).

Excuse Me, I Was Talking

Female justices on the Supreme Court are cut off while speaking more often than men, according to a new study, and male justices are doing the vast majority of interrupting. In Justice, Interrupted, a Northwestern University law professor and student report that this has been occurring more frequently as more women joined the court. The study notes that 65.9 percent of interruptions were directed at the three female jurists.

Source: scotusblog.com (April 5).

THE PERCENTAGE OF CASES decided by federal appeals courts after hearing oral arguments.
The overwhelming majority of cases are being decided based on briefs, without a hearing, according to new data from the Administrative Office of the U.S. Courts. Advocates worry the art of the oral argument may be slipping into obscurity, particularly in the federal court system.

Source: law.com (May 1).

Cartoon Caption Contest

CONGRATULATIONS to Lewis R. Sifford of Dallas for garnering the most online votes for his cartoon caption. Sifford’s caption, far right, was among more than 75 entries submitted in the Journal’s monthly cartoon caption-writing contest.

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

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

“Yes, madam. Any statement you make will be absolutely confidential.”
—Lewis R. Sifford of Dallas
Tenant Power

Nonprofits provide legal and tech support to help resolve housing disputes

By Jason Tashea

The tenants of 178 Rockaway Parkway in Brooklyn had been freezing for months. All subject to the building’s central thermostat, they complained to their landlord. But the temperature remained below the New York City legal minimum of 68 degrees. Then on Dec. 1, 2016, these residents brought a claim to the New York City Housing Court.
Armed with data from a wireless thermometer provided by Heat Seek, a New York City-based nonprofit, the tenants had objective, verifiable data that showed that their landlord kept temperatures under the legal limit. The next day, 178 Rockaway was 10 degrees warmer.

Heat Seek is part of a new cadre of tech nonprofits, law school programs and government agencies around the country rethinking how people interact with housing court. In New York, nonprofits are experimenting with new hardware and software to help pro se litigants collect admissible evidence. In Massachusetts, a coalition is proposing to redesign housing court from the ground up.

The number of self-represented litigants in civil court is staggering. According to the Self-Represented Litigation Network, an estimated three out of every five people in civil court are without an attorney.

According to Dan Jackson, executive director of the NuLawLab—an interdisciplinary laboratory with a goal of creating legal empowerment at Northeastern University School of Law in Boston—71 percent of litigants in Massachusetts housing court are unrepresented.

Reports from California, New Hampshire and Utah all indicate that pro se representation is on the rise. This trend is being driven by the prohibitive cost of a lawyer and more demand than legal aid attorneys can handle.

In New York City, there were 200,000 heat complaints in 37,000 unique buildings in 2015, according to Heat Seek. But less than 4 percent of those buildings were found to be in violation. To close this gap, Heat Seek’s wireless thermometer records a unit’s temperature every hour until enough data is collected to determine whether a complaint can be brought. The platform produces evidence, including the day and time of inside and outside temperature readings, in a format admissible in court.

Still a young organization, last year Heat Seek was in 56 buildings, of which 20 saw a resolution in favor of tenants. Those buildings were chosen for numerous reasons, including by referral from their legal and advocacy partners. Noelle Francois, executive director, says Heat Seek is working on ways to better target future buildings. At a cost of about $1,000 per building, which is covered by grants, quantifying this solution is not easy.

Francois says she receives requests for her product from around the country. Currently, Heat Seek is looking inward at its process before it expands to new cities. Acknowledging that technology is part of the solution, she wants to maximize the impact through partnerships with legal aid organizations and tenant advocacy groups.

A MATTER OF REPRESENTATION

Jackson is taking a broader view of housing court’s challenges. He says reforming housing court “in the margins” is not tenable.

“The problem is that we have a system that was designed by lawyers for lawyers and assumes that people who are seeking formal redress ... will have the benefit of a lawyer,” Jackson says.

In Massachusetts, 93 percent of tenant-defendants and 41 percent of landlord-plaintiffs are unrepresented in summary eviction proceedings.

To understand how the lack of representation affects people and courts, Jackson is joining up with Ideo, a global design company, and the Massachusetts Trial Court to take a “human centered design” approach to housing court.

This approach is defined by three steps. To begin, Jackson and his coalition will meet with users of the court, including litigants, judges and other court staff. From these conversations and witnessing how people interact with the court, the NuLawLab will better understand users’ experiences. It will then develop prototype solutions while eliciting feedback from the pool of users. After numerous iterations, vetted products and processes will be implemented by the court.

Although this approach is well-worn in the technology sector, Jackson points out that “it’s not been done before” in the courts.

One potential project came out of a community input session last fall. Currently, those involved in an eviction proceeding must arrive at court at 9 a.m. for the clerk to call their name. This can include as many as 180 people. Jackson suggests that instead of the cattle call, people could check in at a kiosk, like at an airport, and a ticket would be printed with the time and place of the hearing. Now, instead of waiting in a courtroom for hours, the person could leave and come back or build their case with resources at the courthouse. Jackson is currently seeking funding to begin this work.

Chief Justice Timothy Sullivan of the Massachusetts Housing Court in Boston says the partnership with the NuLawLab builds on its existing work to support self-represented litigants.

“Creating or building a system on pro bono representation is not sustainable going forward,” Sullivan says. “We have to restructure what we do.”

Sullivan sees the partnership with the NuLawLab as a continuation of his court’s innovative reform. He points to ongoing initiatives such as the Tenancy Preservation Program, which helps prevent people from losing their homes by mediating between landlords and tenants being evicted because of a behavioral disability.

“We are constantly doing community outreach to learn from the court user and to maintain an open mind on how to improve user experience in court,” Sullivan says.

DOCUMENTING EVIDENCE

Another approach being taken is JustFix.nyc, a software nonprofit based in Brooklyn. Georges Clement, one of the co-founders, recounts what he saw while sitting in the back of the New York City Housing Court.

“We saw time and again tenants coming in unrepresented. They were carrying a plastic bag with various papers,” Clement says. Even if tenants had photos of needed repairs, landlords would challenge the photos by saying they were taken before repairs were completed.
The Docket

“People were capturing the evidence already, but they weren’t presenting or organizing it in a way that was effective in court,” Clement says.

Using a mobile-friendly web app, JustFix.nyc walks a user through the steps to build a complaint against a landlord or a property management company. Based on legal aid documents and a tenant’s checklist provided by the city, the tool helps collect evidence about disappear and recommends ways to engage the landlord in a proactive way to avoid court. With photos, documentation and metadata that proves when and where the evidence was collected, JustFix.nyc creates a Facebook-like timeline of events that prints in an admissible format.

The beta test of the app began late last year. But with 300 current cases, it’s too soon to know the impact of this tool. On an individual level, however, Paula Tano, a renter in the Bronx, says the tool helped her feel prepared when she challenged her landlord’s unwillingness to fix a long-term water leak that became fetid. Armed with her printed timeline, Tano brought her landlord to court. Before the hearing began, the landlord agreed to the repairs.

“It reaffirmed for me that I had taken the right steps, and that I’d done everything correct,” Tano says. An advocate at Barrier Free Living, a nonprofit that assists domestic violence victims, Tano says she plans to use JustFix.nyc with her clients in need of housing assistance.

Beyond making users into evangelists, such programs are gaining the support of legislators. On Dec. 15, Eric L. Adams, president of the Brooklyn borough, presented legislation that would codify the city’s capability to install and use remote, wireless monitors—similar to Heat Seek. His office also allocated $5,000 to expand Heat Seek in Brooklyn, beyond 178 Rockaway Parkway.

Adams thinks increasing the use of heat sensors will help “combat tenant harassment.” To improve the adoption of these tools, he is working with the housing court to train judges to interpret data collected by these monitors. He says the future of these tools “is a promising one.”

Behind the Wheel

Who’s to blame when self-driving cars crash?

By Steven Seidenberg

On May 7, 2016, Joshua Brown made history. The Canton, Ohio, resident became the first person to die in a self-driving car. Brown, 40, had turned on Autopilot, the autonomous driving system of his Tesla Model S, and set the cruise control at 74 miles per hour. As his car raced down a highway west of Williston, Florida, a tractor-trailer came out of an intersecting road.

Tesla’s Autopilot is a technological marvel. It controls the car, using radar and cameras to scan the road. It keeps the car within lanes on highways. It brakes, accelerates and passes other vehicles automatically.

According to one of Tesla’s public statements, the camera on Brown’s car failed to recognize the tractor-trailer crossing the highway against a bright sky. As a result, the car did not brake, nor did it issue any warning to Brown. The car crashed into the trailer, killing Brown.

The automobile’s self-driving system was not at fault, according to an investigation conducted by the National Highway Traffic Safety Administration. The agency found that Autopilot was designed to prevent Tesla cars from rear-ending other vehicles but was not intended to handle situations when vehicles crossed the road from intersecting roadways. Thus, there were no “defects in the design or performance” of the system, the NHTSA concluded.

Brown was responsible for the crash, according to the agency. If he were paying attention, he would have seen the truck crossing the highway and had at least seven seconds to respond—sufficient time to avoid the collision.

No one knows for sure what Brown was doing in the last seconds of his life. But the other driver told police he heard a Harry Potter movie playing in the crushed automobile after the crash.

Tesla avoided liability for his death because Autopilot was intended to aid, not replace, human drivers. The technology, however, is changing. Google, Mercedes-Benz, Tesla, Uber and Volvo are some of the companies working to develop fully autonomous cars, intended to drive themselves without human intervention. Google’s prototypes don’t have steering wheels or brake pedals.

WHO’S REALLY RESPONSIBLE?

Matthew T. Henshon, a partner at Henshon Klein in Boston and chair of the Artificial Intelligence and Robotics Committee of the ABA Section of Science and Technology Law, says “people haven’t really thought through” who—or what—will be liable when fully autonomous cars crash, resulting in injury or death.

“This is going to burgeon into the most significant subject matter of the 21st century,” says Paul F. Rafferty, a partner in the Irvine, California, office of Jones Day.

The law, as it stands now, is simple. Human beings cannot delegate driving responsibility to their cars. In self-driving cars, a human must be ready to override the system and take control.

This rule has to be updated, according to the NHTSA’s September 2016 report on autonomous vehicles. The organization suggested that different legal standards should apply, “based on whether the human operator or the automated system is primarily
There are good policy reasons for this, says Jeff Rabkin, a former prosecutor and now a partner in the San Francisco office of Jones Day. “If a passenger has no way to operate the vehicle, prosecuting the passenger would not serve any of the purposes of criminal law,” Rabkin says.

Similarly, it wouldn’t make a lot of sense to impose civil liability on the human occupants when the HAV has an accident. The NHTSA therefore has encouraged states to revise their tort laws to hold HAVs liable when there are crashes.

**SHARING THE BLAME**

Holding an HAV accountable is easier said than done. “Multiple defendants are possible: the company that wrote the car’s software; the businesses that made the car’s components; the automobile manufacturer; maybe the fleet owner, if the car is part of a commercial service, such as Uber,” says Gary E. Marchant, director of the Center for Law, Science and Innovation at the Sandra Day O’Connor College of Law at Arizona State University.

“How would you prove which aspect of the HAV failed and who should be the liable party?”

Technical forensic investigations will be required. “Attorneys will need to hire experts to download the black boxes from the vehicles and evaluate the precise system failure that caused the accident—a time-consuming process that will surely add additional expense to litigation,” says Jeffrey D. Wolf, a partner at Heimanson & Wolf in Los Angeles.

This will complicate criminal prosecutions of HAV companies—and transform civil accident cases. Relatively simple negligence suits that involve two parties will be replaced with complex, lengthy and expensive product liability litigation with multiple defendants.

“What have been, to date, mostly straightforward cases of fault against an owner for improper handling of a car will now become cases that are much more expensive,” Wolf says.

As a result, many tort victims will be unable to obtain justice. “It will be difficult to accommodate driverless vehicles under the current common-law framework. We will need a new statutory scheme because otherwise it will be too costly for individuals to prosecute [tort] claims,” says Wayne R. Cohen, founder and managing partner at Cohen & Cohen in Washington, D.C.

He favors a strict liability regime that covers HAV-makers and subcontractors. “Otherwise, you will impede access to the civil justice system for anyone who is injured,” Cohen says.

Other experts worry that a strict liability regime would put an unfair burden on manufacturers of HAVs. “There will be far fewer accidents with HAVs, but when they occur the vehicle’s manufacturer will be sued. So carmakers will have more liability than they do now for making a safer product,” Marchant says.

**BENEFITS COME WITH A COST**

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**BENEFITS COME WITH A COST**

A strict liability regime could discourage companies from making HAVs. But public policy should encourage manufacturers of HAVs because studies have repeatedly concluded they’re far safer than human-driven cars.

A 2013 study by the Eno Center for Transportation (a nonprofit think-tank in Washington, D.C.), estimated that if 10 percent of the cars on U.S. roads were HAVs, 1,100 lives would be saved annually. If 90 percent of the cars were HAVs, 21,700 lives would be saved each year.

HAVs are expected to provide other benefits to society: easing traffic congestion; shortening travel time; burning less fuel; lowering emissions; and providing mobility to those who cannot drive, such as seniors and people with vision problems. If HAVs constituted 90 percent of cars on U.S. roads, the nation would save more than $355 billion per year, the Eno Center estimated.

Because a negligence standard might make it too expensive for crash victims to obtain justice and a strict liability standard might discourage companies from putting HAVs on the road, some people are contemplating other, less traditional methods for handling HAV tort liability. “Perhaps the creation of a no-fault system would be best, funded by buyers of autonomous vehicles or by a percentage of state motor vehicle fees,” Rafferty says.

A similar no-fault system was created to protect another socially beneficial product. “Vaccines made people safer, but there was great liability when something went wrong, so we had to change the liability regime,” Marchant says.

In 1986, Congress required vaccine-makers—in exchange for legal protections—to contribute to a no-fault compensation fund. Sufferers go before special vaccine courts that can’t award punitive damages, only compensation. “They may need to set up something like that for driverless cars,” Marchant says.

Some experts warn it’d be premature to enact laws now. “Legislation changes slowly, and technology changes fast. Legislation can become obsolete very quickly,” Rabkin says.
The Docket

Troll Hike

Supreme Court makes it harder for patent litigants to shop for favorite venues

By Mark Walsh

Could this be the end of out-of-town patent lawyers flocking to Marshall, Texas? They’ve become known for showing up in luxury cars, ordering catered gourmet meals for their trial war rooms and running up expensive hotel tabs.

Will major corporate patent litigants stop sponsoring events and festivals there? That’s the future some observers predict for the top destination for patent infringement lawsuits after a U.S. Supreme Court decision limited the venues where such suits may be filed.

Writing for the court in TC Heartland v. Kraft Foods Group Brands on May 22, Justice Clarence Thomas said the definition of “residence” in the federal statute about patent venue—first adopted in 1897 but later amended—refers only to the state of incorporation for a U.S. company. The decision was 8-0, with Justice Neil M. Gorsuch not participating because the case was argued before he joined the court.

The court overturned a series of decisions by the U.S. Court of Appeals for the Federal Circuit. The Washington, D.C.-based court that specializes in patents had permitted a broader definition of residence that allowed patent suits to be brought virtually anywhere in the country.

The decision will create more challenges for plaintiffs known as patent assertion entities or non-practicing entities—disparagingly referred to as “patent trolls.” These individuals and corporations typically acquire patents not to create products but to generate revenue by asserting them against alleged infringers.

“This is a major decision for how it will affect where patent cases are filed and the number of cases filed,” says Ted M. Sichelman, a professor at the University of San Diego School of Law who helped organize an amicus brief by law, business and economics professors in support of Kraft.

Many observers think the decision will be felt most severely in the U.S. District Court for the Eastern District of Texas. One of its courthouse locations in Marshall, 150 miles east of Dallas, has been popular for filing patent cases, including by trolls. In 2015, 44 percent of patent cases nationwide were filed in the Eastern District, according to Colleen V. Chien, an associate law professor at Santa Clara University, and Michael Risch, a law professor at Villanova University.

FLAVORED-WATER FIGHT

The case before the high court was somewhat unrepresentative of the trends pushing the larger debate about patent trolls. Kraft Foods, a subsidiary of the Kraft Heinz Co., wasn’t a troll that sought to cash in on its patents. It filed a more traditional patent
sue alleging that "liquid water enhancement" products by TC Heartland (which does business as Heartland Food Products Group) infringe three of Kraft’s patents. Kraft has a line of electrolyte-enhanced flavored-drink mixes that compete with Heartland’s Go Splash brand in a half-billion-dollar market.

Kraft, like many of the largest U.S. companies, is incorporated in Delaware, where it filed suit against Indiana-based Heartland, which challenged the venue. Heartland argued it has no business presence in Delaware.

Thomas’ opinion relied on a 1948 version of the patent venue statute and a 1957 Supreme Court decision interpreting it—Fourco Glass Co. v. Transmirra Products Corp. In that decision, the court ruled that for the purposes of the patent venue statute, a domestic corporation “resides” only in its state of incorporation. For many publicly traded companies, that state is Delaware because of its corporate-friendly state courts.

In 1990, the Federal Circuit interpreted a congressional change to a general litigation venue law to redefine “patent venue” to essentially allow such litigation to be brought almost anywhere in the country. The court reaffirmed its view last year with its decision in the TC Heartland case.

Thomas’ 10-page opinion avoided policy questions about patent venue and instead focused on statutory interpretation. He rejected Kraft’s argument, and the appeals court’s conclusion, that amendments to the general venue statute changed the earlier patent-specific venue statute.

Mark A. Lemley, a professor at Stanford Law School who helped organize a brief in support of Heartland, says the decision is the Supreme Court’s most important patent ruling since Alice Corp. v. CLS Bank International in 2014, in which the justices tightened the rules for deciding what inventions are eligible to be patented.

