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Your client now has a lot more money.

And a lot more questions.

We know, because we know you well.

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Seeking equal pay? Here are some strategies.

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DISSECTING FAKE NEWS
I believe the author of “Lies and Libel,” July, page 48, misunderstands why so many people are mad at the mainstream media. For as long as I can remember, they have been populated by only one side of the political divide. Their objectivity has gotten worse since the new administration took office. The media and too many people in government are actively working to undermine the president and his agenda. The insinuation by Steven Seidenberg that fake news was largely from the Republican side is part and parcel of the media message. Democrats have been creating fake news for years.

Everything in the New York Times/Washington Post/LA Times/CNN/MSNBC/NBC/CBS/ABC is reported through a liberal political lens. The fault lies with them for playing fast and loose with facts for 40 years.

David Sarvadi
Haymarket, Virginia

I was disappointed that there was no mention of the biggest piece of fake news in recent times: blaming the Benghazi attack on an obscure video. The ABA should have been a leading force in uncovering the injustices the government perpetrated, including its treatment of the director and the actors. I recommend Kenneth R. Timmerman’s book Deception: The Making of the YouTube Video Hillary & Obama Blamed for Benghazi. It made me fearful for our loss of the rule of law.

Joy Mercer
Morristown, New Jersey

The attack on fake news is appropriate, but the artificial distinction between fake news (favors Trump: bad) and intentional bias and cherry-picking facts (favors progressive causes: OK) is misguided. Regardless of how many academics you quote, these two practices are adjacent on the spectrum, conjoined twins, bitter peas in the same rotten pod. Publishing “all the news that fits the narrative” is no less a misrepresentation and an attempt at mind control than publishing outright lies.

Two things should give pause because those aggrieved by freedom of the press can retaliate. First, freedom of the press does not guarantee access. Just ask CNN what it feels like as the reality sinks in that for the next four years they won’t be allowed to ask a question at a White House briefing. Second is the potential for criminal charges against those who leak to the press and bankruptcies-inducing libel judgments against the press. In connection with the latter, look for a judicial inclination to treat a publisher’s clear bias in its news slant as evidence relevant to the question of recklessness.

Robert Kantowitz
Lawrence, New York

HUNTING SAVES RHINOS
Regarding “Protection from Poaching,” July, page 66, I applaud Sorell Negro’s work to assist in modernizing the legislative framework of Namibia’s wildlife protection laws and hope it will help with its poaching problems. However, a sentence in the article states: “Hunting wiped out about 96 percent of the population” of black rhinos. That is incorrect.

Hunting and its attendant conservation benefits have been responsible for the propagation and saving of the current populations of black and white rhinos, principally by giving them value for the conservancies in Namibia and the farmers in South Africa. Professionally managed hunting in the African countries where these rhinos exist and formerly existed did not cause their steep decline, which was almost entirely caused by uncontrolled poaching for the Middle Eastern and Asian rhino horn trade.

John R. Monson
Manchester, New Hampshire

SPEAKING OUT AGAINST OUTSOURCING
I was shocked by the “legal” managed services world described in “Breaking In,” July, page 36. It appears to be devoid of the business-client relationships based upon expertise, reputation, problem-solving and advice-giving. It is all tech, process and based on litigation discovery. As a business commercial lawyer, mediator and arbitrator who was no stranger to litigation, the world of managed services does not appear to be the practice of law. Indeed, the article highlights nonlawyers not doing what top-notch corporate lawyers do and train young lawyers to do. I practiced law based on who I was in the eyes of clients and what I could do to deal with the needs of clients. It is called reputation.

Donald Lee Rome
Bloomfield, Connecticut

CORRECTIONS
Due to an editing error, the ABA Notices, August, page 71, misstate the URL where information can be found about nominating petitions for the 2017 State Delegate Election (Vacancy), which are due Sept. 21: ambar.org/2017StateDelegateElectionVacancy. Also, the web address for more information about the 2018 Regular State Delegate Election should have appeared as ambar.org/2018StateDelegateElection.

“Breaking In,” July, page 36, misreports the comments of Novus Law CEO Ray Bayley. Bayley was speaking about law firms’ resistance to internal changes. He did not say legal service outsourcers were not offering better approaches to law firms.

The Journal regrets the errors.

CLARIFICATIONS
“Protection from Poaching,” July, page 66, should have stated, regarding black rhinos: Illegal hunting wiped out about 96 percent of the population by the early 1990s.

“Resistance Redux,” August, page 38, should have stated that J. Tony Serra typically charges $25,000 for a death penalty case, knowing he could get nearly 10 times that working as a court-appointed attorney.
For 150 years, the University of South Carolina’s School of Law has been passionate about providing the best opportunities for our students. Now the law school has a new home that offers state-of-the-art facilities and resources to outstanding students like Chelsea Evans and those who will follow in her footsteps.

PUTTING OUR PASSION INTO PRACTICE

CHELSEA EVANS
THIRD-YEAR LAW STUDENT AND EDITOR-IN-CHIEF OF SOUTH CAROLINA LAW REVIEW
President’s Message || By Hilarie Bass

Vision of Success

Future of the legal profession requires change the ABA can provide

The future is upon us and never before has there been a more urgent need for the American Bar Association to lead the way toward change in the profession and a better understanding of the rule of law among our citizens.

As I begin my year as ABA president, my passion for our justice system and connecting individuals with legal services will drive my efforts to bring together a diverse group to tackle the challenges and opportunities that lie ahead. We will focus on issues that go to the core of our profession: how we educate law students, how we serve our clients and how we provide access to justice.