Under TC Heartland, plaintiffs can sue where a defendant is incorporated—many in Delaware—or in a district where they have a regular and established place of business and have committed acts of infringement,” Lemley says.

Most observers think the decision will help technology companies and other large patent holders in their battles with patent trolls. “If you think patents are so important for innovation, you’re a happy camper with this decision,” Sichelman says.

Lemley says the location of a defendant’s corporate headquarters “will usually be fair game, and companies like Apple that have stores around the country can be sued in those places for products they sell in those stores.”

“We will see many, though not all, cases move out of the Eastern District of Texas toward Delaware and technology centers like California, Massachusetts and Virginia,” he adds. “And since the cases that gravitated toward the Eastern District of Texas were overwhelmingly low-value patent troll cases, defendants may find it easier and cheaper to resolve those disputes once they are no longer in the Eastern District.”

PLETHORA OF PATENT LAWSUITS
The decision was perhaps awaited nowhere more closely than in Marshall, a city of about 25,000 where not everyone agrees that patent litigation is going to dry up anytime soon.

“A plaintiff can still sue for patent infringement in Marshall if the defendant is incorporated in Texas or if the defendant is committing infringement and has a regular and established place of business” there, says Carl R. Roth of the Roth Law Firm in Marshall. “And of course, the opinion only applies to domestic corporations. The general venue statute still provides nonresident or foreign defendants may be sued in any judicial district anywhere, and foreign defendants are frequently sued here.”

Roth is partly responsible for the rise of patent litigation there. Texas Instruments hired him to represent it in the Eastern District in the mid-1990s, when the then-struggling tech giant had turned to its portfolio of patents for revenue. TI was suing the infringing companies, but federal trial courts in its Dallas headquarters were clogged with drug and other criminal cases.

TI started to file cases in the small federal courthouse in Marshall. Soon, the federal district judge in the city, T. John Ward (who’s now retired), was expediting patent cases and even used a chess timer to keep things moving.

Marshall became a destination for patent infringement lawsuits under the then-prevailing liberal venue interpretation. Legal teams from Dallas and elsewhere rented office space during trials. Caterers began to devise sophisticated menus for visitors’ palates. (One told the Dallas Morning News after the TC Heartland decision that chicken Florentine and mahi-mahi with mango salsa were favorites.)

When Samsung was in town for a trial, it distributed tech gadgets to the city’s schools, built the local ice rink and helped sponsor the FireAnt Festival. Some hotels even set up PACER accounts to try to track the federal district court’s patent docket.

Michael C. Smith, the partner in charge of the Marshall office of Siebman, Burg, Phillips & Smith and author of the Eastern District of Texas Blog, expects the patent docket to shrink in Marshall—in part because of the Supreme Court decision and partly because it was already trending downward.

But the notion that patent litigation is a major driver of the city’s economy is an exaggeration, he says. “We actually have other things we do for a living in Marshall,” Smith says.

Roth has long been mystified by criticism of the Eastern District patent docket. Besides the fast pace, he says, the judges have been scholarly in their approach to complex patent disputes, and the district’s juries take the cases seriously. Also, the notion that the venue is accessible for plaintiffs is belied by statistics in recent years, showing a near 50-50 split. “Neither side has a home-court advantage,” Roth says.
Lawyers often find themselves facing off against psychiatrists or psychologists during litigation. Whether it’s a personal injury or medical malpractice case, a hearing to determine fitness to stand trial or part of a sentencing hearing, courts nationwide are ringing with the testimony of these experts.

They are among the toughest witnesses to challenge because their testimony can have elements of hearsay as well as subjectivity. That’s because patients’ medical complaints to mental health professionals are subjective, and the diagnosis built on those complaints often is similarly subjective. Even if the testimony is based on data from tests mental health experts administer, few lawyers have the depth of knowledge about the field to match wits with psychiatrists or psychologists.

That’s a fact attorney William Chamblee knows all too well. He admits that when he began his career about 30 years ago, he was intimidated to cross-examine psychiatrists and psychologists. All it took to wipe out that fear was a baptism by fire.

“I crossed Dr. Phil [McGraw] as an expert in a med-mal case in the late 1980s in a little town out in West Texas,” says Chamblee, a founding partner of Chamblee Ryan in Dallas. “He hadn’t yet been an expert for Oprah Winfrey in the beef case in Amarillo. But he was often hired by plaintiff’s lawyers to be an expert witness in litigation. I’d done some crosses before his, but he was the hardest one.”

Chamblee credits his win in that case in part to preparation and a strong cross-examination. “I’d read many of his previous depositions, and I knew if I didn’t get control of him during cross, I wouldn’t be successful,” Chamblee says. “A psychologist or psychiatrist is usually a more difficult cross than other types of experts—especially one with a strong personality.”

**QUESTIONING CREDIBILITY**

However, there are strategies to erode—even destroy—the validity of such witnesses, according to two people who counsel lawyers on how to effectively cross-examine mental health professionals.

Bruce Leckart, a Los Angeles-based forensic psychologist and professor emeritus of psychology at San Diego State University, has developed a set of rules for cross-examining mental health professionals. One rule is to never ask them about the patient directly but instead confine questions to their report. Another is to always determine whether they have taken a complete history of the patient’s symptoms and complaints to support the diagnosis.

Dorothy C. Sims of Ocala, Florida, focuses her practice almost entirely on cross-examining expert witnesses. Sims was a member of the three-lawyer defense team for Casey Anthony, who was acquitted in 2011 of the murder of her 2-year-old daughter, Caylee. Sims says psychiatrists’ and psychologists’ processes can be deeply flawed and vulnerable to attack. Your goal, she says, should be to hit early at the deposition stage, so your opponent is forced to withdraw the mental health expert—ideally after it’s permissible to name a replacement.

It’s also important to understand the differences in training and education among mental health professionals. Psychiatrists have earned a medical degree and completed a general medical internship and then a residency in psychiatry, Leckart says. Because of their medical training, they can write prescriptions, order and interpret brain scans or blood work, and perform physicals, Sims says.

Psychologists typically don’t have a medical degree. Instead, they’ve earned a PhD or a PsyD (doctor of psychology). They’re trained in psychological diagnoses, in addition to psychological testing, which produces the only form of objective data in a mental health evaluation. “From what I’ve seen, most psychiatrists don’t have any training in psychological testing at all,” Leckart says.

**LOOKING FOR COMMON MISTAKES**

You’re not likely to see one kind of professional more than the other in any particular type of case. But Sims says certain types of mistakes are common with each. In her experience, psychiatrists often administer psychological tests without the proper training.

Psychologists, while trained to administer psychological tests, can misadminister them, misinterpret them or misrepresent the results, Sims says. These experts also often rely on nonscientific psychological tests, some of which Sims says are created by the mental health experts for the insurance companies for whom they testify.

Whatever the expert’s training, Leckart and Sims say effective cross-examination will be the same. It starts with a deep dive into the expert’s background and should include...
submitting freedom of information requests to licensing bodies and employers, along with a search of court records.

“A lot of these people misrepresent things on their résumé to the point where it’s absurd,” Sims says. “I’ve had them lie about even having a degree…. Experts will change things on their résumé depending on who they want to be that day.”

Sims says these experts typically deny having been sued and never admit to having had malpractice claims against them, which her digging often finds to be untruthful.

“We go to the website of the court where the person lives or practices and check all the lawsuits against them,” she says. “I found that one expert had been charged twice with hitting a woman.”

When you meet the expert at a deposition, you come out swinging by attacking their biases, says Martin Hoffman, a senior partner at the North Miami Beach, Florida, office of Hoffman, Larin & Agnetti.

“I like to knock that expert off that high chair where he’s the instructor at some university, and therefore the voice of reason, very quickly,” he says. “I want to know what percentage of his income derived from testifying, which you can usually get through a subpoena to a university. I also find it very effective to draw out that he charges $150 an hour to see patients, but that here he’s charging $500 an hour.”

Don Carlson, the senior founding partner of San Francisco’s Carlson, Calladine & Peterson, impeaches experts by asking about “cash therapy,” in which plaintiffs miraculously get better upon receiving a judgment. Carlson also emphasizes that they base their opinions on claims made by the patient. He points out that experts can treat patients infrequently or that a treatment was related solely to the litigation.

EXAMINING PROCESSES

You also can attack someone’s credibility by attacking their processes. The Diagnostic and Statistical Manual of Mental Disorders is the American Psychiatric Association’s seminal guide on mental health disorders. Leckart says many experts don’t even match their diagnosis to the symptoms listed in the tome.

“It’s clear what the diagnostic criteria are, and the doctors always have an enormous gap between the diagnostic criteria and the data in their report—they don’t have the appropriate data to diagnose the disorder they diagnose,” he says. “One of the most frequent disorders plaintiffs allege is a major depressive disorder. DSM requires that at least five of nine symptoms be present for that diagnosis. If you compare the doctor’s report against the DSM criteria, the doctor often hasn’t provided enough information to support that diagnosis.”

You don’t have to rely on the DSM, says Carlson, who gets similar information from Neuropsychological Assessment by Muriel Lezak, which he calls a “must-review” before crossing a psychologist.

Hoffman calls the government’s Social Security disability evaluation criteria “an unbelievable source of information.”

According to Leckart, many diagnoses also are built on an inadequate patient history, which lawyers can cross effectively by remembering a mnemonic that he calls FIDO-C.

“To take a complete history of a patient’s symptoms, the doctor must obtain information about the frequency of the symptoms, their intensity, their duration, their onset and their course over time,” he says.

Another part of every psychiatrist’s and psychologist’s evaluation is the mental status exam, in which an expert sits face to face with a patient and asks standard questions that elicit relatively observable responses, Leckart says. This tests memory, attention, concentration, insight, judgment and verbal skills. Experts’ reports often include only conclusions, such as: “Ms. Jones’ memory was impaired.”

“That’s not good enough,” Leckart says. “That’s a summary conclusion. Ask during the deposition or trial: ‘What techniques did you employ that led you to conclude that Ms. Jones’ memory was impaired?’ Also, you know there are no data in the report, so ask: ‘Where in your report can I find the data collected that demonstrate the impairment?’ ”

It’s all about asking the right questions and taking nothing at face value.
21st-Century Standards

Lawyers must secure client communications from cyber breaches

By David L. Hudson Jr.

In May, the ABA Standing Committee on Ethics and Professional Responsibility released an opinion that says lawyers must make reasonable efforts to ensure that communications with their clients are secure and not subject to inadvertent or unauthorized cybersecurity breaches.

Formal Opinion 477 updates Formal Opinion 99-413, which was issued in 1999 before the widespread use of tablet devices, smartphones and cloud storage.

“It is an important opinion because there have been many changes in the cybersecurity realm,” says Peter Geraghty, senior counsel and ETHICsearch director with the ABA Center for Professional Responsibility.

“There have been all kinds of new applications that have come into play. It is important to address these new developments and how they might apply to lawyers’ day-to-day practices.”

The new opinion explains: “Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation and thus implicate a lawyer’s ethical duties.”

These duties include competency, confidentiality and communication. In the ABA Model Rules of Professional Conduct, Rule 1.1, which focuses on competency, includes a technology clause added in 2012. Comment 8 to the rule provides that lawyers must stay abreast of “the benefits and risks associated with relevant technology.”

Ethics expert Peter A. Joy, a professor at Washington University School of Law in St. Louis, thinks the opinion should have done more to discuss competency.

“The opinion quotes the comment to Model Rule 1.1 on keeping up with technology, but few lawyers really understand what keeping abreast of technology really means,” he says. “Some may think knowing how to use the technology, like the internet or email, is enough. They may fail to realize that using the internet provided by their favorite coffee shop or at the airport to communicate with clients is not secure.”

‘REASONABLE EFFORTS’ APPROACH

The bulk of the opinion addresses lawyers’ obligations to ensure the confidentiality of client information. In 2012, Rule 1.6 was amended to add a new paragraph (c): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Comment 18 to the rule says such unauthorized access or inadvertent or unauthorized disclosure of client info "does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.”

Citing the ABA Cybersecurity Handbook, the opinion explains that reasonable effort is a fact-specific inquiry. It requires examining the sensitivity of the information, the risk of disclosure without additional precautions, the cost of extra measures, the difficulty of adding safeguards, and whether more safeguards adversely affect the lawyer’s ability to represent the client. The opinion adds that lawyers must adopt a process to systematically assess and address cyberrisks.

Generally, lawyers may use unencrypted email when they communicate with clients routinely, the opinion says, but only if they have “implemented basic and reasonably available methods of common electronic security measures.”

The phenomenon of cyberthreats, particularly in “highly sensitive industries, such as industrial designs, mergers and acquisitions or trade secrets, and industries like health care, banking, defense or education, may present a higher risk of data theft.” In such higher-risk scenarios, reasonable effort will likely mean that “greater effort is warranted.” For example, “particularly strong protective measures, like encryption, are warranted in some circumstances.”

The opinion provides seven considerations for guidance, including understanding the nature of the threat; how client confidential information is transmitted and stored; the use of reasonable electronic security measures; how electronic communications should be protected; the need to label client information as privileged and confidential; the need to train lawyers and nonlawyer assistants in technology and cybersecurity; and the need to conduct due diligence on vendors who provide technology services.

“Overall, I think it is a fantastic opinion, particularly with regard to its treatment of lawyers’ obligations regarding confidentiality,” says legal ethics scholar Eli Wald, a professor at the University of Denver’s Sturm College of Law. “In general, ethics opinions are meant to explain the applicable rules of professional conduct. Facing increased
cyberrisks, this opinion provides clear and useful guidance on when lawyers may need to do more to ensure that client communications are secure. The opinion does a great job of clarifying and explaining in practical terms what lawyers must do to comply with the confidentiality and competence rules pertaining to cybersecurity.

WHEN TO PIPE UP

The opinion also briefly addresses communication, covered by Rule 1.4. The opinion says lawyers should inform clients about inherent risks when they transmit “highly sensitive confidential client information.” The opinion notes that “Model Rule 1.4 may require a lawyer to discuss security safeguards with clients.”

For example, the opinion says that if a lawyer reasonably thinks highly sensitive confidential client information is being transmitted such that “extra measures” are needed for protection, the lawyer should inform the client and discuss options.

“The lawyer and client then should decide whether another mode of transmission, such as high-level encryption or personal delivery, is warranted,” the opinion reads. “Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client.”

“Lawyers need to communicate with clients about cyberrisks from the initial meeting and then periodically thereafter,” Joy says. “First and foremost, there needs to be a discussion about whether and when email will be used.”

Wald thinks the opinion could have done a better job of explaining when lawyers must communicate to clients in the event of a security or a data breach. In a 2016 law review article, “Legal Ethics' Next Frontier: Lawyers and Cybersecurity,” published in the *Chapman Law Review*, Wald argues that legal ethics rules should mandate that lawyers disclose “to clients when their confidential information was, or is, reasonably believed to have been accessed by an unauthorized party.”

The difficulty in this area for lawyers, Wald says, is that often with a security breach, lawyers don’t know who hacked their devices or server, nor do they know exactly what confidential client information was accessed.

“The opinion correctly points out that Model Rule 1.4 may require a lawyer to discuss security safeguards with a client,” Wald says. “However, after reading this opinion, a lawyer may reasonably ask, ‘When exactly do I need to communicate to a client about security risks and breaches?’ The opinion could have given more guidance to lawyers as to under what circumstances they should communicate with clients about cyberthreats, security breaches, compromised confidential information and possible remedies.”
On Breaking Rules
Learn the fundamentals first—experiment later
By Bryan A. Garner

It's often said that you must know the rules before you break them. But why is that, exactly? It's a question worth pondering.

I recently flew coast to coast sitting beside a young filmmaker with an MFA from New York University. He's a finalist this year at the Cannes Film Festival. I asked him whether he's ever met someone who wanted to do something with the camera that nobody had ever thought of doing before—something boldly original.

"I think you're describing me before I got serious!" he said.

"That's funny," I said. "What would you think if you handed a violin to someone who said, 'I am going to play the game with the camera that nobody has done before.' Or what if you handed a set of golf clubs to someone who said, 'I am going to play the game with these clubs in a way never before imagined!'"

"It would be foolish," he said. Naturally, I agreed.

Mastery of any discipline begins with imitation. You must know what's been done before, and you must know about technique. You must know the rules of the discipline so that you can produce consistently strong results. Otherwise, you're just acting in ignorance, and the quality of your results will be wildly variable—and generally poor.

So great pianists play in very much the same way, and their individual virtuosity comes through only in subtle ways. Professional golfers may look very different from one another, but they're very much alike in the fundamentals—especially how the clubface, shoulders, feet and body look at the moment of impact with the ball. If there's variation among expert players, it's at the fringes. And all experts have begun by imitating their great predecessors.

SENSIBLE RULES FOR WRITERS

The same is true of writers. You have to know certain rules. I can think of eight offhand: (1) You must fervently want to be understood, and therefore you must see things from the readers' point of view—and it's best to think of your readers in the broadest possible way. (2) Sentences need to be linked to one another, fore and aft. (3) The same is true of paragraphs. (4) The first paragraph or two are the most valuable real estate you have, so you must make the most of them. (5) The closing paragraph is the second most valuable real estate, so you mustn't squander it—but instead cinch the deal (you're selling your ideas). (6) Because the primary position of emphasis in an English sentence is the end, you must try to end sentences emphatically if you want to keep your readers from dozing. (7) Once you've written a draft, you must ruthlessly cut every unnecessary word (not being too hard on the word that). (8) You must be attentive to the fine points of phrasing, word choice and punctuation—not for the sake of pedantry but for the sake of making comprehension effortless for your readers.

Those are good rules.