One major focus of my term will be examining our legal education system. From analyzing declining bar passage rates to ensuring new lawyers are trained to provide legal services in a technological future, no organization is better equipped for this job than the ABA. We have brought together 10 of the most extraordinary legal innovators and educators to create a new Commission on the Future of Legal Education, which will be led by Patricia White, dean of the University of Miami School of Law. The commission will engage many of the stakeholders in legal education and recommend how to do a better job of educating and testing the competency of future lawyers.

At the same time, we want to focus another important initiative on educating all Americans about the law. With the many alternative sources of information available today, questions often arise about the factual basis for news and political claims. To address this important need, we have launched ABA Legal Fact Check. This service will provide reliable, nonpartisan information to the public and news media addressing a wide range of legal topics from the rule of law to the Constitution.

We have several other exciting initiatives in the works. Whatever new challenges we take on, we remain fervently committed to protecting the rule of law, enhancing access to justice by our citizenry and speaking out when the judiciary is attacked.

In the words of the philosopher Plato that are etched into the façade of the Department of Justice building in Washington, D.C.: “Justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens.”

We will approach the challenges ahead with passion in our hearts and souls. I urge all of you to join me on this vital mission. ■
Law Firm Hosts an Evening of Art Imitating Life

Antiquity meets modernity in the Theater of Law

ON A WEDNESDAY EVENING in June, 150 Schulte Roth & Zabel employees and four award-winning thespians packed a Manhattan conference room for a standing-room only event: a performance of Aeschylus’ ancient Greek tragedy The Eumenides.

The premiere of Theater of Law, an innovative dramatic project, was underwritten by SRZ and co-produced by Theater of War Productions and the New York University School of Law’s Forum on Law, Culture & Society.

“Theater of Law serves as a catalyst for what we hope will discuss ethical challenges of the legal system,” said FOLCS board member and SRZ partner Jeffrey A. Lenobel. “We want the play to make us think about our work … and how we deliver justice for our clients.”

As the evening began, FOLCS director Thane Rosenbaum joked: “Is this the coolest law firm in the city, or what? Everyone else is briefing cases.” The room erupted with laughter.

The audience of lawyers, partners, IT specialists, recruiters and secretaries sat enraptured as The Wire’s Reg E. Cathey, Tony Award-nominated Kathryn Erbe, The Good Wife’s Zach Grenier and Obie Award-winning Ana Reeder shepherded two scenes from the Western world’s first murder trial to life.

After a passionate 30-minute performance that took both actors and audience on a journey from laughter to rage, Theater of Law director Bryan Doerries facilitated a four-person panel and audience discussion.

“What did you recognize in spite of the distance of time and culture that spoke to your own experiences?” asked Doerries, who is also artistic director for Theater of War Productions.

Voice by voice, a chorus emerged: the importance of status and authority with regard to prosecution, the O.J. Simpson and Bill Cosby trials, the Furies with a “lust for vengeance” when they felt deceived by the play’s outcome, the riot that ensued after the police were acquitted in the Rodney King trial versus reconciliation in the wake of the Rwandan genocide.

“The Furies’ repetition of ‘We are wretched, we are overcome with rage, we cry out with grief, and where is justice?’ couldn’t possibly resonate more than it does right now,” said one panellist, an IT technician (Lenobel asked that some participants remain anonymous). The performance left him shaken, and he shared how recently, while watching a Daily Show clip about the Philando Castile trial, he found himself like the Furies. “I felt like crying with grief again and again. … Justice couldn’t mean more than it does right now.”
Opening Statements

PHOTO COURTESY OF JAMES GRIPPANDO

A lawyer in the audience referenced the same sequence. “The emotional reality of this from 2,500 years ago was the same,” he said, “from the prosecution side to the defense side.”

A librarian shared her outrage over the part of the performance where a character noted a woman’s death is less important than a man’s. “Twenty-five hundred years ago, and how much has changed?” she asked. “Once that was out there, I was the Furies.”

Theater of Law intends to interrupt emotionally detached industries by offering professional audiences a cathartic way to collectively confront the feelings that underlie their work. The organizers hope the project will travel nationwide to lawyers, prosecutors, advocates and law students. (For upcoming performance information or to host a Theater of Law performance, contact FOLCS producer Katie Yee, katie.yee@folcs.org.)

“We want to give people the opportunity that Athena gave the ancient Greeks in this play,” Rosenbaum said, “allowing courtrooms to be a place where justice can hold your anger, hold your rage. Our legal system doesn’t allow for that.”

The script, which Doerries translated, read as a love letter to the legal system, and the discussion bridged the ancient and contemporary worlds.

“It’s always been my belief that lawyers are either actors or writers,” one audience member said. “It is hand in hand—the law and theater ... The best trial lawyer is putting on a show. And I don’t mean in a Broadway sense; I mean it’s a life or death show sometimes.”

—Caroline Rothstein

Harper Lee Prize Goes to Boies Schiller Counsel

12th book in series takes top honor

“Winning the 2017 Harper Lee Prize for Legal Fiction is easily the proudest moment of my dual career,” says James Grippando.

Boies Schiller Flexner lawyer James Grippando has won the seventh annual Harper Lee Prize for Legal Fiction for his book Gone Again, the 12th in his Jack Swyteck series, about the adventures of a Miami criminal defense attorney. The novel opens with Swyteck being approached to help stop the execution of a convicted murderer by the mother of the purported victim—who believes her daughter may still be alive.

“I don’t know who’s happier, James Grippando the writer or James Grippando the lawyer,” he says. “Winning the 2017 Harper Lee Prize for Legal Fiction is easily the proudest moment of my dual career.”