KICK THESE EDICTS

But many of us, at an impressionable age, picked up lots of bad rules that no reputable authority countenances. Unlike the eight just listed, they're all simple prohibitions: (1) You mustn't begin a sentence with a conjunction, such as And, But or Nor. (2) You should never begin a sentence with Because. (3) You mustn't write a one-sentence paragraph. (4) You should never use first person. (5) You mustn't end a sentence with a preposition. (6) You mustn't split an infinitive (those who believe this often don't know what an infinitive is). (7) You should never use since as a softer equivalent to because, and you should never use while to mean although. (8) You must never use contractions.

Those aren't really rules. They're the stylistic equivalent of hearsay upon hearsay. Reputable writing authorities repudiate them, one and all. So part of the problem is to figure out what the real rules are—and then figure out when it makes sense to break them.

Notice that the simple-Simon prohibitions above are probably intended for young children. An analogous rule would be that of the Suzuki method of violin instruction, in which children are taught that before playing, they must begin with a zip-and-step (parting their feet [zip] and then moving the right foot forward [step]). But imagine the reaction you'd get from a virtuoso violinist if you accused them of violating a “rule” by not zipping and stepping at the beginning of a performance. It would be absolute nonsense.

When it comes to supposed rules of writing, it's good to know what's at their foundation. Some are aimed at curing young schoolchildren of elementary blunders. We teach kids not to begin with And or But precisely because they tend to begin all their sentences that way (especially And), and they need to be weaned off the habit. We teach them not to begin a sentence with Because just to keep them from perpetrating sentence fragments by mistakenly putting a period rather than a comma after the Because clause. We teach them not to write one-sentence
paragraphs so they’ll learn how to compose well-devel-
oped paragraphs. We teach them to write without I
and me because beginners easily become addicted to
mentioning themselves excessively—and need to learn to
write with a more objective tone. All the while, we ignore
the fact that they’ll ultimately need some sentence-
starting conjunctions, some Because sentences, some
one-sentence paragraphs and some uses of first person.

Other “prohibitions” are mostly nonsense and always
have been: the idea that you mustn’t end with a prep-
osition or must never split an infinitive. The great
H.W. Fowler demolished these false idols in his 1926
A Dictionary of Modern English Usage. Nobody has
successfully countered him. Most writing authorities,
if they mention these bugaboos at all, take pains to
eliminate them.

What about contractions? Again, it’s arguably
useful to teach children a type of formal prose style
before they mature and learn to relax their style (relax,
I said, not be lax). It’s good that they learn you are, and
later you’re, so they’re not hampered by a fundamental
confusion between your and you’re. The same could be
said of their and they’re (and there, for that matter).

But contractions are an effective antidote to stuffiness,
and they aid readability—demonstrably. Consider this
sentence from The Law of Judicial Precedent (2016):
“To say that a trial court or appellate court generally
won’t rethink a prior ruling isn’t to say that it can’t.”

An uncontracted style there will strike many as either
stilted or downright laughable.

LEARN FIRST, IGNORE AS NEEDED

I should point out that my late co-author Justice
Antonin Scalia disagreed with me about contractions.
But he broke his own rule and allowed contractions
throughout our first joint book, Making Your Case.

And on occasion he broke his own rule, even in judicial
opinions.

There are Bluebook rules worth breaking. One
is the notion that explanatory parentheticals are
“recommended” with many citations—a convention
that spoils any product with in-line citations. Even
proponents of in-line citations, such as Justice Scalia
and Judge Richard Posner (no fan of the Bluebook),
acknowledge that trailing parentheticals bastardize
paragraphs when the citations are interlarded within
the writing. Another is the idea that underlining is an
acceptable practice in court documents.

Still, I would never say you shouldn’t learn established
citation form just because you can later decide to ignore
certain elements of it.

When it comes to breaking rules, Paul J. Kiernan
of Washington, D.C., cites the Harlem Globetrotters
basketball team. They know how to play basketball,
make passes, dunks and so on, but they’re entertaining
because they then break or bend those rules for comic
effect. If they couldn’t play a real game, their breaking
the rules wouldn’t work. Or consider the comic classical
pianist Victor Borge, who followed the same pattern.
Or if you appreciate fine couture, think of Alexander
McQueen and what he did with clothing design.

Only after you can truly perform as the discipline
requires can you break rules to good effect.

Bryan A. Garner, the president of LawProse Inc.,
is the author of many books, including Garner’s
Modern English Usage (also available as a mobile app),
The Chicago Guide to Grammar, Usage, and Punctuation
and The Law of Judicial Precedent, co-authored with
Justice Neil M. Gorsuch and 11 other appellate judges.
In a break from our usual pattern of expert commentary on law practice, this month we turn to the real experts—practicing lawyers—to discuss how they bring in clients.

Starting at Zero

How to Build a Clientele through Contacts, Communication and Confidence

By Marc Davis

Toya Gavin started her solo law practice really lean—like “no clients to speak of” lean. That was in January 2015. She now has a thriving practice in South Orange, New Jersey, with referrals that come in regularly from current clients, former clients and other attorneys.

Gavin, a prosecutor in Newark for 4½ years, now specializes in law for small and online businesses.
"I've always been interested in entrepreneurship and business," Gavin says. "And after my years as a prosecutor, I wanted to work with folks who were following their dreams or looking to build or add something to their community. I wanted to be part of those dreams and help people accomplish them."

How did she make that jump? The actions were all her own, but they can be summed up in one word: marketing. She also drew on her network connections to get client referrals.

“My initial network included many defense attorneys. Then I expanded by joining groups online and talking to friends and family members in small business,” she says.

“I used my initial network for client referrals, advice on practice management [and] courses,” Gavin says. “I also found Solo Practice University online and signed up. SPU was very helpful because there are courses and discussions on every facet of a solo practice.”

Within two weeks of starting, Gavin was handling per diem criminal law work for other defense attorneys she had met as a prosecutor. “I covered court hearings. These opportunities happened because of my network,” she says. About two months later, she had her first official client.

“I was optimistic and fearful, but I am also very determined,” Gavin says. “So I did a lot of work prior to starting my practice to manage my fear. I ultimately knew that the worst thing that could happen was that I would have to get another job.”

GROWTH SPURT

Coleman Watson, an intellectual property and patent attorney in Orlando, Florida, started a solo practice in July 2015 without clients but with two prospects who eventually became clients.

Less than a year later, Watson had two part-time contract patent attorneys on his payroll. And now he has a three-attorney firm.

Watson attributes his quick ramp-up to aggressive marketing. “The first thing I did to acquire clients was to advertise on FindLaw,” he says. “The advertising was directed at people seeking an attorney in the tech space.”

Watson’s second marketing initiative was hiring a public relations company. The PR firm “helped secure opportunities to write and publish seven articles in various magazines,” he says.

“I wrote about tech issues, matching the interests of readers of these magazines. The result was some people who read my articles contacted me and became clients.”

He quickly acquired clients, and his first year in business was profitable. But “it was not enough to make a living. I made up the difference with a line of credit,” Watson says.

PRO BONO PLUS

Pouyan Darian is another attorney who hung his shingle without a single client. “Starting a law practice without clients forced me to find creative ways to generate clients within the ethical rules,” says Darian, an immigration law and deportation defense lawyer in White Plains, New York, who’s been in solo practice since September 2014.

“Pro bono work was a supereffective [means] for me to acquire clients,” Darian says. “I gave free talks about immigration scams and shady deals. Many people are misinformed. I talked with community leaders and told them I was starting a law practice. I got a lot of referrals this way.”

One of his biggest challenges in starting up was building and maintaining confidence in his own abilities, according to Darian. “Most people around me, including my friends and family, told me I was not ready to start my own practice,” he says.

Before he attended law school, Darian had some sales training, which he says helped develop skills he used to sell his services to clients. Running a solo law practice is like any other business, Darian says, and owner-attorneys are salespeople—whether or not they admit it.

“While the vast majority of my clients are low income, most do not have issues paying for ... a $1,500 deposit and making monthly payments of $500,” he says.

“The key is to work out a payment plan that the client is able to meet and adjust payments on a case-by-case basis, so that clients do not default. The reality is that many immigrants have large family and social structures,” Darian says, “And although they may individually earn less than the average U.S. citizen, they have access to pools of cash for emergencies and can usually borrow from family members.”

TIME AND A WEBSITE

It probably takes a startup three to five years to build a successful practice, says Jared D. Correia, an attorney and senior law practice adviser with the Law Office Management Assistance Program, a nonprofit consultancy in Boston. “Attorneys who are aggressive marketers can [succeed] because they do well in acquiring clients,” he says.

“Ninety-five percent of a solo practice startup’s time and money should be devoted to marketing,” Correia says. And one of the most effective marketing tools for an attorney starting a solo practice is a website.

“A website is essential,” he says. “A website helps establish credibility, and people and clients expect it.”

William C. Peacock, a family attorney and marketing consultant for lawyers, agrees. “It’s the best marketing tool for a startup,” he says. Peacock, whose law office is
in Long Beach, California, started a full-time solo practice in January 2015. But by the end of that year, he had joined a larger firm.

It could cost $5,000 or more to create a site using a website builder, Peacock says. “But for lawyers just starting up who are tech savvy, they can do it themselves much less expensively using WordPress,” he says.

Web hosting by an internet service company that provides a site address and internet connectivity can be found for as little as $1 per month from GoDaddy in the first year, according to Peacock. Prices will increase in the second year.

For attorneys unable, or without the time or inclination, to build their own sites, professionals specializing in websites for lawyers can create one for you.

A recent study by the ABA Law Practice Division’s Social Media, Legal Blogs and Websites Interest Group found that a median market cost for a website was $5,096. Zola Media can create a simple website for $1,800, according to Fred Cohen, founder and CEO of the Port Washington, New York, marketing company.

“We can build more complex websites for $10,000 and up,” Cohen says. “We can design the imagery, color scheme, create the content and secure the domain name. If the client wants a blog, we can create and write it for them.”

The larger, more costly packages include advanced customization, more pages, specialized content and a dedicated project manager.

The website creation process begins with a consultation between designer and client: The practice is discussed, the target market is determined, a vision for the site is established, a unique value proposition (how the service differs from the competition and benefits customers’ needs) is set up, and goals are created.

Although it’s not strictly a marketing tool, Correia recommends that website designers include an e-commerce capability in their design so clients may pay by debit or credit card. “This will cost extra, but it makes it easier for clients to pay the attorney,” Correia says. “Clients also pay more quickly if this payment option is available.”

He encourages lawyers to include pictures on their websites “to create a more visceral connection with viewers.” Correia also advises lawyers to get a professional headshot, not a selfie, and publish it with a biography. “Lawyers should also consider including their photos on business cards,” he advises.

Still, despite the elaborate website options available from professionals, “there’s no need to spend money on a superfancy website,” Correia says. “All you’d need is a landing page and a place to publish content.”

**LAWYER LISTINGS**

Website directories that list attorneys and might include client reviews—such as Avvo, FindLaw and Martindale-Hubbell—can help prospective clients find lawyers. But not all of them get great reviews.

“Startup lawyers should absolutely place themselves on directories for reasons of exposure online the way more experienced attorneys would,” Correia says. “Startup attorneys, however, should keep in mind that their ratings on such services like Avvo will grow as they gain experience.”

Sandy Van, a personal injury lawyer in Las Vegas, says some directory sites are better than others, and one that she has used is not very good for her purposes.

“I love Avvo,” she says. “The leads are very good. I pay $300 a month for my Avvo account. I also have a Martindale-Hubbell account, but it’s not too productive. When my contract expires I won’t renew it.”

The downside of these directories, according to Van, is the contract, which in some cases requires a commitment for a year and might not be effective.

Joel A. Rose, president of a law practice management consultancy in Cherry Hill, New Jersey, says, “based on
people go to the internet when they look for an attorney. “And it’s probably not feasible for a startup on a strict budget,” Peacock says.

But using social media is a very effective marketing tool. Marketing messages on social media platforms—Facebook, Twitter, YouTube and others—can be targeted to recipients by ZIP code, specific interests and other categories, such as small-business owners.

Suzanne D. Meehle, managing attorney at Meehle & Jay in Altamonte Springs, Florida, uses Facebook for marketing. “Facebook helps people get to know me as a business expert,” says Meehle, who specializes in small-business matters. “Facebook generates clients. I target ZIP codes in my area and rely heavily on existing clients, deepening that relationship. They’ll encourage referrals. I post something on Facebook and Twitter every day.”

Meehle’s Twitter messages—material on small-business issues—go to lawyers outside Florida and sometimes result in client referrals. She also posts a weekly message on her website about some legal subject.

When Meehle asks new clients where they found her name, the response she gets most often is "on the internet, or I read an article on your blog, or somebody gave me your name.”

Marc Davis is a freelance writer based in Chicago.
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Law Scribbler

by Victor Li

TALKING TECH
CHATBOT APPS HELP USERS COMMUNICATE THEIR LEGAL NEEDS

When I was at the ABA Techshow this year, a prevalent question on people’s minds seemed to be: “Are the robot lawyers coming?”

In some ways, they’re already here. Take chatbots. For most people, chatbots are what you see when you go to a website and an automated program starts asking whether you wish to chat. Using natural language, chatbots can simulate human conversation, giving the user the impression that they are talking with an actual person instead of with artificial intelligence. Chatbots are already being used in a variety of ways, including addressing customer needs, educating children, providing investment advice and even debating the meaning of life.

And chatbots can help people with their legal needs. During the Tech for Justice Hackathon plus Veterans event that took place in March during Techshow, first place went to Carry On, a tool designed to help victims of military sexual trauma. An important part of Carry On is Coralie, a chatbot that connects users to resources or services to allow them to report an incident, navigate the justice system or get help.

“If I need help right now and a human isn’t available, that’s a problem, given the world we live in today, as well as our technological capabilities,” said Christy Leos, director of operations at the Internetbar.org, who helped design the chatbot portion of Carry On.

BUSY BOT
In 2016, Joshua Browder became an instant sensation when his legal chatbot, DoNotPay, overturned nearly 160,000 parking tickets on behalf of users in the United Kingdom and the United States.

A computer science student at Stanford University, Browder designed the bot because he is, in his words, a terrible driver. “I got a bunch of tickets, and when I went to appeal them I found that I was copying the same text over and over,” says Browder, who claims that DoNotPay had successfully overturned 245,000 tickets in the U.K. and U.S. as of March.

That month, Browder announced he had expanded his chatbot’s capabilities to help refugees in Canada, the U.S. and the U.K. claim asylum. The plight of refugees hit home for Browder, whose grandmother fled the Nazis, as Brexit and President Donald Trump’s polices have underscored the need for such a tool.

Whereas he had only needed a couple of months during his summer vacation to set up the parking ticket bot, the immigration bot was more complex and took nearly a year to build. Browder says he consulted with immigration lawyers in all three countries, and the chatbot asks users a few questions and then auto-populates the necessary forms for them.

“The benefit of a chatbot comes from the fact that many people are really terrible at describing their legal problems,” says Browder. “There are lots of ways to do it but only one legal way. The chatbot can translate human input into legally correct input.”

The new version of DoNotPay is on Facebook Messenger. Browder decided to use the social network’s chat interface because of its reach (more than 1 billion users) and accessibility.

FACEBOOK FRIEND
Facebook has become one of the go-to places for chatbots, boasting more than 30,000 as of September 2016.

California lawyer Tom Martin, who created LawDroid for Facebook Messenger, points out that Apple hasn’t really rolled out the welcome mat for chatbot apps yet.

“Facebook provides detailed demographic information in terms of who is using [LawDroid],” says Martin, who launched the app in November to help individuals generate California business incorporation documents. “I can then tailor my marketing efforts based on that information.”

The technology isn’t perfect. Some chatbots have become vehicles for scammers. Last July, for instance, Tinder users were swindled by a chatbot phishing for personal information by impersonating potential matches. Others, including Joshua Lenon, lawyer-in-residence at Clio, have argued that chatbots can limit access to justice by telling users that they have no case or recourse.

Nevertheless, Browder and Martin think the sky is the limit. Martin points to Amazon’s Alexa and thinks chatbots with voice capabilities could eventually perform a wide range of legal services. Browder, meanwhile, thinks that chatbots could help facilitate cooperation between the law and other disciplines, particularly medicine.

“Lawyers are confined by their law degrees,” Browder says. “But a chatbot doesn’t have to stop between industries. They can diagnose medical or psychological illnesses and also help users get legal help.”

Law Scribbler Online: Victor Li shares his reporter’s notebook at ABAJournal.com/lawbythenumbers and on Twitter at @LawScribbler.
During her first maternity leave, Rachel Rodgers drafted a contract while her newborn slept next to her. The sleep-deprived business and intellectual property solo practitioner had to juggle taking care of a preemie with serving a client who needed a contract right away. “It was stressful,” she says, recalling that she had to cradle her computer instead of her baby.

She’s not the only new parent who has found herself either working during her leave or bombarded with emails immediately after returning to work. “It’s hard for any person whose life has just been turned upside down by creating life,” says Lori Mihalich-Levin, partner in the health care practice at Dentons in Washington, D.C., and author of Back to Work After Baby. “There are certain issues that are unique to attorneys, but in general, it’s a major life transition for everyone.”

Still, it’s possible to carve out a successful leave as long as you start preparing early, says Rodgers, who managed to have a full maternity leave after her second baby. She says she only had to check in with her office occasionally, despite having a busy solo practice.

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She’s not the only new parent who has found herself either working during her leave or bombarded with emails immediately after returning to work. “It’s hard for any person whose life has just been turned upside down by creating life,” says Lori Mihalich-Levin, partner in the health care practice at Dentons in Washington, D.C., and author of Back to Work After Baby. “There are certain issues that are unique to attorneys, but in general, it’s a major life transition for everyone.”