The prize is awarded by the ABA Journal and the University of Alabama School of Law. Harper Lee, who studied law at the university, authorized the prize’s creation to mark the 50th anniversary of the publication of To Kill a Mockingbird. Since 2011, it has been granted to a novel published within the previous year that best illuminates the role of lawyers in society and their power to effect change.

“Grippando’s book does a masterful, entertaining job exploring the important topic of the death penalty and actual innocence,” says Molly McDonough, editor and publisher of the Journal. “It’s no wonder James
Grippando was able to speak to this aspect of a lawyer’s duty, given that he is a lawyer and started his career doing death penalty work.”

Gone Again was one of three finalists for the prize. A nominating committee considered more than two dozen books for the prize and narrowed it down to Gone Again, The Last Days of Night by Graham Moore and Small Great Things by Jodi Picoult.

A panel of four judges made the decision to award the prize to Gone Again: Deborah Johnson, winner of the 2015 Harper Lee Prize and author of The Secret of Magic; Cassandra King, author of The Same Sweet Girls’ Guide to Life; Don Noble, host of Alabama Public Radio’s book review series as well as host of Bookmark, which airs on Alabama Public Television; and Han Nolan, author of Dancing on the Edge.

Grippando is the author of 25 books. He lives in Fort Lauderdale, Florida, with his wife, Tiffany, and their two children. The first Swyteck novel, The Pardon, was published in 1994 after Grippando spent 12 years as a trial lawyer. After its success, he did leave the practice of law for several years but soon decided to return.

“I wasn’t one of those lawyer-authors who became a writer because I hated what I was doing,” Grippando says. “I actually liked the practice of law and the camaraderie of being part of a law office and the intellectual stimulation of being around a lot of very bright and talented people.”

So 15 years ago, Grippando joined Boies Schiller as counsel.

“Back when I wrote my first novel, there was no such thing as telecommuting. No one had a smartphone, email was just catching on. Now, there’s so much more flexibility, and I’ve gotten to a point where I can write a novel pretty quickly,” Grippando says. “So working at the law firm and writing as a dual career has worked for me.”

Grippando will receive his award Sept. 14 at the University of Alabama School of Law campus in Tuscaloosa. He will also receive a copy of To Kill a Mockingbird signed by Lee. The latest installment in the Swyteck series, Most Dangerous Place, was published in February.

—Lee Rawles

James Grippando’s

GONE AGAIN

winner of the

2017 HARPER LEE PRIZE FOR LEGAL FICTION
How We Give 100 Percent

By Katy Mickelson

Making It Work is a 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. For more, visit workingmother.com.

It’s 6:30 p.m. and I’m walking from my office, head buried in my phone as I try to get one last email out. As I pass by an outdoor patio populated by suits, I happen to spy a judge in my division enjoying a chilled chardonnay with a fellow colleague. Waving as I pass by, I stop to chat. Inevitably, the conversation turns to “How is work?” And “I’m so sorry to have missed the event you co-chaired last month. How was the turnout?” And “You know she has two young kids. ... How do you do it?” Checking my phone again, I kick myself for not leaving my desk 10 minutes earlier. I realize I now have 10 minutes to run into Old Navy to pick up outfits my 4- and 7-year-olds possibly will wear to the family photo shoot I have planned for Saturday morning at the lake—ugh, did I ask my parents if we can park in their parking space? Mental note to add to my to-do list—and get home on time to relieve my nanny by 7:30 p.m. Trying to politely speed up the conversation, I shrug, give the standard answer of “I let myself feel OK about not being able to give 100 percent in everything I do” and make my way toward the subway.

But do I really agree with the self-deprecating comment that we female lawyers and moms always seem to make? Do I really think I am giving less than 100 percent? When I really level with myself, the answer is a resounding no. Despite my attempts to convince myself that I am a girl who does not do everything to the “nth” degree (and I am fine with it), nothing could be further from the truth. I took a dive into the law seven years after graduating from the University of Michigan. Working in public relations at an international agency in Chicago, I wanted...
something more “heady.”

“You’ll be a perfect lawyer,” my dad had been pounding into my head since I started college. But I resisted, opting instead for media tours, special events and pitching to the local media. I was good, but I was not satisfied. Facing 30, I decided it is either

... (Continues on page 68)
Judging Love

Dallas litigator Rachel Lindsay used her legal skills to find ‘the one’

IT ALL STARTED WITH A PROPOSAL—albeit one Dallas litigator Rachel Lindsay felt was so far-fetched that she had nothing to lose by saying yes. She and her boyfriend had recently split up. The casting team from The Bachelor was in town scouting single women willing to look for love on national TV. And a group of colleagues had just walked into the office and asked her to interview for a spot on the hit ABC show. Lindsay agreed to give it a go. To her surprise, she was chosen, and in January, she became one of the 30 women vying for the attention of that season’s star. She made it all the way to the finals before coming home, still single. This summer, however, the 32-year-old Cooper & Scully associate got another chance at romance as the star of The Bachelor.

The show is still airing, as of press time, but I’m told I am able to report that you are in fact engaged. Is that correct?

Yes! I am so glad they are letting me tell people I am engaged. I want to tell everyone who it is because I am so happy, but I can’t. That has definitely been the hardest part, but that’s where my legal skills come in: I am able to keep things confidential.

What type of arrangement did you make with your firm to be able to take a leave to film both shows?

For The Bachelor, I went through the entire process and was told I was chosen, and then I told my boss ... It turned out that my boss was a huge fan of the show, and he was ecstatic. My promise to my firm was that I would do the filming then go back to work, and I did. I was actually in trial between The Bachelor and being announced as lead in The Bachelorette. I came home from The Bachelorette in June and was back at my desk immediately. I am actually at work right now.