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No Baby Blues
4 tips to making your pregnancy leave work
By Danielle Braff

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MATERNITY RELIEF
By the end of that first trimester, Rodgers began streamlining her New York City-based practice, Rodgers Collective. She hired a consultant who created systems for her contracts, automated the onboarding systems (welcome emails and intake forms and everything else that could be automated) and dealt with all the administrative items.

But even with everything streamlined, she still had to figure out how to keep all her clients while taking three months off work. That’s when Rodgers contacted a law school classmate who had recently gone solo. Rodgers asked him to take over for her when she went on her maternity leave.

“There are lots of freelance attorneys and contract attorneys you can hire to help you out during your leave,” Rodgers says. “The only thing I will say is that they’re typically not always comfortable with managing a client. Solos are great to ask because they’re accustomed to doing it all.”

But no one can simply hop in and take over at a moment’s notice, says Susan Smith Blakely, a former partner, law career counselor and author of Best Friends at the Bar, which tackles the subject of women in law careers. Before leaving for three months, Blakely says, prepare transitional memos for your team. These should include the history of your cases and an explanation of all the players, along with their contact info.

EVADE EMAIL
No matter how well you have things covered, expect to see thousands of unread emails sitting in your inbox once you return from your leave, Mihalich-Levin says.

After her first maternity leave, she made the mistake of reading through every one. She was wiser the second time. Instead of reading through her emails, she met with her team and asked them what were the key things she missed and how could she help them moving forward, Mihalich-Levin says.

And instead of viewing her maternity leave as a total break from work, she saw it as a leadership opportunity. “Take credit for a well-planned leave and return,” Mihalich-Levin says. “It’s about using those skills that you gained as a new parent. Think about ways that you could be a leader in your new role.”
Breaking In

Can legal service outsourcing appeal beyond document review? By Jason Krause

FROM A BUSINESS PERSPECTIVE, OUTSOURCING LEGAL SERVICES ought to be a no-brainer: Most modern businesses increase profits and productivity by outsourcing functions to third parties. But getting outsourcing services into law firm budgets has been a hard sell.

“I think the legal profession is built on norms that include the billable hour and wasteful, redundant ways of doing things,” says Ray Bayley, CEO of Novus Law, a Chicago-based legal services firm. “We don’t follow those norms, and the challenge for us is using our more efficient nonconformist approach in an industry driven by conformity.”

According to a recent study by Thomson Reuters and the Georgetown University Law Center, 51 percent of law firms and 60 percent of corporate legal departments use at least one outsourced service provider—but almost exclusively for document review. In those cases, the services can deliver large teams of document reviewers for large cases so that law firms do not have to hire and train the teams themselves.

“There was a time when outsourcing was completely unacceptable to most lawyers, but that ship has sailed,” says David Simon, a Milwaukee-based partner with Foley & Lardner who has used Novus’ services. “There comes a point where you will lose work because clients don’t like to overpay for a review.”

FAST FAILURES

But a number of high-profile startups offering full-scale outsourced service have already come and gone. The virtual law firm Clearspire dissolved its legal

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division, in which remote lawyers collaborated with clients in a secure online environment.

Outsourcing businesses fail for several reasons. According to the survey, 59 percent of law firms that do not use outsourcing say data security is their top concern, while 54 percent cite poor quality of service. Bayley says many outsourcing companies try to cut costs without offering approaches that are any better than what law firms can do in-house. “If you don’t fundamentally change your business model, how can you change the way you charge for your services?” he asks.

Legal task outsourcing will likely never be a no-brainer as it is for many business functions. Most successful outsourcing services find ways to automate small, routine legal tasks. But to be truly useful, they must improve the workflow and processes within a law firm.

That goal is often at odds with the billable hour pay structure. After all, when tasks take less time, law firms have fewer hours they are licensed to bill back to clients.

And if outsourcing lowers costs in a matter, a law firm must then find ways to redeploys its assets and resources. That means offering subject matter expertise no outsourcing service can match.

“Law firms are an expert model; they get paid for delivering expertise,” says Suman Sarkar of Three S Consulting, who has written a book critical of outsourcing. “Outsourcing only makes sense as far as it lets firms focus on that part of their business.”

WORKING IT

Until recently, the ABA Model Rules of Professional Conduct mandated that attorneys with supervisory authority over another lawyer ensure those attorneys maintain the highest ethical standards. However, the ABA Ethics 20/20 initiative relaxed those requirements, making it easier to bring third-party service providers into a matter.

Simon says that in his experience, outsourcing makes more sense for some matters than others. For example, in a fast-moving matter with many records, Novus was able to process, upload and index a large number of emails for Simon so he could review documents while flying to interview parties overseas.

“Novus is great for a matter where speed and volume is the biggest issue,” he says. “In a matter where you’re looking for a needle in a haystack or hinky numbers in a spreadsheet, it might make more sense to do it yourself.”

Most important, outsourcing providers can use technology that a law firm cannot afford to support. That will include artificial intelligence, contract management, process mapping and workflow technology.

“Outsourcing will work, but only if the service providers and lawyers can collaborate and find ways to truly change their processes,” says Simon. “That may involve alternative fees structures and things you are not comfortable with, but something has to give.”

INNOVATING SERVICES: Ray Bayley is CEO of Novus Law.
Globe-trotting attorneys offer their new-era strategies for efficient business travel
By Dawn Reiss

traveling 2.0
In this age of ever-changing rules and regulations, business travel can be more difficult than ever. The reality is that the more preparation and planning that go into a business trip, the more likely it will be a success.

“As you get older, travel changes,” says Paul Justas Sarauskas, counsel at Mayer Brown in Chicago and a member of the American Immigration Lawyers Association. “When I was younger, it was exciting. It’s become more stressful and annoying because of security and everything else. These days I try to bring back the fun and take out the stress.”

That’s why Sarauskas makes a point to stay in a hotel near, but not where, a conference is being held and then wander.

“I like the variety,” says Sarauskas, who uses Booking.com. “Some of my colleagues only stay at the Marriott or another chain hotel to get the points. I like the adventure, to change hotel brands from boutiques to huge chains and B&Bs to get a different feel each time. I find a place where I can walk to everything in the area. Then you can find a restaurant that calls your name. That’s part of the adventure.”

To make travel less stressful, he arrives at O’Hare International Airport in Chicago at least three hours in advance of any flight—domestic or international—so he doesn’t have to worry as much about getting stuck in city traffic. He does work at a bar or restaurant or at the gate. To make navigating the airport easier, he always checks a bag so he can bring a compact carry-on. Sarauskas doesn’t stress about delayed luggage, relying on credit to purchase anything he might need if his bag doesn’t arrive.
right away. His other suggestion: Arrive the day before an event or hearing takes place to get acclimated.

“I’m all about eliminating points of stress,” says Sarauskas, who lived in Italy for more than a decade and jokes about how his luggage was lost many times while living abroad but always found a day later.

**NAVIGATING AIRPORTS, BORDERS AND FLYING**

Besides getting TSA Precheck and Global Entry, some attorneys are turning to the expedited security program Clear, which uses biometric technology, scanning passengers’ eyes or fingerprints at a kiosk to allow them to bypass TSA ID checks and go straight to the usual physical screening.

“Global Entry is the best thing in the world to help you,” says Randall Kessler, founding partner of Kessler & Solomiany in Atlanta, who gets the Clear service free as a Delta Medallion Million Miler flyer. “But Clear helps you cut to the front of the TSA Precheck lines and there’s never any wait.”

Tad Thomas, founder of the Thomas Law Offices, a personal injury law firm in Louisville, Kentucky, is also a big fan. He pays $179 a year and says Clear helps him save time in busy airports. More than 20 U.S. airports now have it, including New York’s JFK and LGA, and Washington, D.C.’s DCA and IAD. Users, who must be U.S. citizens or permanent residents, can start the process online but have to visit one of the company’s airport kiosks with a U.S. driver’s license, passport or other form of official identification.

Shawn Toor, an associate attorney who focuses on business and real estate transactions at Williams Kastner in Seattle, uses a Nexus pass to travel quickly across the Canadian border. It can also be used in dedicated Sentri lanes when going between Mexico and the U.S. “There’s a separate line at the border to go through TSA Precheck,” Toor says. “And I use it when I drive across the border too.”
To keep up with various changes in rules and regulations, Sarauskas suggests frequently viewing updates from the U.S. Department of State.

Zainab Hussain is an associate at the Foundry Law Group, a Seattle-based firm that specializes in data privacy and intellectual property. She was in Saudi Arabia, where her parents live, when the first travel ban was imposed by President Donald Trump. Although Hussain—who was born in India, grew up in Saudi Arabia and became a permanent U.S. resident in December—usually brings a laptop to conduct work, she’s going to think twice about it now since she’s worried about theft or damage in her checked luggage, given the electronics ban. Her plan is to put any important documents she might need in the cloud instead of on her hard drive and to access them via Dropbox or OneDrive. She also makes sure any important documents that might require a credit card, such as applications for a trademark or business license for a client, are done before she leaves on a trip so financial information isn’t compromised.

When it comes time to get through security at customs, Sarauskas says it’s important to stay relaxed even if some of the agents are overly aggressive. “Smile,” he says. “And make sure to have a business card handy. They question everyone lately and the question will make you feel like you are doing something wrong even though you’re not, so always stay relaxed.”

Alan K. Brubaker, a partner at Wingert, Grebing, Brubaker & Juskie in San Diego who travels with a CPAP machine for his sleep apnea, says customs and TSA are always curious about his laptop-size device. “But it’s a lot more common than it was five years ago,” says Brubaker, who packs distilled water for his machine in several reusable stainless steel bottles inside his checked luggage. “And now they just say CPAP to the person manning the X-ray machine.”

Like many of his counterparts, Kessler uses his Priority Pass membership to access more than 1,000 airport lounges worldwide, which also allows him to rent a conference room if he needs to make a conference call in private. He also uses Skyroam, a global hot spot to get secure Wi-Fi.

To save time, Kessler says, he arranges his flights so they never leave or land during rush hour, which helps him avoid getting stuck in traffic. “I love getting in during the middle of the night. Then there’s no hassle at the airport,” he says.

Thomas, who travels at least three days every week, avoids traffic by flying out over the weekend, when there’s less business travel. Smaller crowds make it easier for him, since he has a connection on 90 percent of his flights. To get real-time updates on when his airplane will land, Thomas uses his FlightAware app.

Kessler also uses the Hertz Platinum program, which will send a representative to meet him at the terminal and give him a ride back to the airport once he drops off his rental. To keep working while he’s in-flight, Kessler pays $29.95 a month for PhoneTag, a voicemail-to-text service that immediately transcribes a voicemail, which helps Kessler respond via email while he’s midflight. Through a credit card, he also has a complimentary subscription to Gogo, an in-flight internet provider that charges a flat monthly fee, which allows him to maximize work time.

PACKING, LUGGAGE AND COMPLICATIONS

John Quick, a partner at Weiss Serota Helfman Cole & Bierman in Coral Gables, Florida, who handles everything from bankruptcy and collections to civilian oversight of law enforcement, jokes that he first learned how to pack during his first job as a “professional folder” at J.C. Penney.

If it’s a short trip, Quick saves time and aggravation by carrying on. He recommends a lightweight suitcase with four wheels since he’s had other styles break on the cobblestone streets of Budapest and Paris.

For international travel, Quick opts for a 30-inch suitcase, packing heavier items like shoes and paperwork at the bottom so they aren’t rolling on top of his clothes, followed by pants, undershirt, shirts and undergarments on top. He always brings a wetsuit bag for soiled clothes and a bathing suit. He also rolls his ties around a couple socks to avoid getting a crease. Quick’s other go-to item: a hanging toiletry bag by Flight 001 that he puts on the back of his bathroom door to keep his sink from getting cluttered.

Quick’s worst travel experience was walking into court in Jacksonville, Florida, when a person with a big pretzel and mustard spilled it all over Quick. “There was nothing
Tech Tools to Keep You Charged

Having the right technology can make traveling more efficient and effective. Here are apps and websites to make your business trip a breeze.

• Have a travel assistant on the go. The Lola app—from the co-founder of Kayak—connects you with travel consultants who help plan out your trip, offer real-time airport updates, find hotels, and suggest restaurants and other local hot spots.
• Find optimal legroom. Since there’s not an industry standard yet, do a seat comparison on a site like SeatGuru that can help compare seat pitch and width among airlines.
• Snag a short-term luxury apartment. If you’re sick of staying in a hotel, think of Oasis Collections as a luxury version of Airbnb with 24/7 concierge service through its app.
• Sign NDAs and other important documents on the go. Deliver contracts and acquire electronic signatures in PandaDoc, a business app that integrates with Google apps, Dropbox and more.
• Keep your cellphone charged. Some call the Spyder Commuter the Swiss army knife of battery chargers thanks to its three-in-one ability to plug into a wall outlet, USB slot or car charger and still fit in your pocket or purse.
• Get great dinner reservations. If you need to meet a client at a restaurant, the Velocity app may help you find a seat at a Michelin-star eatery or a new hot spot.
• Scan business cards and receipts. It’s easy to lose business receipts and tax write-offs slips when traveling. CamScanner and Evernote Scannable apps will duplicate documents, receipts and business cards on the go.
• Convert currency quickly. Use the OANDA Currency Converter to find top exchange rates anywhere in the world.
• Compare flights in reward miles. If you want to maximize your miles or are reconsidering the programs you use, Award Ace tracks redemptions across 63 airline programs to make it easier.
• Talk to almost anyone. If you’re not sure how to say something, Google Translate can help you communicate in more than 100 languages.
• Have someone else ship your luggage and clean your clothes. For a flat rate of $99 per trip, plus a $9.95 per month storage fee, Dufl will send you a suitcase to fill with clothes, creating a virtual closet to choose from for your next trip. Dufl stores your items in its warehouse, and will ship your choice of packed clothes to your hotel and then clean them on their return.
• Earn redemptions in a new way. Created by Priceline founder Jay Walker, the Upside Travel Co. rewards business travelers for booking through its site for flights coupled with a spectrum of two- to five-star hotels. Upside can save you money and offers gift cards for a variety of shopping partners.

I could do,” Quick says. “I took off my coat and the first thing I told the judge was someone spilled on me and I thought it would have looked worse to have it on. Luckily the judge didn’t have a problem, but he appreciated me addressing it right off the bat.”

He’s not alone. Thomas says when American Airlines lost his suitcase during a conference in New Orleans, he had to wear the same jeans and shirt two nights in a row, after being promised the suitcase would arrive. “I played it up,” he says. “I wore beads to the conference and explained why I looked the same as I did the night before. Then people feel bad for you.”

Brubaker, who likes to fold his suits lengthwise in his suitcase and then fold the collar back toward the bottom of the coat, says he left a highlighter in his pocket that bled through his white shirt during a flight to San Francisco. To replace his shirt before a meeting for a class action lawsuit at 8 a.m. sharp, he arrived at clothing retailer the Hound and knocked on the back door to seek a replacement.

Liz Espín Stern, a Mayer Brown partner in Washington, D.C., and leader of the law firm’s global mobility and migration practice, had a fellow passenger’s coffee spill on her and makeup remover open up in her suitcase, soiling a suit. In both instances, Stern says, she had to act fast by asking a concierge where to go, and pay a lot of money to hire a driver and acquire a new suit to get the job done.

To make packing easier, Stern duplicates her favorite travel pajamas—one for summer, one for winter—with
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two toletry bags ready to go, along with a “what to pack” list on her iPad to make sure she doesn’t forget anything. She keeps a pair of hotel slippers in her briefcase to help her feel more relaxed on the plane. Always brings a couple of Bounce dryer sheets in her suitcase and briefcase to keep her clothing from looking wrinkled. She also suggests running the shower for a few minutes to add moisture to the hotel room to sleep better in the evening.

For Stella Lellos, a partner at Rivkin Radler in Uniondale, New York, one of the hardest things to do was travel with a breast pump. “If you aren’t traveling with a baby, you have to figure out a way to store the milk,” she says. “And that all depends on how long you are traveling.”

Lellos was in London when she had to ask her five-star boutique hotel to hold her breast milk since the mini refrigerator wasn’t cold enough. “I labeled it, called the concierge, and they took it away,” she says. “I called when I was checking out, and a staff change had happened in that period of time and they had no idea what I was talking about.”

After a frantic search, which required Lellos showing the hotel staff what an empty bottle looked like, she was able to track down her missing milk. “The hotel went crazy and it was embarrassing,” she says.

Her other tip for nursing attorneys: If a business meeting starts running long and you need to go pump, just tell the room, “I’m sorry, there’s just something I can’t get out of and I need a 15-minute break,” she says, or ask if a break can be moved up during a meeting.

UNTETHERED TRAVEL
Doug Bend, founder of San Francisco-based Bend Law Group, a B certified corporation that focuses on helping entrepreneurs and startups, offers a flexible work policy with unlimited sick and vacation time for attorneys. Most of his attorneys are traveling at least six to eight weeks out of the year. Luthien Niland, a senior associate at Bend’s six-person firm, often works remotely three days a week from Lake Tahoe since her husband works on ski patrol there. When another attorney, Alex King, asked to move from the Bay Area to Sonoma, Bend says he saw it as an opportunity to pursue winery clients.

Having this policy works because the firm is largely transactional and doesn’t focus on litigation, Bend says, and he’s managed long-term employee retention by striking a happier, healthier balance with flex time.

“We get a monthly report from the bookkeeper of their expenses and net revenue,” says Bend, who uses Clio as his cloud-based management software. “To me it’s more important how many billable hours they have than where they are working.”

To manage all the travel, Bend has his attorneys sync up through a Google calendar to run a virtual law firm that meets in person once a week at various locations in San Francisco, ranging from the club lounge in his building to a Bank of America conference room. For teleconferencing, he uses UberConference because it sends an email update after each call about how long everyone spoke, so he can gauge productivity and see whether someone dropped off a call early. Once a month he also schedules something fun on the calendar such as a barbecue or happy hour for everyone to mingle and stay connected.

While Bend is traveling on vacation, he prioritizes his work by focusing on billable client tasks instead of those that are administrative. That makes him more productive because of his laser focus on working only two hours a day to balance it with down time.

“When I’m traveling I always have my out-of-office message on,” says Bend, who likes to travel with a Rimowa suitcase that weighs only 4.19 pounds. “It’s important to block out time to do the work and enjoy the travel. Then when I respond to clients they are more appreciative that I’m working while I’m traveling.”

But attorneys who frequently travel or work remotely need to take precautions to protect communications and client data. There are steps that can and should be taken when utilizing public internet access. Based on recommendations from her school’s IT staff, Lori Nelson, alumni relations director for the University of Utah’s S.J. Quinney College of Law, has instituted a number of cybersecurity measures while traveling. When using Wi-Fi, Nelson makes sure she’s connected to her school’s virtual private network to send and receive data.

“If you are going to send documents while traveling, you should make sure that rather than sending them as an attachment, you lodge them on an FTP site,” Nelson advises. “That way both you and the recipient have to sign in to get access to view the documents. Client portals, offered by some case management software as well as other providers, work great for this purpose.”

Nelson also points out platforms that can be used to encrypt text messages, such as ChatSecure and Wickr. If you’re texting from one Apple product to another (you can tell because messages appear with a blue background instead of green), those messages are already encrypted through Apple’s system.
Liz Espín Stern duplicates her favorite travel pajamas—one for summer, one for winter—with two toiletry bags ready to go.

Laura Premi is spending a year working abroad. “I’m lucky to be at a firm that focuses on being innovative.”

Stella Lellos advises nursing attorneys that if a meeting starts running long and you need to go pump, just excuse yourself.

Doug Bend commits to billable tasks to stay more productive on the road.

Tad Thomas travels at least three days every week. He avoids airport snarls by flying out over the weekend.

“The best advice is just to be aware, know where your data is and how secure the network you are using is before you use it to have confidential communications,” Nelson says. (For more, see “21st-Century Standards,” page 24.)

Laura Premi, a partner at Cypress in Los Angeles, says she recently approached her firm about spending a year working abroad via Remote Year, a company that brings together 50 or more professionals who work in 12 different cities around the world. The application process includes a $5,000 down payment and $2,000 monthly installments, which includes private accommodations, travel between destinations, workspaces and Wi-Fi.

Premi says she approached the senior partners and other partners at the firm and explained that traveling abroad had been a lifetime passion of hers. “I’m lucky to be at a firm that focuses on being innovative,” says Premi, who began traveling in April with a rotation among Vietnam, Thailand, Japan, Colombia, Peru, Portugal and Croatia, among other destinations. “Of course they had questions about the logistics, but they were really happy to facilitate my desire to see the world and thought it could be beneficial to my clients to learn firsthand how other companies are using technologies to work remotely.”

To manage the logistics, Premi has committed to being available at least four hours a day during the Pacific time zone, even if it’s sometimes 5-9 p.m. in LA because of the drastic time difference. She dropped her U.S. carrier plan and transferred her cellphone number over to Google Voice so it can be forwarded to a Skype number since she will have Wi-Fi in all of her locations. Premi also plans to purchase local SIM cards in each country that will make her accessible to her colleagues via a VOIP app on her cellphone.

Before she left, Premi made sure her laptop was encrypted with LastPass as a password manager and will remote in using a VPN. She also purchased a second iPad to attach to her laptop so she can have an additional work screen through the app Duet Display. “A lot of work can be done by computer and phone since technology allows you to work anywhere,” Premi says. “I can’t make court appearances or take depositions in person, but my team at Cypress is going to do it on my behalf and I’m going to use video technology to make it feel like I’m in the office when I’m not.”

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Fake news is just false, but the cure may not be so simple.
Words matter. Just ask James Alefantis, owner of the Comet Ping Pong restaurant in Washington, D.C. Starting Nov. 5, Alefantis and the employees at his pizzeria received hundreds of death threats via texts, Facebook messages, and Twitter. One of these informed Alefantis: "I will kill you personally." A month later, 28-year-old Edgar Maddison Welch walked into Comet Ping Pong with an AR-15 assault rifle and fired repeatedly.

Why were Alefantis and his employees targeted? Because of a lie that was preposterous on its face: The basement of his restaurant didn't even have a basement. Nevertheless, many reports of this "criminal conspiracy" were widely shared on social media and were pushed by Alex Jones on his widely syndicated radio show and his influential website, Infowars.

The consequences were all too real. Threats from the story's believers frightened Alefantis and his employees, causing several to quit. The restaurant was forced to close from the restaurant's nonexistent basement.

By Steven Seidenberg
restaurant hired security personnel to guard concerts held there. No one was shot by Welch. He had come to rescue children from supposed subterranean captivity yet discovered nothing but an ordinary restaurant. Welch later gave up peacefully to police. Former patrons of Alefantis’ restaurant, however, may think twice about visiting the family-friendly venue after an armed man was taken into custody there.

One might think, after suffering all this, Alefantis should have a legal remedy. He should be able to bring libel suits against Jones and other purveyors of the child sex slave lie. (In fact, Jones recently settled a lawsuit by the Chobani yogurt company for defamation and breach of the Idaho Consumer Protection Act after videos and social media posts, including a Twitter-circulated video that had the headline “Idaho Yogurt Maker Caught Importing Migrant Rapists.” Jones issued an apology on May 17; no other details were announced.) But Alefantis has not sued. Nor has Comet Ping Pong, Clinton, Podesta or almost anyone defamed by the deluge of fake news stories in 2016.

Real Confusion
“In the last year, especially during the election, fake news became very pervasive,” says Larry Atkins, a journalist and adjunct professor at both Temple University and Arcadia University. This has not merely harmed people’s reputations; it has produced pernicious effects for U.S. politics and society. Fabricated news stories are causing a great deal of confusion about the basic facts of current issues and events, according to 64 percent of U.S. adults surveyed in December by the Pew Research Center, a nonpartisan research organization.

The confusion and misinformation caused by fake news is undermining America’s ability to govern itself, experts fear.

“Misperceptions are consequential. They have profound importance in our system of government because the people are charged with making choices based on information. People don’t have to be experts, but they have to have a foundation of knowledge,” says R. Kelly Garrett, an associate professor of communications at Ohio State University.

There may seem to be an obvious way to attack fake news: Sue for defamation. The plaintiffs might win huge awards, driving some purveyors of fake news out of business. Fear of libel suits might cause the creators of fake news to rethink their behavior and hew more closely to the truth.

Libel suits can raise tricky legal issues. Defendants may be protected by statute or beyond the reach of U.S. law. Plaintiffs may not want to sue for fear of further publicizing false charges. And in the end, would prosecuting libel suits be good public policy? To what extent would successful lawsuits help stamp out fake news?

The current occupant of the White House and his administration have adopted a broad definition of “fake news.” They label as fake any news story they argue is biased or inaccurate (usually when the story opposes an administration stance and often without offering any evidence of the story’s supposed bias or inaccuracy).

Thus, on Feb. 6, President Donald Trump tweeted: “Any negative polls are fake news.” On Feb. 17, he tweeted that ABC, CBS, NBC, CNN and the New York Times were “the FAKE NEWS media.”

The administration is misusing the term fake news, according to experts in journalism. Fake news is “deliberately and strategically constructed lies that are presented as news articles and are intended to mislead the public,” says Barbara Friedman, an associate professor at the University of North Carolina’s journalism school.

Fake news is different than biased news. “Biased news articles are not lying or misrepresenting facts,” says Atkins, author of the book Skewed: A Critical Thinker’s Guide to Media Bias. “They are cherry-picking quotes or facts to back up their position but think they are telling the truth. MSNBC will show a positive slant on Obamacare. Fox News will have a negative slant. Neither is fake news because both networks are just cherry-picking facts, not making stuff up.”

Inaccurate news stories are not fake. “News that isn’t well-sourced and that has unintentional mistakes in it isn’t fake news,” Friedman says. “That’s because providers of real news—unlike sources of fake news—strive for accuracy and work to correct their errors.”

And fake news isn’t a new phenomenon. (See...
“Yesterday’s [Fake] News,” page 53.) “There has always been fake news. There has always been made-up stories and hoaxes, and some have circulated quite widely,” says economics professor Matthew Gentzkow of Stanford University, a research associate for the nonprofit National Bureau of Economic Research.

But today’s fake news is different because it typically does not come from established media organizations. Fake news now originates online from politically motivated groups or individuals just seeking to make a quick buck. They can quickly and cheaply create fake news and spread it to millions via social media.

A group of teenagers in the Balkan nation of Macedonia, for instance, was responsible for creating thousands of fake right-wing news articles, many of which went viral. When social media users clicked through to the teenagers’ phony news websites, the youths made money from online ads.

“In the past, there was no mechanism for some kid to make up a story and the next day it is seen by millions of people,” says Gentzkow. “Social media have changed things by making it much easier and faster to spread fake news. And it makes fake news financially profitable.”

As Seen on Facebook
Fake news is just a small fraction of all available news, but it has garnered quite a following on social media. In the last three months of the 2016 election, the top 20 fake news stories on Facebook generated more shares, likes and comments than did the top 20 news stories from mainstream media, according to an analysis by Buzzfeed.

During this period, “fake news [on social media] was both widely shared and tilted in favor of Donald Trump,” with pro-Trump fake stories shared 30 million times and pro-Clinton fake stories shared 7.6 million times, professors Hunt Allcott of New York University and Gentzkow wrote in a study published Jan. 17, “Social Media and Fake News in the 2016 Election.”

“The extent to which fake news is part of social media is alarming,” says Rachel Davis Mersey, an associate professor of journalism at Northwestern University’s Medill school. “A frighteningly high extent of people are getting their news from social media.”

“Among millennials, Facebook is far and away the most common source for news about government and politics,” the Pew Research Center declared in a June 2015 report. “The younger you are, the more likely you are to get news from social media and to get your news only from social media,” Mersey says.

But reliance on social media isn’t limited to the young. Sixty-two percent of adults get some news there, and 18 percent do so often, according to a May 2016 Pew report. Moreover, 14 percent of Americans called social media their “most important” source of election news, according to Allcott and Gentzkow’s study.

Social media create significant political effects. Twenty percent of social media users report they modified their stance on social or political issues because of material they saw on social media, according to survey results published by the Pew Research Center on Nov. 7, 2016. Seventeen percent of those surveyed said social media helped change their views about a specific political candidate.

And that’s why it’s worrying that so much of the news on social media is fake.

Real Effects
Fake news has three main effects. First, it fools some people, causing them to believe in falsehoods.

“We estimated that half the people who saw fake news stories believed they were true,” says Gentzkow.

These falsehoods are not limited to ridiculous stories of child sex slave rings. They harm people’s knowledge of important public matters.

“Before the election, 84 percent of people said there was disagreement over the basic facts of public issues. Fake news is driving this confusion,” says Michael Barthel, a Pew research associate.

Fake news also makes people uncertain about what facts to believe and which sources of information to trust. This has harmed the credibility of the mainstream media, which are already reeling under weak finances and a decadeslong conservative attack on the "lame-stream media."

In 2016, Americans’ trust and confidence in the mass media “to report the news fully, accurately and fairly” dropped to its lowest level in Gallup polling history, with just 32 percent of respondents indicating they had at least a fair amount of trust in the media.

“It is pretty clear there is a crisis of credibility,” Gentzkow says.

The mainstream media aren’t the only ones whose credibility has suffered. Intelligence agencies, scientists and many other experts are no longer seen as trustworthy by many politicians and voters.

“It is harmful to assert you can only trust what the people on your side tell you. When high-profile political figures make these claims, as Trump repeatedly has, that is dangerous,” says OSU’s Garrett.

“When we cast aspersions on all institutions that seek to gather and disseminate knowledge, how do we make public policy decisions?”

The third effect of fake news is that it widens the nation’s partisan divide, inflaming people’s fears and hatreds. “Fake news is ... making people double down on opinions they already have,” Mersey says.

As an example, Mersey also offers Pizzagate: “Opponents of Hillary may not believe Pizzagate occurred, but they nevertheless become more certain they don’t like her. It increases the intensity of their emotion,” she says. “Hillary supporters, who see Pizzagate as false, become more certain she is being unfairly attacked and become more strident in defense of her.”

Fake news creates a vicious circle. Such news stokes partisan division, which in turn leads people to believe only news that supports their views, which further heightens partisan division.
Sue Who?

For centuries, libel suits have been used against those who intentionally spread false accusations about others. And such suits could be brought against today’s purveyors of fake news. But anyone bringing such suits would face significant obstacles.

One obstacle is finding suitable defendants. There are many potential targets: Anyone who creates defamatory lies can be sued, as can anyone who repeats these lies.

But some defendants, like the Macedonian teenagers, are outside the country, so it may be difficult to enforce any U.S. court judgment against them.

Moreover, these teens—and many other potential defendants—often lack sufficient funds to justify bringing lawsuits against them.

“Bringing a libel suit isn’t inexpensive, and if a defendant doesn’t have deep pockets, it may not be worthwhile to bring suit,” says Shaina Jones Ward, a senior associate in the Washington, D.C., office of Levine Sullivan Koch & Schulz and a member of the ABA’s Forum on Communications Law.

Facebook’s pockets are plenty deep, as are those of YouTube, Twitter and Reddit. Such online media outlets, however, are protected by Section 230 of the Communications Decency Act of 1996. This federal statute declares that providers of interactive services are not liable for content posted by their users.

The intent is to protect free speech online. A contrary rule “would be like holding a mailman liable for defamatory content in a letter that he delivered,” says Robert P. Latham, a partner in the Dallas office of Jackson Walker and another member of the Forum on Communications Law.

That leaves a relatively small number of possible deep-pocket defendants. Financially successful websites, such as Infowars, that allegedly posted fake news could be targeted. So might famous and successful individuals allegedly responsible for fake news—people such as radio host Jones. Because of the First Amendment, however, it could be tricky to prove that any of these people or organizations committed libel.

Liable for Libel

In the landmark New York Times v. Sullivan decision, the U.S. Supreme Court held that the Constitution’s protections for freedom of speech and the press restrict the scope of libel law. The court declared that in order for a public official to obtain damages for a defamatory falsehood relating to the official’s conduct, the official must prove the defendant made the defamatory statement with “actual malice”—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”

The high court subsequently read this First Amendment protection broadly in Gertz v. Robert Welch Inc. Actual malice was required in libel actions brought by a public official or a public figure if the allegedly defamatory article concerned an issue of public interest and concern.

Thus Clinton might well need to prove actual malice if she wanted to win a libel suit against Infowars and its creator, Jones. As the Democratic candidate for president, former Secretary Clinton was a public figure, and the assertion that she masterminded a child sex slave ring certainly merited public concern.

Law professor William McGeveran of the University of Minnesota notes that to satisfy the first part of the actual malice standard, a plaintiff must prove the defendant knew the statement was false but published it anyway.

“ ‘Reckless disregard’ allows one to infer intent by the defendant’s disregard of objective evidence,” Ward says. “The plaintiff can show many sources had debunked the story before its publication, or that the sources for the story were not trustworthy.”

“Courts also look at the inherent improbability of the [defamatory] statements,” says Clay Calvert, director of the Marion B. Brechner First Amendment Project at the University of Florida.

Public figures vilified by outrageous fake news stories could thus have a reasonable probability of proving reckless disregard. “Hillary Clinton would have a good shot at winning a libel suit against Alex Jones,” Calvert asserts.
YESTERDAY’S (Fake) NEWS

Fake news has a long history in America. Benjamin Franklin intentionally published stories alleging that the British paid Native Americans to scalp men, women and children in the rebellious colonies. During the contentious election of 1800, Federalist newspapers tried to keep people from voting for Thomas Jefferson by running fake stories of his death. In the early days of the republic, however, people’s expectations for news stories were quite different from today.

“The notion of objectivity as we think of it today didn’t exist in the early 19th century. Instead, there was a long history of newspapers being supported by political patronage,” says journalism professor Barbara Friedman of the University of North Carolina. “Political parties considered newspapers as extensions of what they did. They were tools. The point was to discredit and even savage the opponent with falsehoods.”

The partisan-funded press faded away in the 1830s, but fake news continued in a different form: The penny press lied about sensational events to entertain readers.

The penny press needed readers because they were not funded by political parties. The first of these papers, the New York Sun, published “lots of crime stories, sports stories, local stories, gossip and rumors,” says Matthew Goodman, author of a book on the newspaper and its times, The Sun and the Moon. “It created the template for the good tabloid papers of today.”

To boost circulation, the penny press was more than willing to use deliberate falsehoods that exaggerated and embellished events. In 1836, New York City newspapers ran a series of widely read articles on the murder of Helen Jewett, an upscale prostitute, and the subsequent trial of her alleged killer. The story was sensational, and the newspapers were so, thanks to doses of intentionally false details.

“James Gordon Bennett [editor of the New York Herald] visited the crime scene numerous times,” Friedman says, “and wrote very florid prose about Helen Jewett and the seedy world she occupied, which was foreign and fascinating to the audience. Some of the things he wrote were made up. His coverage was embellished for the sake of entertainment.”

Sex, Lies and Man-Bats

If such falsehoods were exposed, readers at the time were not upset, as demonstrated by what may be the most famous newspaper hoax of all time. In 1835, the Sun ran a series of six articles claiming an astronomer, using a new, high-powered telescope, had discovered life on the moon. The astronomer had found no such thing, but that didn’t stop the fledgling Sun, which was desperate for readers.