Which leads directly to my next question: Although you’re back to your real life and your real job, it seems like you still have a lot of Bachelor-related responsibilities, such as live-blogging episodes, posting on social media and doing interviews. How do you manage it all?

It’s definitely hard, and I underestimated the time commitment. I was never big on social media prior to this, so that has been a struggle for me.

Did you have any TV experience prior to appearing on The Bachelor?

No, but I think being in court and in front of a jury prepared me for it. Especially as a woman, the jury sums you up immediately and is listening to everything you’re saying. You have to be on your game all the time, and that prepares you for being in front of the camera. The difference is, when I am in front of a jury, I am not talking about my emotions and my life.

Were there any legal skills that you called on to help you on the shows?

Dispute resolution—especially when I was on The Bachelor, being in the house with the other girls! On The Bachelorette, it was the ability to read through people and really analyze what they were saying, if they were genuine or feeding me stuff. That really paid off.

Did you ever bust out with direct or cross-examination techniques or voir dire skills when you were on The Bachelorette?

I think I did that a little too much when it got to the end and got serious. I had a list of questions I needed to ask—I had an outline with bullet points!

When it comes to dating, lawyers tend to meet other lawyers, but on The Bachelorette, your group of eligible bachelors included a drummer, a model, a firefighter, a professional wrestler and even a guy who called himself a “tickle monster.” What did you think about that?

I loved that—it was what I wanted. I wanted to step outside my comfort zone and meet different types of men. Maybe that’s why I hadn’t been successful before in love.

Did you feel any pressure as the franchise’s first African-American lead? Did you see yourself as an activist or as a role model?

I definitely felt pressure before I ever said yes to The Bachelor. It was something I worked through before I decided to say yes. As the first of anything, you’re going to be judged. If you accept the good, you have to accept the bad. And I had to ask myself: Can I handle this? For me, what it really boiled down to was what would happen if I didn’t do it? I realized I had the opportunity to be a role model for girls, not only as an African-American woman, but also as a professional woman and a woman in my 30s. That overrode any concerns I had. And you actually found love! [Check online to see what happened.]

I know! I know!

Is more reality TV in your future?

I am a never-say-never person. Right now, it is not in the future for me. I really want to focus on us—on how we bring our lives together.

—Jenny B. Davis
### Cartoon Caption Contest

**CONGRATULATIONS** to Richard A. DiLiberto Jr. of Wilmington, Delaware, for garnering the most online votes for his cartoon caption. DiLiberto’s caption, far right, was among more than 100 entries submitted in the *Journal’s* monthly cartoon caption-writing contest.

**JOIN THE FUN** Send us the best caption for the legal-themed cartoon at right. Email entries to captions@abanjournal.com by 11:59 p.m. CT on Sunday, Sept. 10, with “September Caption Contest” in the subject line.

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

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**TWEET THIS**

Seven Twitter users blocked from President Donald J. Trump’s account have filed a lawsuit claiming the action violates their First Amendment rights. The complaint says the Twitter blocks are an unconstitutional attempt to “suppress dissent.” The account has more than 34 million followers and 35,000 tweets. The lawsuit was filed in the U.S. District Court for the Southern District of New York by the Knight First Amendment Institute at Columbia University.

Source: thehill.com (July 11).

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**$6/hr**

That’s the below-minimum-wage rate plaintiffs allege they were paid as phone sex workers. In what may be the first such class action filed in federal court in Los Angeles, plaintiffs—who are mostly women—claim they were misclassified as independent contractors in violation of the Fair Labor Standards Act. The case alleges defendant Tele Pay USA charges callers $5 per minute but fails to pay current and former “telephone actors” minimum wage or overtime.

Source: law.com (June 28).

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**$100 million**

The amount donated by Agnes Gund for the newly created Art for Justice Fund. The 78-year-old used part of the proceeds from the $165 million sale of her prized 1962 Roy Lichtenstein painting, *Masterpiece*, for the fund, which will be administered by the Ford Foundation. The price, including $15 million in fees, puts it in the top 15 for highest-priced artworks. Gund, an avid art collector, created the fund to support criminal justice reform and reduce mass incarceration.

Source: nytimes.com (June 11).

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**50% Decrease**

Plaintiffs in federal court are having a harder time winning cases these days. A draft study shows success rates for plaintiffs in adjudicated federal cases declined from about 70 percent in 1985 to 33 percent in 2009. The two University of Connecticut law professors who conducted the study say the reason for the falling win rate remains a mystery, but conclude there could be systemic issues at play, including changing judicial attitudes.

Source: reuters.com (June 28).

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“All I said was: Justice has only one ‘i’!”

—Richard A. DiLiberto Jr. of Wilmington, Delaware
Prison Pays

Trump administration reverses federal plans to phase out use of private facilities

By Lorelei Laird

EDWARD KENZAKOSKI WAS 17 when he was caught in possession of drug paraphernalia. Unfortunately for Kenzakoski, he lived in Luzerne County, Pennsylvania, and landed before Judge Mark Ciavarella.

While a typical outcome for a juvenile in this situation was probation, Ciavarella sentenced Kenzakoski to a month at the privately operated PA Child Care detention center. Kenzakoski's mother, Sandy Fonzo, says he came out of the experience angry and depressed, leading to two assault charges and more incarceration. In 2010, Kenzakoski committed suicide at age 23.