As the series progressed, the supposed fauna and flora on the moon became increasingly lurid and sensational. “There were veiled bison, something that looked like a unicorn and biped beavers that walked on their hind legs, had discovered the secret of fire and built huts.”

The final installment had the greatest creature of all: man-bats that talked, flew, built temples and fornicated in public, which drew a great deal of consternation among the Sun’s readers,” Goodman says.

Thanks to this moon hoax, the Sun went from a struggling paper. They were totally wrong. “The Sun’s circulation never went back down,” Goodman says. “The public tipped their hats, said, ‘You did a masterful job of entertaining us,’ and didn’t turn against the Sun.”

That’s because Americans at the time held a different view of what news media were supposed to do. “A large purpose of the newspaper was to entertain. The papers printed stories and jokes. There was not the same bright line between fact and fiction that we expect in our newspapers today,” Goodman says.

Even in the late 1800s—when investigative journalism came to the fore, and newspapers such as the New York Times began to champion objective journalism—fake news continued.

In the run-up to the Spanish-American War, William Randolph Hearst’s newspapers ran fabricated stories in order to goad America into war and imperial expansion.

Hearst’s papers falsely claimed Spanish officials in Cuba were committing atrocities, such as strip-searching American women. Hearst’s reporters wrote about the horrible suffering of the Cuban people—before those reporters had arrived in Cuba. Conditions in Cuba were bad, and Spanish rule was harsh, but Hearst embellished the facts.

“There was not due diligence in the coverage, and Hearst certainly had an agenda,” says journalism professor Rachel Davis Mersey of Northwestern University.

Hearst’s fake news wasn’t solely responsible for pushing the United States into the Spanish-American War, but it was a factor in bringing about the war. “Fake news inflamed the passion of readers, including politicians,” many of whom wanted war, Friedman says.
Not all libel plaintiffs need to prove actual malice. The Constitution permits a private individual to win a libel suit by merely showing the defendant acted negligently in publishing the defamatory statements, the Supreme Court held in *Gertz*.

This would help Alefantis and his restaurant, Comet Ping Pong, should they wish to sue. Neither was famous prior to the fake news stories. (In March, Jones publicly apologized to Alefantis and his business neighbors, but not Clinton or Podesta.)

Private individuals, however, can sometimes be deemed “limited-purpose public figures,” requiring them to prove actual malice. “Ordinary people get sucked into public affairs and become limited-purpose public figures all the time,” says McGeveran. “People who commit crimes or are wrongfully accused of crimes by police” would fall into this category, he says, because crimes are matters of public concern.

One might argue, therefore, that Alefantis and his restaurant were limited-purpose public figures since they were caught up in allegations that a major party presidential candidate was committing a heinous crime. That is a somewhat tenuous argument, however, because in Pizzagate, the police made no accusations of criminal activity. The accusations came only from highly partisan private entities, such as Jones and Infowars.

“It looks like the matter of public concern was totally fabricated,” McGeveran says. “So for the people who created these stories, the actual malice standard shouldn’t apply.”

The situation may be different for those who simply reposted or retweeted the fake news stories. “I see an argument for considering Pizzagate to be a matter of public concern, at least for those people who repeated it thinking it was true,” says McGeveran. He concedes this argument would “test the boundaries about what is a matter of public concern, but the libel doctrine is set up to give a great amount of leeway on that.”

To be guilty of libel, a defendant must have made a false statement of fact, including an opinion that implies incorrect facts. However, opinions, hyperbole, satire and imaginative invective are all protected by the First Amendment and beyond the reach of libel law.

This could be used to defend purveyors of fake news. “Defendants could argue the stories about Pizzagate were imaginative expression, not meant to be taken literally—that no reasonable person would take those stories literally,” says Calvert. “The court would look at whether Alex Jones was presenting the stories as real news. If those stories purported to be factual, no matter how outrageous they were, they would be actionable.”

**At What Cost?**

Should a purveyor of fake news be found guilty of libel, the financial consequences could be severe. The defendant would be on the hook for three different types of damages:

- Special damages compensate the plaintiff for quantifiable financial harm. In the case of Alefantis and Comet Ping Pong, for instance, the special damages could include lost business and the costs arising from added security and hiring replacement employees.
- General damages compensate for harm to the plaintiff’s reputation. These damages can be fairly large.
- Presumed or punitive damages “are where the big money comes from,” Calvert says. Punitive damages, however, can be difficult to get. If the libel involves a matter of public concern, a plaintiff must prove the defendant acted with actual malice. Some states, such as Massachusetts, have adopted an even tougher rule. They have statutes forbidding all punitive damages in libel suits.

The final obstacle to suing purveyors of fake news for libel is the costs of bringing such suits. Those costs go beyond those of litigation.

Suing for libel can harm the plaintiff’s reputation by bringing the false charges to wider public attention. As the trial drags on, the false allegations can be spread by the media for months, perhaps years. Even if the plaintiff wins the suit, much of the public will...
remember the charges and forget the trial result.

This may be the main reason why no libel suits have been brought against purveyors of recent fake news.

"Why would Hillary Clinton want to file a libel suit in which she would have to have her deposition taken and give more publicity to the Pizzagate story?" Calvert asks.

This may also explain why Alefantis declined to make any comment for this article; he presumably wants to put the Pizzagate allegations behind him.

Still, not suing may make sense for those traduced by fake news, but it may be a bad result for American society. Such libel suits could help stanch the flood of fake news, "especially if one of these cases results in a large monetary award," says Ward. A large judgment could put a fake news site out of business and make others think twice about engaging in fake news.

Libel suits, however, can never single-handedly solve the problem of fake news because it is so easy to create fake news online. "Fake news is a moving target, and the problem of fake news because it is so easy to create false story to spread. If a story is found to be false, it will be demoted in the news feed, labeled on Facebook as "disputed," and users who attempt to share the story will be warned that its accuracy has been disputed by whatever organizations found it to be false.

It's unclear how much impact all this will have, in part because it can take days before fact-checkers can declare a story is false. That gives plenty of time for a false story to spread.

Reputable news media also are fighting fake news and are more willing to label assertions as false or unfounded, or even as lies. They are collaborating to identify fake news and make the results freely available.

In Europe, a fact-checking collective has so far garnered 37 organizations, including the BBC, International Business Times, Bloomberg, Le Monde and Agence France-Presse. Le Monde has gone further, making Chrome and Firefox plug-ins that provide pop-up warnings when users view dubious stories.

The U.K. is opening a parliamentary investigation into how fake news is created and spread, how it affects democracy and how to combat it. The German government tabled a bill that would penalize social media if they fail to promptly block and delete fake news from their services. Penalties would reach up to 50 million euros ($54 million), and corporate officials could face fines of up to 5 million euros ($5.4 million).

The United States is unlikely to follow Europe's lead, largely because the First Amendment constrains government action.

"It is extremely difficult to define in a clear way the boundary between fake news and alternative viewpoints," says McGeveran. "You may know it when you see it, but it is a danger to impose limits on speech."

According to experts, instead of prohibiting or punishing fake news, the government should better educate people to be more thoughtful consumers of news. Some schools are already teaching students about credible sourcing on social media. More needs to be done.

"I would love media literacy to be taught in schools as part of civics education," Mersey says.

Friedman concurs: "The U.S. has never had robust education of media literacy as, say, Canada has. That lack of education contributes to people's inability to distinguish between real and fake news."

In the end, individuals need to put more effort into their own news consumption. A first step is to break out of political echo chambers and take a more cautious approach to the news.

"They need to be savvy analysts of any story that purports to be real news," Calvert says. "They should think critically about the content they are reading, rather than just accepting it at face value."

This is particularly important when people find congenial news articles. "One strategy Americans can use is to be aware of this: Recognize that if your emotional buttons are hit, you are less likely to deploy your critical-thinking skills," says Garrett. "Before you share a link that says, 'Trump is terrible' or 'Democrats are terrible,' think carefully."

Finally, people need to become more active in their support of truth. They should provide financial support to reputable news media and speak out when they come across fake news.

"Don't be quiet when people are spreading misinformation. Don't be nasty, but say the information is wrong," says Garrett. "If a lot of people do that, it can be influential."

Steven Seidenberg is an attorney and freelance reporter in the greater New York City area.
Navigating Drone Laws
Has Become a Growing and
Lucrative Legal Niche
By Darlene Ricker
Imagine a Jetsons-like world with drones buzzing above your building as they deliver packages, dry cleaning and even groceries to a rooftop concierge. Four years ago, CEO Jeff Bezos predicted that Amazon.com would be using drones for deliveries by 2019, and aviation lawyers saw what was on the horizon: a budding practice area in which the sky is literally the limit.

Although legal developments might delay Bezos’ timeline, nothing has slowed the proliferation of drones in a wide range of commercial and personal uses. To hobbyists, a drone is a fancy toy. To Hollywood studios, it’s a magical tool. To search and rescue crews, it’s a lifesaving device. Regardless of the application, the central issue remains: How will the law be interpreted and applied in this uncharted territory?

That question has catapulted the careers of a cadre of attorneys across the country. Given the ambiguities in the law, which had no warning of this technological development, the brave new world of drones has spawned a growing—and lucrative—legal niche. With little case law for guidance and a complex web of government regulations to wade through, “drone attorneys” have recently found themselves in high demand.

The problems drones can cause might not initially have been obvious to the public. But the Federal Aviation Administration was keenly aware from the beginning. The agency’s mandate is clear-cut: to keep safe the airspace. Anything that flies carries the risk of crashing into another object or falling and endangering people and property below: Drones fall under the legal rubric of “aircraft” and therefore must be regulated for the same reasons airplanes are. Beyond safety concerns, the same legal issues that apply to the use of any vehicle (even an automobile) have their place in drone law: permissible operation, civil and criminal liability, misuse and the like. That has opened multiple doors for the practice of drone law.

In its infancy, drone law was largely the domain of sole practitioners, many of them licensed aircraft pilots or drone hobbyists. But when Congress in 2012 mandated the FAA to draft regulations for drone operation by 2015, the prospect of drone law practice began to catch the attention of large firms, particularly those with aviation law departments.

NEW OPPORTUNITIES

Among the first was Dentons, one of the largest law firms in the country as well as a global firm with a long-established aviation law department. In late 2013, Dentons announced the formation of a UAS (unmanned aircraft system aka drone) practice group, which launched in 2014. The firm has more than 20 aviation lawyers and professionals, five of whom focus almost exclusively on drone matters.

If drone law seems too narrow of a niche for a large firm, it has turned out to be anything but. “Law firms recognized that drone law is the hottest, most ripe opportunity there is,” says Michael Drobac, an attorney in Akin Gump Strauss Hauer & Feld’s drone law practice group in Washington, D.C.

For Dentons, it made perfect sense to expand its practice into drone law. “A drone is a small aircraft. Who better than aviation attorneys to be lawyers to the drone industry?” says partner Mark Dombroff, who co-chairs the firm’s aviation law department and is based in McLean, Virginia.

He sees drone law as an enormous area. “Drone technology is going to advance dramatically, and it’s going to revolutionize the size and magnitude of the aviation industry.” A former FAA and Department of Justice aviation attorney, Dombroff saw the potential when...
Congress issued its drone regulations mandate. “We looked at the drone world and said to ourselves, ‘This isn’t a toy. A drone is aviation.’ We knew the drone industry was going to develop and eventually be regulated just like airplanes,” he says.

It has taken 114 years—since the Wright brothers flew the first airplane—for aviation law to reach its current state of development.

“I can assure you it’s not going to take that long for drone law to catch up,” Dombroff says. He predicts that the niche will eventually become as large as aviation law because the widespread use of drones significantly exceeds the sphere of drone manufacturers or operators.

DRONES, DRONES EVERYWHERE

The U.S. military, which began to experiment with unmanned aircraft in the 1920s, developed much of the early drone technology for wartime use, such as conducting surveillance in dangerous places and delivering deadly weapon payloads.

When it comes to deploying drones as a deadly force in conflict, international humanitarian laws govern their use. This requires distinguishing between combatants and civilians and taking precautions against strikes on civilian areas and infrastructure.

But drones found their way outside the military, creating the need for a different set of rules for civilians. The sheer numbers that operate in the “drone zone” are staggering. As of Feb. 1, there were 49,857 commercial drones and 664,688 hobbyist drone owners registered with the FAA. Because hobbyists get one ID number for all the drones they own, the FAA estimates owner registrations represent 1.6 million drones.

The statistics encompass all manner of machines, from basic models for toy or recreational use—now easily available online and in electronics and department stores—to super-high-tech devices favored by those who use drones for business.

Adam Lisberg is a spokesman for DJI, a leading drone manufacturer based in China that sells sophisticated professional-use drones. He says the technology has already affected a panoply of industries. “People say drones are the future. That’s true. But they’re also very much the here and now,” he says.

“Every day we’re seeing new uses of drones that are saving money, saving time and making filming safer. Just about every business you can think of needs images,” Lisberg says. “It can be done more efficiently, safer, cheaper with a drone. It’s so much safer to do inspections with a drone than having someone climb to the top of a cellphone tower.”

Dombroff ticks off myriad ways businesses are already using drones: insurance, news gathering, commercial surveillance, remote sensing, power line inspection, commercial filming, concerts, advertising, real estate, construction, law enforcement, firefighting, disaster relief, agriculture, education, air quality, search and rescue, and mineral, gas and oil exploration.

Dentons has clients in many of those areas, which makes it logical for Dombroff’s firm to have a drone practice, he says. “Those clients are entering the aviation industry,” he says, even if it’s by default.

FIGHTING THE FAA

Akin Gump, which formed a drone law practice in 2014, defended an aerial filming company in a recent high-profile FAA enforcement matter, Huerta v. SkyPan International. The largest drone fine ever sought—$1.9 million—targeted SkyPan, a provider of aerial photography for real estate developers and
architectural companies. SkyPan has used drones for more than two decades without incident.

The Federal Aviation Administration claimed that SkyPan flew near high-rises in restricted airspace in Chicago and New York City. The case settled in January for $200,000. Before SkyPan, the largest commercial fine was $18,700.

Some might wonder why the FAA singled out SkyPan. The enforcement action might have been somewhat more objective than it appears.

In assessing the severity of violations for drones and commercial air carriers, the FAA refers to a sanction guidance table that suggests fine ranges based on several elements. Among them are whether the aircraft was manned or unmanned, whether the violation was willful and intentional or inadvertent, whether the operator was a business or an individual, and how many violations happened.

According to an FAA spokesman, enforcement actions come from a variety of sources, including complaints from the public, referrals from local law enforcement and independent FAA investigations. Building owners are among those who have complained about drone activity in their vicinity.

Because FAA fines range from $1,000 to $10,000 per incident, they can rack up easily, even in situations that might not appear to warrant harsh punishment. For example, if a drone falls from the sky and dents a car but is found to have been flown in violation 100 times, math dictates that the fine could be $100,000 or $1 million. If a proposed levy exceeds $400,000, the FAA sends a civil penalty letter to the alleged violator. If a settlement is not reached, the FAA may refer the matter to the DOJ, which determines whether to file a complaint. SkyPan was a business matter that involved more than 60 drone flights from 2012 to 2014 that allegedly violated FAA regulations. In the settlement, the agency agreed to make no findings of violation.

Drobac, executive director of the Small UAV Coalition, a trade organization in Washington, D.C., says there was “white-hot interest in the [drone] industry in SkyPan.”

In Dombroff’s view, “SkyPan sent a firm message to the drone industry: ‘You’re not playing with toys anymore. You’re in the regulated world of aviation.’” He predicts significantly stepped-up FAA enforcement by the end of the year.

Using drone technology, SkyPan International produces virtual reality panoramas, such as this skyline view of the John Hancock Center in Chicago, as well as a stereographic product dubbed “little planets.”
The FAA has targeted drone operators as diverse as teenagers and large corporations, issuing fines from $400 into the millions. Shawn Usman, a hobbyist who crashed a drone on the White House lawn in 2015, paid $5,500. More often, fines and settlements range from $1,100 to $2,200.

“The drone community is not well-organized, and it’s easy for the FAA to pick on them,” says Jonathan Rupprecht of Palm Beach Gardens, Florida, a sole practitioner who is a licensed pilot and flight instructor.

NEW REGULATIONS

The FAA has a new enforcement tool. Last August, long-awaited drone regulations under Part 107 of the Federal Aviation Regulations (the small UAS rule) took effect. They approved drone use for agriculture; research and development; educational and academic use; power line, pipeline and antenna inspections; rescue operations; bridge inspections; aerial photography; and evaluations of wildlife nesting areas.

The regulations took several years to reach their final form, and the agency received input from “a variety of industry stakeholders and elected officials,” the FAA spokesman says. “In fact, the FAA has had an aviation rule-making committee on UAS, consisting of industry representatives, to make recommendations to the FAA since 2008.”

Loretta Alkalay, an aviation and drone lawyer in New York City, says the new regulations are a mixed bag.

On the down side, she says, “the FAA has created a nation of scofflaws.” Alkalay, who was the regional counsel of the FAA’s eastern division for more than 20 years, teaches a popular drone law course at the Vaughn College of Aeronautics and Technology in Queens.

She says drone enthusiasts, particularly student hobbyists, find the regulations to be confusing. “The FAA needs to make it easy to comply. A lot of people get started as hobbyists. If you make it difficult for students, you make it difficult to feed the pipeline for aviation professions.”

Brendan Schulman—DJI’s vice president of policy and legal affairs, who is based in its New York City office—takes exception.

“It’s easier now to comply with the law. Part 107 lowered the barrier of entry,” he says. “Anyone who wants to experiment with the use of a drone in his business just has to pay $150 and pass a multiple-choice test. Before, you had to go to flight school and pay thousands of dollars to get a pilot’s license.”