By then, Pennsylvanians knew something was wrong in the Luzerne County juvenile justice system. That same year, Ciavarella and one of his colleagues, Judge Michael Conahan, were federally indicted on charges they took $2.6 million in kickbacks from the developer of PA Child Care and another for-profit detention center. To fill those facilities, prosecutors said, they sent thousands of kids to detention for offenses as minor as making fun of a teacher online. Both judges and their co-conspirators were convicted. Ciavarella was sentenced to 28 years in prison, and the Pennsylvania Supreme Court vacated all the juvenile cases they handled.

On the day Ciavarella's jury found him guilty, Fonzo...
rushed to the federal courthouse in Scranton, thinking she’d see the disgraced judge being led away in handcuffs. Instead, he walked out free pending sentencing, with his lawyer declaring: “This is not a ‘kids for cash’ case.”

“I’d like him to go to hell and rot there forever!” Fonzo yelled in a video that went viral. “Do you remember my son, an all-star wrestler? He’s gone! He shot himself in the heart! You scumbag!”

Alex Friedmann, a prison reform activist with the Human Rights Defense Center and managing editor of Prison Legal News, says this scandal could only have happened with for-profit facilities because publicly run facilities don’t need to fill beds. That’s just one reason Friedmann wants to abolish private prisons.

“Pretty much everything bad that can happen in prisons is more likely to happen in private prisons, due to their business model,” says Friedmann, who served 10 years in Tennessee lockups—six in a privately run facility—in the 1990s for armed robbery, attempted robbery and assault with intent to commit murder.

That’s a familiar claim from critics of the private prison industry. And in August 2016, the Department of Justice joined that chorus. Former Deputy Attorney General Sally Yates said the Bureau of Prisons would phase out the use of contract facilities, citing a report that found serious safety and security problems at the department’s contract prisons. (That decision didn’t affect the states, which use private prisons much more heavily.)

**PHASEOUT HALTED**

But her announcement came before President Donald J. Trump won the election. After taking office, he issued an executive order calling for the detention of more immigrants, most of whom are held in private prisons. Attorney General Jeff Sessions reversed Yates’ decision, saying private prisons were necessary to meet the DOJ’s future needs. Those policies suggest that the federal government will increase its use of private prison contractors.

When OIG personnel visited three of the private prisons, they found that two were using solitary confinement units to house new arrivals—because the institutions were out of other beds. That’s inappropriate, Horn says. The United Nations has declared solitary a form of torture under certain circumstances.

Eisen says the problems all come down to a profit motive. “If you talk to [public] directors of corrections, they say, ‘I want to keep my prison population low.’ Private prison companies won’t say that,” she says. “Some of them are paid per inmate.”

**FOLLOW THE MONEY**

The profit motive also creates systemic consequences, reformers argue. Friedmann says the existence of the industry has slowed justice reform on issues such as early release or reduced sentences. “ Policymakers did not have to make those difficult and politically unpalatable decisions,” he says. These days, he adds, the major private-prison contractors use their financial power to perpetuate themselves.

The two largest prison companies, the Geo Group and CoreCivic (formerly the Corrections Corporation of America), spent about $1 million lobbying Congress in 2016, according to data from the Center for Responsive Politics. They targeted appropriations bills, as well as bills about private prisons themselves.

They also donate. In addition to supporting congressional and local candidates, CoreCivic and the Geo Group gave $250,000 each to Trump’s inaugural festivities, data from the center shows. It also shows that Geo Group organizations (not counting individual employees) gave at least another $450,000 to Trump-affiliated organizations. A CoreCivic spokesman says that the company avoids taking official positions on legislation that determines the duration or basis of imprisonment, and that it mainly lobbies for full funding of its contracts and “educating lawmakers about the solutions we offer.” He says the inaugural contribution was in...
line with the contributions it made to both Obama inaugurations.

A spokesman for the Geo Group, Pablo Paez, says the company has never taken a position on criminal justice, sentencing or immigration enforcement priorities. “Our political activities focus entirely on promoting the use of public-private partnerships ... and our contributions should not be construed as an endorsement of all policies or positions adopted by any individual candidate,” Paez says.

Eisen says this political work permits the companies to avoid transparency. One defeated bill, which CoreCivic lobbied against last year, would have subjected the industry to the Freedom of Information Act. Rep. Sheila Jackson Lee, D-Texas, has introduced the Private Prison Information Act in Congress seven times but has never succeeded. This has consequences down the line. Horn says when he was running public prisons, he got calls from elected officials encouraging him to privatize certain functions or back off from enforcing a contract.

Nonetheless, Horn sees a place for private prisons, particularly for immigration detention, where the need fluctuates. He thinks the solution is writing stronger contracts with prison companies. Currently, he says, private prison companies save more money by understaffing than they pay in penalties under their contracts.

“We know what private vendors are going to try and do,” he says, “but if we don’t hold them accountable, we don’t write a contract that’s tough to violate, that’s enforceable and then actually enforce it, shame on us.”

Stifling Speech

Government invokes doctrine to silence expression it doesn’t like

By David L. Hudson Jr.

Government officials removed a high school student’s painting from the U.S. Capitol building earlier this year, contending that its message was anti-police and inappropriate. The student and his congressional representative objected, arguing that the government engaged in impermissible viewpoint discrimination by censoring the artwork.

The government countered that removing the painting, submitted in a congressional art competition, was its prerogative under the government speech doctrine.

The controversy raised an important question: Did the government violate the First Amendment by censoring private speech, or was it engaged in government speech? Over the last two decades, the Supreme Court has expanded the government speech doctrine, and more officials have asserted it as a defense in free speech cases.

“The government speech doctrine has the ability to swallow much of the Constitution’s protection for freedom of speech,” says constitutional law expert Erwin Chemerinsky, dean of the University of California law school and an ABA Journal contributor. “The Supreme Court has said that when the government is the speaker—or when the government adopts private speech as its own—the First Amendment does not apply.”