At the 2017 Consumer Electronics Show in January, Michael Huerta, administrator of the FAA, said that since Part 107 went into effect, more than 30,000 people have started the remote-pilot application process. About 16,000 have taken the remote-pilot knowledge exam, and about 90 percent have passed.

In the five months since the new regulations took effect, the FAA had not initiated any cases that alleged Part 107 violations, according to the FAA spokesman. However, he says, there might be incidents under investigation that the FAA will not discuss.

Meanwhile, John Taylor, a Silver Spring, Maryland, attorney and a drone hobbyist, says, “A 13-year-old who fails to follow the arcane nuances of FAA regulations regarding recreational use shouldn’t be a felon for failing to comply with rules appropriate to commercial operations. Small flying toys aren’t aircraft and shouldn’t be treated as such, especially when operated below the...
Toy drones that weigh 0.55 pounds or less do not require registration, and that covers most toys costing less than $100. Children must be at least age 16 to apply for a drone license and are subject to enforcement actions for drones. According to the FAA spokesman, the agency has received complaints about underage children operating drones. But as of March 7, it had not taken any enforcement actions.

“I believe that whether a property owner wants his children to be able to fly their toy aircraft there, or whether he wants to prohibit commercial drone flying there, is the property owner’s choice,” Taylor says. “That opinion may not sit well with a lot of folks, especially commercial operators, but I believe that’s where a century of aviation case law takes us.”

Taylor spent a winter night in 2015 crafting a legal challenge on his own behalf to the rule that prohibits flying model aircraft within 30 miles of Washington national airspace. “I was sitting in my office and realized that, with Christmas coming, thousands of people would be getting drones as gifts. And like everyone else, they probably had no idea how to operate them legally,” he says.

Rupprecht was beside him at the desk. The two stayed up all night, drafting a petition for injunctive relief. Taylor filed his complaint that December.

At this point the fate of the registration requirement for hobbyist drones appears uncertain. The U.S. Court of Appeals for the District of Columbia Circuit struck down the requirement May 19, ruling in *Taylor v. Huerta* that the FAA didn’t have the authority to regulate model aircraft. At press time the FAA had not announced whether it would challenge the ruling.

**“THE FAA NEEDS TO MAKE IT EASY TO COMPLY.”** —LORETTA ALKALAY
Several drone attorneys expressed skepticism that a motion for rehearing or an appeal would be effective. “The opinion said what the FAA is doing is illegal and told them to stop. It doesn’t get much clearer than that,” says Taylor, the plaintiff.

The agency confirmed it was considering its options, saying in a statement, “The FAA put registration and operational regulations in place to ensure that drones are operated in a way that is safe and does not pose security and privacy threats.”

Taylor dismisses that rationale, calling the registration requirement “a feel-good measure taken in reaction to unfounded hysteria” about drones and air safety. “Registration seemed a tyrannical thing in the first place, and people are mad,” he says.

Should the decision stand, Taylor asks: “What happens now with the information about people in the database and the fees that have already been collected?”

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“We [drone attorneys] all fly, and we support each other. We’re like a freedom fighter group,” he says.

UNAnswered Questions

While the 624-page tome released by the FAA last June brought some clarity, drone attorneys say a lot of gray areas remain. “Everyone’s playing hot potato with the drone industry,” Rupprecht says. “The FAA [with Part 107] instead of answering important questions. We still don’t know where the navigable airspace is, and that’s a big problem.”

That issue has been hovering above drone operations since 1899, when the Supreme Court in Florida v. Riley ruled that police may conduct warrantless aerial searches from public airspace. Although the height flown was 400 feet above an alleged marijuana farm, the court did not define the limits of “public” or “navigable” airspace, Alkalay says.

“I am confident the courts will find that you own some space over your property,” she says. “But is it 10 feet? Fifteen feet?”

Drone attorneys want the FAA to have jurisdiction “all the way down to a blade of grass,” Rupprecht says. “Otherwise, it will be a regulatory nightmare if we have to deal with a mishmash of state and local regulations.”

The issue is whether federal law pre-empts state law. Schulman of drone manufacturer DJI deems pre-emption to be “a pressing issue.” Formerly in private practice, he was a member of the FAA rule-making committee.

Schulman fought several high-profile drone cases against the FAA. Among them was his successful defense of Raphael “Trappy” Pirker in the first federal case that involved the operation of a commercial drone in the United States.

In 2013, the FAA fined Pirker $10,000 for using a drone in 2011 to film the University of Virginia in Charlottesville for an advertisement that promoted the university’s medical school. The FAA alleged that it came within 100 feet of an active heliport at the university and within 50 feet of people on a busy street.

A pedestrian told the FAA that he feared he would be struck and had to move out of the drone’s path. Pirker was cited for operating a drone “in a careless or reckless manner so as to endanger the life or property of another.” The case, Huerta v. Pirker, turned into a protracted legal battle. It settled in 2015 for $1,100.

Schulman expresses concern that local and state legislatures proposed more than 280 state bills in 2016 to regulate drones. Their passage, he says, “would lead to a less safe operating environment because it will be less clear what the rules are.”

Dombroff of law firm Dentons sees pre-emption as a nonissue. “Pre-emption is well-established by U.S. Supreme Court decisions,” he says, pointing to the 1946 case U.S. v. Causby.

Causby held that the federal government has pre-empted the regulation of airspace from the ground up, creating a zone known as “Causby airspace.” But it didn’t pre-empt privacy issues, which are regulated by the states, Dombroff points out.

Privacy and Safety Issues

Sally French, the author of the popular Drone Girl blog, says Part 107 does not regulate anything related to privacy.

“Some people say we need drone privacy laws. The same privacy laws we have now apply to the camera in your iPhone. Your cellphone can do a lot more damage than a drone. You can take a photo in a locker room, and the person may have no idea. A drone is big and loud and obvious,” French says.

Dombroff says there has been a degree of hysteria about privacy at the state level. “Everyone should slow down, take a deep breath and see if we need new privacy laws for drones. I guarantee there will be, at some point.”

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point, a lawsuit by the federal government against a state drone law,” he says.

The focus on regulating drones has escalated along with technology. As commercial pilots started to fly higher, so have drone operators. That sparked safety concerns within the FAA. Of recent concern has been a sport or a hobby known as aeromodelling (or drone races), and its popularity is burgeoning.

ESPN partnered with the Drone Racing League in September for a 10-episode season of drone races, billed as the most recent extreme sport. Operated by controllers on the ground, the drones navigated obstacle courses at up to 80 mph.

When an unmanned aircraft reaches speeds that high, the airspace, as well as those on the ground below it, might be at risk. However, Mark LaFay, an author of drone law books, says, “The practical question is: How can a drone impact my life? If your drone battery dies or you have a mechanical failure, a 10-pound piece of equipment can damage property. If you drop 10 pounds on someone’s head, it could kill them.”

Sole practitioner and licensed pilot Rupprecht agrees that drone safety is important. But he points out: “At the end of the day, there are a lot of other things that can kill you. You’re worrying about a little drone crashing but not the airplane you’re flying on?”

Last September, Alina Pituch sued a University of Southern California fraternity chapter and an event-planning company, claiming she suffered a head injury when a drone photographing a frat party fell on her. The lawsuit in the Los Angeles Superior Court alleges negligence and premises liability.

Some people have taken concerns about personal safety from drones into their own hands and promptly found themselves on the wrong side of the law. LaFay says that even if a landowner thinks a drone might crash and damage their property, they do not have the right to shoot it out of the sky.

A Kentucky man did exactly that, claiming he had feared a drone was going to crash onto him. But his "self-defense against drones" position didn’t fly with authorities. “If someone parks his car on your front lawn, you don’t have the right to light it on fire,” LaFay says. “You have the right to call a tow truck and sue the insurance company. It’s the same if a car hits your mailbox—the driver is responsible for the damage. You have to go through the proper process.”

Industries and professions that depend on drones have encountered some unique legal hurdles. Three years ago, the FAA began to allow drones to be used in commercial filmmaking, but a waiver is required to fly a drone at nighttime or above people (such as at outdoor concerts or the Olympics). FAA records indicate that 65 percent of waiver applications have been used for night operations.

Aerial Mob, based in Carlsbad, California, was one of the first film production companies in the United States to receive FAA approval to use drones in film production in late 2014. The company works with major motion picture studios.

“Part 107 has some good parts and some not-so-good elements,” says Tony Carmean, a founding partner, producer and head of business development at Aerial Mob.

Before Part 107 was enacted, his company faced numerous restrictions on filming at certain locations. “We lost business because we couldn’t turn around the paperwork fast enough,” he says. “Before 107, we lost a job with Fox because it took four months to get it approved. Now, we just have to give the FAA a few hours’ notice. The FAA has it pretty streamlined to apply for a waiver to fly in the dark and over people.”

In November, the FAA approved Disney’s request to allow drone flights above Walt Disney World and Disneyland Resort. The Magic Kingdom has been a no-fly zone since 2003, when the restricted airspace was created for security reasons after the 9/11 terrorist attacks in New York, Washington, D.C., and Pennsylvania.

Now, instead of using live fireworks displays, drones will perform in a musical show that features simulated fireworks, Disney characters in the sky, and perhaps simulated space flights such as from the Star Wars movies. Drones will have LED lights and fly in formations that create light-based entertainment, which some say could revolutionize the entertainment industry.

Whether or not that comes to pass, one thing is certain: The drone industry and the issues that surround it are not going to fly away anytime soon.

Darlene Ricker, a former entertainment law and intellectual property attorney, is a freelance writer based in West Palm Beach, Florida.
A Sterling Reputation

The Silver Gavel Awards have honored outstanding depictions of law in media for 60 years

By Lee Rawles

In 2017, the ABA Silver Gavel Awards for Media and the Arts will celebrate their 60th anniversary. To Kill a Mockingbird, Law & Order, NPR’s All Things Considered, SCOTUSblog and Netflix’s Making a Murderer—these were different forms of media, but all increased public awareness and understanding of the American judicial system and all have earned Silver Gavels over the years.

It was the influential ABA President Charles S. Rhyne who first conceived of the awards and presided over the inaugural award ceremony in 1958. The Silver Gavel Awards recognize outstanding work in the media and the arts that meets at least one of three goals: educating the public about fundamental legal principles and values, as well as about the American legal system; educating the public about the role of lawyers and other legal professionals and the operation of legal institutions; and encouraging support for improvements in the justice system by raising public awareness of current laws and policies.

Since so much of the mission of the Silver Gavel Awards involves education, it eventually found a home in the ABA Division for Public Education, which manages the competition every year. This year, that meant accepting more than 150 submissions and sending them to a screening committee of 45 volunteers who winnow down the finalists. Once the finalists have been chosen, the 18-member ABA Standing Committee on Gavel Awards meets for two days in Chicago to debate the merits of each entry.

The winners are typically announced in May. Although the award ceremony used to be part of the ABA Annual Meeting, it has grown to be its own event, hosted at the National Press Club in Washington, D.C.

Stephen C. Edds of Butler Snow in Jackson, Mississippi, is the current chair of the standing committee.

“Many people don’t understand the Silver Gavel Awards and what we’re trying to do,” Edds says. “I’m hoping that the more people that learn about it, the more people will pick up a book or tune into a podcast and really see the kind of work we see every year.”

LONG-TERM JOB

People who become involved in the Silver Gavel Awards tend to stay involved. That is certainly the case for attorney Gail Leftwich Kitch, executive vice president of communications and finance for the Washington, D.C.-based Voter Participation Center, who has served on both the screening committee and the standing committee. Kitch first came to the awards through her work with the Division for Public Education. This year, she was part of the screening committee.

“I just love having a connection, and part of it’s just the quality; you’re given the opportunity to see such high-quality work,” Kitch says. “And you’re part of an effort, which you deeply believe in, supporting the overall mission of increasing public understanding of the law.”

One screening committee experience that has really stuck with Kitch was listening to the Serial podcast, which won a Silver Gavel in 2015 for its first season, focusing on the case of Adnan Syed. Serial brought a tremendous amount of attention to Syed, who was sent to prison for the murder of his ex-girlfriend, Hae Min Lee. In the wake of that attention, Syed was granted a new trial. “It was quite extraordinary,” Kitch says.

Watching a piece of media impact the real world drove home for her the caliber of work she’s seen while serving on the committees.

When Serial won its award, host Sarah Koenig said, “To know that the ABA sees value and intelligence in what we’ve done is so gratifying. I feel like it legitimizes what we tried to do with this case: not to create problems where there were none, but to point out all the reasonable doubt lurking inside a forgotten conviction.”

STELLAR HISTORY

In the 60 years the ABA has been giving out Silver Gavels, categories considered
for prizes have been adjusted and revamped. For example, books were not considered for prizes until 1964. Sometimes the committee has to adapt the rules to account for types of media that didn’t exist when the awards first began. In 1998, the ABA announced it would have a category for websites and other “new media.” That year, the winner of that category was the project now known as Oyez, a multimedia archive of the U.S. Supreme Court that houses recordings of all the court’s audio back to 1955—and still survives.

Today, that site would fall under “multimedia,” one of the nine categories considered for prizes. Awards and honorable mentions are now available in the categories of books, commentary, documentaries, drama and literature, magazines, multimedia, newspapers, radio and television—but not every category will necessarily be given an award every year. Only work that truly merits a Silver Gavel will receive it.

If a particular issue—the death penalty or wrongful convictions, for example—has captured the attention of the public that year, there may be several entries dealing with that topic.

“You see a kind of interesting interplay between what you’re seeing in the submissions and what you’re seeing in the popular culture and real life,” Kitch says.

In 1958, the Silver Gavel Awards’ first year, one was given to 12 Angry Men, a Henry Fonda movie, which is still held today as one of the finest legal movies ever made. (Another Fonda movie, Gideon’s Trumpet, would win a Silver Gavel in 1981.) But in addition to the big-name winners, there have also been some more unlikely award recipients.

In 1979, a Silver Gavel was won by an inmate of Louisiana’s Angola prison, Wilbert Rideau, for a column in the prison magazine The Angolite. The warden attended the ceremony to accept Rideau’s award for him. There have been multiple generations of Silver Gavel winners. ABC News broadcaster Marlene Sanders won an award for her reporting on gun control in 1977, and her son Jeffrey Toobin won in 2008 for

**SPOTLIGHT ON 2017 SILVER GAVEL WINNERS**

Honorees will receive their awards from ABA President Linda A. Klein on July 18 during a ceremony at the National Press Club in Washington, D.C.

**BOOKS**

**Silver Gavel**

Evicted: Poverty and Profit in the American City by Matthew Desmond

**Honorable Mention**


**DOCUMENTARIES**

Silver Gavel

Do Not Resist by Vanish Films

**NEWSPAPERS**

**Honorable Mention**

“Forsaken: Florida’s Broken Mental Health System” by the Sun Sentinel

**RADIO**

Silver Gavel

More Perfect by WNYC Studios

**TELEVISION**

Silver Gavel

Trapped by Trilogy Films

Dawn Porter

Attorney

Dawn Porter expected to be considered for a Silver Gavel for a second time. “I was so pleasantly thrilled!” Porter was a practicing attorney for many years, first at Baker & Hostetler and then as in-house counsel for television and news studios. She left to become an independent filmmaker and founded the production company Trilogy Films. “As lawyers, we have lots of tools, and storytelling is one of them,” Porter says. “I felt like I had seen enough to try my hand at this type of storytelling.”

The mission of the Silver Gavel Awards is an important one for Porter. “I think that the way that the law intersects with our everyday lives is not always readily apparent,” she says. For her films, she gravitates toward stories with legal aspects. As an attorney, she finds many media portrayals of the justice system inaccurate and misleading, and as a documentarian, “any opportunity to show a truer version of what actually happens is really appealing.”

Edds says the awards’ role of putting a spotlight on media that reflect the true workings of the justice system is vital.

“You know, there’s such a lack of civic education in our schools today that it makes the Silver Gavel Awards much more important now than it was 60 years ago,” Edds says. “If we can expose students—or even their parents who probably didn’t get civics educations, either—to some of these books and documentaries, which really show how our legal system works, then we will have satisfied our role.”
Attorney Sorell Negro was shocked in 2015 to discover how few black rhinos are alive in this world. Only about 5,000 still are in existence—and 28 percent of these live in Namibia, a country on the southwest coast of Africa.

That number is staggeringly low compared to the 65,000 black rhinos estimated to have been alive in 1970. Hunting wiped out about 96 percent of the population by the early 1990s.

The animals are slow to reproduce. But thanks to major conservation efforts, the black rhinoceros population was beginning to rebound. However, as Negro learned, poaching of black rhinos had increased recently.

Sixteen black rhinos were killed by poachers from 2005 to 2013, according to Negro. But that number has increased vastly in the years since: 24 black rhinos in Namibia were poached in 2014; and since 2015, the number has increased to more than 130.

“There are all these issues that make the rhinos very, very much at risk,” says Negro, chair of the International Committee of the ABA Section of State and Local Government Law. “I really just was heartbroken about it.”

The situation for black rhinos is far from unique. Namibia is home to elephants, cheetahs, wild dogs, an endangered type of antelope and other threatened, beloved animals—some of which are also increasingly at risk because of poaching and other threats.

Negro, an environmental and land use attorney at Robinson and Cole’s Miami office, wanted to help. She contacted the Legal Assistance Centre, a public interest law firm in Namibia, and spoke to Willem Odendaal, the firm’s land, environment and development project coordinator.

“Over the next several months, I communicated with Willem and learned more about the problems that Namibia is facing in this regard, and I discussed with him possible ways to assist LAC in addressing the poaching crisis and possible scopes of a pro bono project,” Negro says.
“It took several months of researching the problem and potential partners, reaching out to potential partners, and putting together the proposal and scope of the project.”