WHOSE SPEECH IS IT?

Many trace the doctrine to a 1991 government funding case, Rust v. Sullivan, even though the court didn’t use the term government speech. The court narrowly upheld a federal regulation that prohibited doctors who received federal funds for family planning services from discussing with patients the option of abortion. Critics termed it the “abortion gag rule,” but the court upheld the regulation, writing that the government can “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way.”

Since then, the government speech doctrine has become more of a force in First Amendment law, thanks to Supreme Court decisions.

In Pleasant Grove v. City of Summum (2009), the court reasoned that a Utah city could decline to post a religious monument that listed the seven aphorisms of Summum in a public park, even though the park already had a Ten Commandments monument. The reasoning: Monuments in public parks were a form of government speech.

More controversially, a divided court ruled 5-4 in Walker v. Sons of Confederate Veterans (2015) that the state of Texas could refuse to approve a specialty license plate with a depiction of the Confederate battle flag. The majority reasoned that specialty plates are a form of government identification and communicate messages from the state. “Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the state has endorsed that message,” wrote Justice Stephen G. Breyer.

“The Walker decision probably helped further educate governmental bodies—as well as lower courts—about the role of the government speech doctrine as a potential defense to First Amendment challenges by private individuals who seek to join or alter or silence what the government believes is its own expression,” says Helen Norton, a University of Colorado law professor and associate dean, who has written
extensively about the doctrine. Chemerinsky says governmental officials are “much more frequently claiming the government speech defense since Walker.”

**RECENT DECISIONS**

The case of the artwork removed from the Capitol is one high-profile example. David Pulphus of St. Louis had his painting selected by a panel of local artists and, ultimately, by U.S. Rep. William Lacy Clay, for display in the Cannon tunnel, which is part of the Capitol grounds.

Pulphus’ painting depicts a protest, including police officers with piglike heads, and a black man crucified on the scales of justice. The painting was intended to convey social injustice, including events in Ferguson, Missouri, and was displayed for months without incident. It was later removed by members of Congress for its anti-police content.

Pulphus and Clay filed a federal lawsuit, contending the removal was a form of impermissible viewpoint discrimination in violation of the First Amendment. However, U.S. District Judge John D. Bates ruled in Pulphus v. Ayers on April 14 that the art competition was a form of government speech.

Bates identified three key factors from the Supreme Court decisions in *Summum* and *Walker*: (1) whether the medium historically has been used to communicate government messages; (2) whether the public reasonably interpreted the government as the speaker; and (3) whether the government has editorial control over the speech.

Bates determined that the last two factors cut in favor of a finding of government speech. He reasoned the public would view the art competition as government speech and explained that the government retained final editorial control over what art pieces could be displayed.

Chemerinsky, who was co-counsel for Pulphus and Clay, saw it differently. “Congress created a forum for private speech,” he says. “It said that it would post students’ artwork. The artwork was not created by the government and the government was not expressing a message. It was a forum for private speech. The student’s artwork was taken down solely because government officials disliked the viewpoint expressed. That violates the First Amendment.”

Leslie Gielow Jacobs, a professor at the McGeorge School of Law at the University of the Pacific who has written on the doctrine, disagrees, even though she terms the politically motivated removal of the artwork as troubling. “If this were a true art competition, with final quality judgments made by art experts bound by professional standards of excellence, then the removal of this painting after it was deemed to meet the criteria would be unconstitutional, targeted viewpoint discrimination,” she explains. Jacobs says that the art submissions instead represent the “collective image or identity of the House of Representatives” and thus fall within government speech.

Chemerinsky says the case will be appealed. On March 29, a three-judge panel of the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, unanimously ruled in *Vista-Graphics Inc. v. Virginia Department of Transportation* that state officials did not have to display informational guides for tourists from a private company.

The panel wrote: “We easily conclude that the plaintiffs’ guides displayed at rest areas operated by the commonwealth constitute government speech.” In other words, the government could pick and choose which brochures were made available for tourists to pick up on its property.

The appeals court focused on the fact that the rest areas are operated by the state and are located on public highways. Because of this, the panel wrote that the public would view informational guides as endorsed by the state.

Jacobs believes the 4th Circuit also reached the correct decision under Supreme Court precedent. “The scope of the *Vista-Graphics* program is literature offered at ‘information centers’ located within rest areas and welcome centers operated by the Virginia Department of Transportation,” she notes. “The literature-distribution program is commissioned government speech because the Virginia Department of Transportation affirmatively uses the meaning of the literature that it accepts into the program to fulfill a statutory and regulatory mandate to provide information for the traveling public.”

**THE DOCTRINE’S FUTURE**

In the congressional artwork case, Judge Bates recognized the uncertain nature of the government speech doctrine, writing: “The government speech doctrine is still evolving, and it is not entirely clear how courts should distinguish between nonpublic forums and government speech.”

Norton explains that government officials should be able to assert the government speech doctrine when government “initially authorized the communication and that onlookers understood the speech to be the government’s speech at the time of its eventual delivery.”

Experts predict the government speech doctrine will continue to be asserted. “I think we are likely to see more of these sorts of controversies due to changes in expressive technology that greatly enhance such opportunities for interaction and collaboration through the government’s growing use of blogs, social media platforms, virtual worlds and other online platforms,” Norton says.

Jacobs agrees. “Areas where government speech claims will arise are transit advertising, government entity websites, various types of moneymaking ‘sponsorship’ and advertising arrangements,” she says. That includes “street banners, ads on city recycling bins, and ads on the sides of school buses.”
Married with Kids
Court rules on birth certificate designations for same-sex parents
By Mark Walsh

On the busy final day of its term in late June, the U.S. Supreme Court issued an unsigned decision that pleased advocates of same-sex marriage. At the same time, it arguably revealed at least one new legal foe of such marriages and sparked debate about whether the court’s 2015 decision that legalized them was now cemented as a matter of precedent.

In *Pavan v. Smith*, the court issued a per curiam decision, over the published dissent of three justices, that requires the state of Arkansas to treat the issuance of birth certificates for the children of same-sex married couples exactly as it does for opposite-sex married couples.

“It was an incredibly important decision,” says Courtney G. Joslin, a professor and family law expert at the University of California at Davis School of Law. “The court emphatically declared that the rules about children must be applied equally to same-sex spouses.”

**BIOLOGY AND MARRIAGE**


One member of each couple (Leigh Jacobs and Terrah Pavan) gave birth to a child in 2015 by artificial insemination. Each couple sought to put both spouses’ names on their child’s birth certificates. But the Arkansas Department of Health issued certificates that listed only the birth mothers’ names. A state statute specifies that “the mother is deemed to be the woman who gives birth to the child.” If the mother is married at the time of birth, the law says the name of her “husband shall be entered on the certificate as the father of the child.”

The state’s rule that requires the listing of the woman’s husband as a parent has some limited exceptions. But it generally applies even in cases of artificial insemination.

The two couples sued, alleging that the state requirements were inconsistent with the Supreme Court’s 2015 decision in *Obergefell v. Hodges*, which held that a state may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”

A state trial court agreed with the couples. But the Arkansas Supreme Court reversed and upheld the state statute, saying that it “centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife.”

The couples did not even ask for summary reversal when they sought Supreme Court review of their case—only that the justices take up their case. Arkansas officials defended the state high court’s ruling, saying in a brief that “courts across the country have also long recognized that parental rights flow from biology, not marriage.”

The justices considered the case at six private conferences before they issued the per curiam decision on June 26. “The Arkansas Supreme Court’s decision, we conclude, denied married same-sex couples access to the ‘constellation of benefits’ that the state has linked to marriage, the unsigned opinion says, quoting language from *Obergefell*.

“Same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child’s birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school,” the per curiam opinion said.

“We think it is significant this was a summary reversal,” says Catherine Sakimura, family law director at the San Francisco-based National Center for Lesbian Rights, which helped represent the two couples. “We think it is significant this was a summary reversal,” says Catherine Sakimura, family law director at the San Francisco-based National Center for Lesbian Rights, which helped represent the two couples. “The court decided that this result was so clearly required by *Obergefell*.”

However, one conservative legal observer says the *Pavan* decision was a case of the Supreme Court majority exceeding the court’s authority. “*Obergefell* only held that states must license same-sex marriages and recognize licenses issued by other states—nothing else,” says Travis Weber, director of the Family Research Council’s Center...
for Religious Liberty in Washington, D.C. “States still regulate marriage more broadly, and the state of Arkansas has the authority under the Constitution to answer questions which the Supreme Court left unanswered—questions like those which arose in Pavan.”

**GORSUCH DISSENT REVEALING**

Justice Neil M. Gorsuch filed a dissent to the per curiam that Justices Clarence Thomas and Samuel A. Alito Jr. joined.

Gorsuch objected to the majority’s handling of the case without setting it for oral argument, saying that the question and some of the peculiarities of the Arkansas couples’ case did not seem to warrant “the strong medicine of summary reversal.”

Nothing in the court’s Obergefell decision spoke, “let alone clearly,” Gorsuch said, to a state’s rules meant to ensure that a child’s biological parents are listed on the birth certificate.

The state had advanced rational reasons for its biology-based rules, “like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship or susceptibility to genetic disorders,” he added.

Sakimura calls Gorsuch’s dissent “baffling” and “legally and factually inaccurate.” She read the views expressed by the newest justice, who, of course, was not on the high court for the landmark 2015 decision on same-sex marriage, as “expressing his disapproval for Obergefell and marriage equality, and making it known that same-sex couples are not entitled to marriage rights.”

Melissa Murray, a professor and family law expert at the University of California at Berkeley School of Law, agreed that the Gorsuch dissent was “quite revealing.”

Considering Gorsuch’s active pen in his first three months on the court in writing dissents and concurrences, Murray says, “we have this new justice who is really flexing his muscles on the court.”

**CHIEF JUSTICE WEIGHS IN**

Another member of the court has drawn scrutiny with regard to the per curiam decision in Pavan. Chief Justice John G. Roberts Jr. wrote the lead dissent in Obergefell, delivering an impassioned summary from the bench (his first and only such bench dissent so far) about how the court was exceeding its authority in requiring states to recognize same-sex marriages.

But Roberts did not join the dissent in Pavan. Does that necessarily mean he joined the majority per curiam opinion? Opinion is divided.

Speaking during a panel discussion at the University of California at Irvine School of Law in July, liberal constitutional scholar Erwin Chemerinsky said he would read the Pavan decision as 6 to 3, with Roberts in the majority. (Chemerinsky, an ABA Journal contributor, became dean of Berkeley Law on July 1.)

Conservative Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals at San Francisco, speaking on the same panel, said he also would interpret the decision as including Roberts in the majority.

But some scholars who happen to be relatively recent Supreme Court law clerks were quick to chime in on the nuances of the high court’s “shadow docket”—summary reversals and other per curiam actions typically issued without full briefings and arguments.

Will Baude, a professor at the University of Chicago Law School and a former law clerk to Roberts who has studied the shadow docket, told the Washington Post that there are times in a per curiam action that a justice might not agree with the majority but may elect not to publicly dissent.