She proposed the project to her firm to an enthusiastic response—then she looped in lawyers from the international law firm DLA Piper. Support also came from the government law section. That’s how Jordan Lesser, legal counsel for the New York State Assembly, got on board.

Working with the Legal Assistance Centre, Negro and the rest of the team set out on a major project: to figure out how to improve the country’s wildlife laws—and strengthen their enforcement—with the aim of saving more Namibian animals.

“What do they need to do to try and address this very daunting, very complicated problem?” Negro says.

CONSERVATION CONSTITUTION

For years, Namibia has been lauded for its impressive conservation efforts. After it gained independence from South Africa in 1990, the country adopted a constitution that “is considered by many to be one of the most progressive constitutions in the world,” as attorney Stephen W. Snively said in 2012 in Probate & Property, the magazine of the ABA Section of Real Property, Trust and Estate Law.

Among its notable aspects: It’s the first constitution in Africa (and still one of few in the world) to provide for environmental protections—with a section that requires the “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of the Namibians, both present and future.”

Namibia’s constitution also creates the appointed position of ombudsman, charged with some environmental protection oversight—namely, “the duty to investigate complaints concerning the overutilization of living natural resources, the irrational exploitation of nonrenewable resources, the degradation and destruction of ecosystems, and failure to protect the beauty and character of Namibia.”

The country has an extensive framework of wildlife protection laws and policies, plus international environmental obligations. Local communities have been granted broad authority to create and protect wildlife conservancies. More than 80 such conservancies exist now, encompassing an estimated one-fifth of the country’s land.

Namibia has experimented with ideas such as paying poachers to shift professions and become wildlife guardians—along with more controversial measures, such as auctioning off the right to hunt a black rhino, with the fees going toward conservation.

The black rhino and elephant populations, among others, were seen to be recovering. But the recent increases in poaching—not just of black rhinos but also of elephants and other animals—pointed to holes in this conservation framework.

Negro and her colleagues spent about half a year researching what those holes are and where improvements can be made. In September, in coordination with the Legal Assistance Centre, she and Lesser traveled to Namibia to meet with government and law enforcement officials, prosecutors and other stakeholders.

Then the two lawyers produced a detailed report, looking at how to better protect Namibia’s wildlife, as well as how to provide supplemental briefings and draft legislation. They also analyzed current legislation and worked on “understanding loopholes and problems, connecting the dots to prevent poaching,” Lesser says.

LEGAL FRAMEWORK

The draft form of the report came out in January. In it, problems with the current legislative framework are identified—these include weak penalties, lack of protection for whistleblowers, poor communication and cooperation between agencies, laws that don’t allow for prosecution of poaching beyond those who do the poaching and ineffective management of the community conservancies.

The report provides many solutions. These address the particular loopholes and problems, such as increasing penalties for poaching, expanding the criminal law to include activities related to poaching, better management of conservancies, and improving agency cooperation.

Negro is particularly excited about the creation of an environmental court, which would alleviate the pressure on Namibia’s overburdened judicial system.

The court would be home to judges specially trained to handle these sorts of cases and dedicated prosecutors whose “job would be to deal with environmental crime,” she says.

The draft report and other materials have been given to stakeholders for their review. Negro and Lesser are planning a trip back to Namibia (over the summer, they hope) for workshops at which remaining concerns will be heard and incorporated into the report.

Then it will be up to Namibia’s people and lawmakers to decide how to proceed.

“Ours is really a suggestion of how you could approach making their laws stronger,” Negro says.

Odendaal says he’s optimistic that the work by Negro and her team will benefit his country’s animals and people.

“I truly hope that it will make a change to the legislative framework in Namibia,” he says. “The fact that we are working with American lawyers is great, for the simple reason that we are getting international exposure. I am impressed by their professionalism and, of course, in terms of working on comparative legal issues, it helps us in proposing the necessary law reform to our current legislative framework.”

GLOBAL COLLABORATION

The project is already considered to be a success by Ellen Rosenblum, chair of the government law section. Rosenblum says she would like to see more section members “providing expertise to our counterparts in Africa and elsewhere and working on projects like this that involve their local governments—particularly law enforcement.”

It’s a way to provide help on important international issues and to keep young lawyers involved with the section, by helping them pursue projects “that are meaningful to them and have a real community service aspect,” Rosenblum says.

According to Negro, the anti-poaching project has been meaningful for her from the start. But the enormity of this venture really struck her when she was in Namibia, visiting the people who are trying to protect the wildlife. She and her fellow travelers were driving through the country’s vast wildlife reserves. There were armed guards at the entrances and exits—and often no other people in between. But there were animals. She says she never spotted any black rhinos, but she saw a lot of other animals—zebras, warthogs, giraffes and even elephants.

“It really sunk in for me how challenging it is to protect these animals in such a vast space that’s so open and rural,” Negro says—and how important, how impressive it is, that people like Odendaal and his colleagues at the Legal Assistance Centre are “devoting their lives to helping these animals exist. It’s incredible.”
When the 2017 ABA Annual Meeting convenes in New York City Aug. 10-15, the organizers hope attendees will not spend all their time cooped up in a hotel.

Under ABA President Linda A. Klein’s direction, a new CLE in the City series was created to give lawyers the chance to visit and network at law firms and legal venues around town while earning up to 4.5 CLE credits.

Attendees can learn about white-collar crime enforcement at Debevoise & Plimpton, get financial restructuring tips for their clients from Weil, Gotshal & Manges or find out how Wachtell, Lipton, Rosen & Katz is navigating new landscapes in mergers and acquisitions. CLE in the City programs will cost $25 per session; they will be free to those who opt for an all-access registration package and to all law student members who register for the annual meeting.

More than 30 programs are planned in the CLE in the City series, and over 100 programs will take place throughout the duration of the annual meeting, including nine CLE Showcase programs. Likely to be popular, showcase programs will include a celebration of the 50th anniversary of Justice Thurgood Marshall’s ascension to the U.S. Supreme Court, a deep dive into deportation and immigration policy in the Trump era, a session on practical strategies to address implicit bias and a look at how sexual violence is being addressed on college campuses.

“As the premier gathering of the nation’s legal professionals, the 2017 annual meeting presents unparalleled opportunities to learn from and be inspired by lawyers, judges and leading legal experts from around the country,” Klein says. “Against the backdrop of the dynamic city of New York, this year’s agenda includes more than 100 CLE sessions and showcase programs, as well as a broad array of meetings and networking opportunities. “On Aug. 12, be sure to join us at the General Assembly at the New York Hilton in Midtown and the president’s reception under the New York City lights at Rockefeller Center.”

The conference will be Klein’s last event before her term as president ends. At the close of the meeting, she will pass the gavel to ABA President-elect Hilarie Bass.

Among other standout events:

• The age-old question of pizza superiority will be tackled at the opening reception on Aug. 10. A Trial of Two Pizzas will take place, pitting Table 87’s coal-oven, New York-style pizza against Lou Malnati’s deep-dish pie from the ABA’s home-town of Chicago. Arguments will be heard from both sides and the evidence carefully consumed.

• The theme for the ABA Expo reception on Aug. 11 will be Craft Beer + Taco Night. Guests will enjoy local microbrews and a full-size taco stand. About 70 vendors are scheduled to appear at the expo this year.

• Early risers on Aug. 12 can take part in a charity run/walk from 6:30 to 8 a.m. in Central Park to benefit the ABA’s Veterans Legal Services Initiative. A 3-mile and a 5-mile route are available, as is a guided yoga/walking session for anyone seeking a more contemplative experience. Proceeds will benefit the VLSI’s goal of providing access to justice for veterans and advocating for policy improvements on their behalf.

In place of a plenary session—keynoted last year by former FBI Director James Comey—the ABA will tip its hat to Broadway by hosting It Is Only Fair, a benefit concert and rally in support of the Legal Services Corp. New York talent will perform, interspersed with LSC clients and advocates who will speak about the LSC’s critical role as the nation’s largest provider of free legal aid. The LSC’s preservation has been a top priority for Klein and the ABA, as its funding was eliminated in President Donald Trump’s first budget proposal.

PAYING IT FORWARD

Annual meeting attendance is not limited to ABA members, but members receive significant discounts. An all-access pass to the meeting, which includes free admittance to all CLE programs as well as all social events and entity and governance meetings, costs $495 for members, versus $695 for nonmembers. Law students with premium memberships can pay $195 for the same level of access; for law students with free memberships, the price would be $225. Other levels of registration are also available, with special pricing for members and law students, including standard registration ($225 for members; $425 for nonmembers) and limited registration ($95 for members; $295 for nonmembers). All levels are invited to the benefit concert for the LSC.
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Advocates Assemble
ABA Day draws bar leaders to Capitol Hill to meet with Congress
By Rhonda McMillion

Over 400 bar leaders from all 50 states, the District of Columbia and the U.S. Virgin Islands converged on Capitol Hill for hundreds of face-to-face meetings with members of Congress during the 21st annual ABA Day in Washington, D.C., which was held April 25-27.

ABA Day, coordinated each year by the Governmental Affairs Office, provides an opportunity for ABA members to convey the association’s views on priority issues of importance to the legal profession. “Our legislative program is based on the relationships you cultivate at ABA Day. We could not do this without your help,” ABA President Linda A. Klein said in her message to participants.

This year, attendees focused their discussions on funding the Legal Services Corp. to assist low-income Americans with civil legal needs and on supporting access to justice for homeless veterans.

Responding to the Trump administration’s proposal to eliminate LSC funding, the bar leaders urged members of Congress to increase the corporation’s current funding level of $385 million to $450 million for fiscal year 2018, which starts Oct. 1, 2017. ABA Day participants emphasized that, despite limited resources, legal aid programs annually assist nearly 1.9 million Americans across the country. Those helped include aging citizens, domestic violence victims, natural disaster victims, rural populations and veterans.

The participants delivered more than 19,000 Legal Aid Defender cards to congressional members with messages created by their constituents through a grassroots campaign organized by the Governmental Affairs Office.

Bar leaders also urged their members of Congress to enact the Homeless Veterans Legal Services Act. This would expand access to legal services for displaced veterans and those at risk of homelessness by authorizing the secretary of the Department of Veterans Affairs to partner with public and private entities and help fund a portion of the cost of legal services.

Keynote speakers during the event’s opening session included Sen. Dan Sullivan, R-Alaska; Reps. Susan Brooks, R-Ind., and Brian Fitzpatrick, R-Pa.; and LSC President James J. Sandman, who all recognized the ABA’s efforts to preserve the LSC and expressed their support for the organization’s funding. During the breakfast briefing the next day, James Burnham, special assistant to the president and senior associate counsel in the Office of the White House Counsel, told the group that the administration has made filling judicial vacancies a priority and would soon be sending nominations to the Senate. Sen. Al Franken, D-Minn., thanked the ABA for its LSC support and vowed that Congress would not let LSC funding be eliminated.

SUPREME HONOR
This year’s Justice Awards recognized the following members of Congress for their support for issues of critical importance to the ABA and the administration of justice: Sen. Mazie K. Hirono, D-Hawaii, for her commitment to nondiscrimination and her efforts to ensure that unaccompanied minors have access to legal and humanitarian protections; Rep. Joseph P. Kennedy III, D-Mass., for his continued leadership in securing increased LSC funding and in protecting the attorney-client privilege; and Rep. Mac Thornberry, R-Texas, for his leadership in passing the first major reforms in over 30 years to the Uniform Code of Military Justice.

Grassroots Advocacy Awards were presented during the annual Capitol Hill reception at the U.S. Supreme Court. Justice Elena Kagan kicked off the event by thanking the ABA and emphasizing the importance of legal services. Award recipients included Edwin A. Harnden for his efforts to garner lawyer support for the Campaign for Equal Justice and Kids in Need of Defense, which works to increase awareness about the rights of unaccompanied immigrant and refugee children.

Summing up the impact of this year’s event, ABA Day Planning Committee Chair Patricia Lee Refo said, “It was inspiring to see so many bar leaders from around the country participate in the legislative process by letting members of Congress know how important it is to foster access to civil justice. Our input and the time we spent educating policymakers on these issues was invaluable to the success of ABA Day.”

This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is editor of ABA Washington Letter, a Governmental Affairs Office publication.
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

ABE ANNUAL MEETING OF THE MEMBERS

The Annual Meeting of the Members of the American Bar Endowment will be held on Monday, August 14, 2017 at 8:45 a.m. at the New York Hilton Midtown, Ballroom Level, in the Grand Ballroom. In addition to the election of Board members, ABE members will be asked to vote on amendments to the ABE bylaws. Two proposed alternatives will be before the members. One set of amendments is being proposed by the ABE Board of Directors and the other set is being proposed by some individual members of the ABE.

ABE Proposal: The proposed bylaws amendments if adopted would (i) permit the ABE to more easily communicate and provide notice to its members by allowing the ABE to post meeting notices on the ABE website and deliver them by email; (ii) increase the size of the Board of Directors to fourteen (14) to allow for representation by two (2) members appointed by the President of the ABA and two (2) members appointed by the Board of Governors of the ABA; (iii) continue the role of the members of ABE in the election process for Board members who are not the two appointed by the ABA President and the two appointed by the Board of Governors and in filling any mid-term vacancies; (iv) retain the authority of the ABE Board to appoint its officers, and (v) retain the requirement that amendments to the Bylaws be approved by the ABE members.

Proposal by Certain ABE Members: The proposed bylaws amendments, if adopted, will (i) permit the ABE to more easily communicate and provide notice to its members by allowing the ABE to post meeting notices on the ABE website and deliver them by email; (ii) reduce the size of the ABE Board of Directors to nine (9); and (iii) give the ABA Board of Governors or its designee the right to (a) elect the members of the ABE Board of Directors; (b) elect ABE’s officers from amongst the members of the ABE Board; (c) fill vacancies on the ABE Board; and (d) amend the ABE Bylaws, thereby removing the right of the ABE members to elect ABE Board members and approve an amendment to the ABE Bylaws.

The two nominees for election as Directors of the American Bar Endowment are Jonathan Cole, of Baker Donelson, Nashville, Tennessee, and Palmer Gene Vance II of Stoll Keenon Ogden PLLC, Lexington, Kentucky, each being nominated to serve for a second term.

See abendowment.org for the full text of the notice of ABE Members Annual Meeting, slate of nominees for the elected Board member positions, and the full text of the bylaws amendments proposals.

PROPOSED AMENDMENTS TO THE CONSTITUTION, BYLAWS AND HOUSE RULES OF PROCEDURE

Proposed amendments to the Constitution, Bylaws and House Rules of Procedure of the American Bar Association have been duly filed with the Secretary of the Association by the indicated sponsoring members of the Association for consideration by the House of Delegates at the 2017 Annual Meeting in New York City. For the full text of this notice, go to ABAJournal.com/magazine, Your ABA, ABA Announcements.
Putting the Enemy on Trial

In early July 1942, about seven months after the bombing of Pearl Harbor and U.S. entry into World War II, President Franklin D. Roosevelt issued two proclamations related to the handling of enemy saboteurs. The first, in effect, made these enemy combatants subject to military justice. The second set up a military commission to try those accused of attacks on any part of America’s vast industrial infrastructure.

What prompted the presidential action was the announcement the week before of arrests in New York City and Chicago of eight German operatives. They were part of a Nazi plot, which came to be known as Operation Pastorius, to wreak havoc on U.S. soil in key installations such as factories, railroads, power plants and shipyards.

Each of the eight—all German-born—had lived in the United States, and two were citizens. All had been trained in sabotage and delivered to the country via submarine—four to a spot on the tip of Long Island; four to Ponte Vedra Beach on the Florida coast. They carried what one would expect of saboteurs: explosives, timing devices, a list of targets and about $175,000 in cash.

The eight were caught barely two weeks later, long before they had any serious chance to commit sabotage. FBI Director J. Edgar Hoover claimed credit for detecting and thwarting the scheme. But their undoing came when one conspirator, George John Dasch, called the FBI’s New York office, made an appointment with authorities in Washington, D.C., and turned himself over to them.

The group that landed on Long Island had been confronted by a lone, unarmed Coast Guard watchman who reported them after they offered him a bribe. By the time law enforcement returned to the scene, the German agents had left by train to New York City.

Their subsequent arrest, however, shook the Roosevelt White House; and justice began to move on a very fast track. The day after the proclamations, the Germans were moved to military custody and charged with four counts under the Articles of War. Their trial began July 8 and continued until July 27, when the defense rested its case.

That same day, the U.S. Supreme Court announced a special session. And on July 29, while the military commission stood in recess, the court heard arguments by all the conspirators but Dasch, petitioning for habeas corpus and access to civil courts. The government argued that the German conspirators, even those who were U.S. citizens, had no constitutional right to habeas or access to the civil courts—even to decide the question of court access.

On July 31, the court ruled per curiam in favor of the government, deferring a full, written opinion for later. With that ruling in hand, the military commission continued to deliberate. And on Aug. 4, all eight were found guilty and sentenced to death.

It wasn’t until Oct. 29 that the Supreme Court filed its written opinion in the case, Ex parte Quirin. In a ruling that six decades later would color high court actions on the issues of Guantanamo and the treatment of illegal combatants, the court declared that even citizens who take up arms against the nation can be considered “enemy belligerents”—a category distinct from treason—and tried by the military. Moreover, the treatment of enemy belligerents is prescribed by the Articles of War, not the Constitution.

By then, the court’s decision was a matter for posterity. At the behest of Hoover and Attorney General Francis Biddle, Roosevelt commuted the sentences of Dasch and fellow conspirator Ernest Peter Burger, both of whom had cooperated with investigators. The others already were dead.

Only 56 days after the first group set ashore on Long Island, the remaining six had been executed by electrocution at the District of Columbia Jail.
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