Joshua Matz, a Washington, D.C., lawyer, wrote in the blog Take Care on June 27 that the Pavan per curiam opinion “has been widely misinterpreted as demonstrating that Chief Justice Roberts has accepted (or resigned himself to) Obergefell.”

“Respectfully, that interpretation is incorrect. Pavan tells us nothing about the chief’s position on Obergefell,” wrote Matz, a former clerk to Justice Anthony M. Kennedy during the same term in which Kennedy was the author of the majority opinion in Obergefell.

**WHERE THEY STAND**

Matz wrote that there are several possible reasons for such a “secret dissent,” including to conceal the justice’s views from the public and thereby retain future flexibility, as a display of good will to the majority or the institution as a whole, or to avoid needlessly creating the appearance of conflict.

As he suggested, the debate is more than just academic. The question of whether the chief justice would fully support Obergefell as a matter of stare decisis is all the more important, given Kennedy’s potential retirement and the fears among some same-sex marriage proponents that a more conservative replacement for him might upset settled matters.

Matz said no one should conclude that Roberts has accepted Obergefell as stare decisis until there is “crystal clear evidence of that development.”

“Pavan does not afford such evidence,” Matz continued. “Rather, it tells us nothing: The chief could have been in the majority (heck, he could have written it), or he could have dissented without publicly noting his disagreement. It is not hard to imagine reasons why, if he did dissent, the chief would have preferred to keep his position concealed from the outside world.”

Sakimura says Roberts joined another majority opinion during this past term that approvingly cited Obergefell. That was Sessions v. Morales-Santana, in which Justice Ruth Bader Ginsburg wrote on behalf of a majority that struck down a provision of U.S. immigration law that treated mothers and fathers differently.

Sakimura says when it comes to Pavan, “we can’t really know how Roberts voted. But we know that he did not join the dissent. He did not publicly attempt to undermine the stare decisis power of Obergefell.”

—SHANE SHAFFER
Now that Judge Neil M. Gorsuch has been on the U.S. Supreme Court for five months, let’s go back in time to review a very small sample of the more than 30 hours of hearings held by the Senate Judiciary Committee before his confirmation. Is there a lesson that the questioning can teach us as practicing lawyers? Can reflection upon what we saw and heard help us hone our craft?

For starters, these proceedings provided some key reminders: Do you have some purpose in mind in your persistent questioning, or are you beating a dead horse? Are your questions a tactical gambit with a strategic goal you can articulate, at least to yourself, and hopefully it becomes apparent to others? Or are you just belaboring the obvious?

Sen. Richard Blumenthal, D-Conn., attempted to get Gorsuch to reveal whether he agreed with a series of landmark Supreme Court decisions near and dear to the hearts of liberals. Blumenthal repeatedly asked Gorsuch to affirm that he agreed with the opinion in Brown v. Board of Education (1954).

Gorsuch refused to utter the magic words that the senator wanted to hear. Instead, he gave Blumenthal far more through his repeated questioning. “It is a seminal decision ... maybe one of the great moments in Supreme Court history,” the judge replied. But the senator persisted: Do you agree with it? “It is one of the shining moments of constitutional history in the United States Supreme Court. ... We’re on the same page.”

Gorsuch, in what the Democratic senators surely interpreted as disingenuousness, claimed that it would be an “act of hubris” were he to answer that he agreed with the Brown decision. Blumenthal was unwilling to accept the tenor of Gorsuch’s answers.

Was Blumenthal beating a dead horse? All he managed to extract from the future justice was that when Brown v. Board overturned Plessy v. Ferguson (1896), which upheld Louisiana’s racial segregation laws for public facilities, it reversed a prior precedent that was “a dark, dark stain on our court’s history.”

The senator, in his cross-examination of the well-prepared “witness,” wanted a specific answer. He was unwilling to quit, no matter how pointless his persistence seemed to become. Was he not listening to the answers he got? The answers were so much more forcefully articulated than the magical “I agree” to which he was asking the judge to commit himself. Was he beating an already thoroughly dead horse? Why would Blumenthal not take yes for an answer when that magic word was not spoken? Did the senator in fact neither hear nor process the meaning of the answers he got instead of the one he wanted? Have you ever faced a recalcitrant witness with exasperation, seemingly deaf to the answers you were in fact getting?

TO PERSIST OR TO QUIT

For lawyers, the question becomes when you should refuse to take the de facto equivalent of yes or no for an answer. First and foremost, ask yourself: What is my goal in any line of questioning on the stand, in a deposition, in a negotiation? Don’t meander and hope you get some nugget of value whose meaning you’ll perhaps determine in the future. Ask yourself where you want to go, how you plan to get there, and when you’ll know you have received a helpful answer—even if not in the form you expected and desired.

Be purposeful, strategic and tactical. Great buzzwords. But what do these words mean in this context? Determine a goal. Is it to pin down the answer to a factual question? Is it...
to extract a particular admission against interest? Is it to expose a lie or an improbable assertion? Then, figure out how you're going to get there. Are you going to ask a direct question or elicit an answer that by deduction gives you the conclusion you need? Be willing to take a shortcut, if one is possible, or navigate a detour, if it becomes necessary.

To accomplish any goal, you have to figure out how to best play your interlocutor or your deponent. Try to learn as much as you can about that person before you enter the court, deposition or negotiating room. If you haven't been able to do so, use the opening gambits. People reveal themselves with surprising clarity, if we're prepared to see and listen.

We send a lot of nonverbal signals out to one another. Watch. Listen. Don't be so wrapped up in what you're trying to accomplish that you don't see, hear, understand or process the witness's game. If you're going to get your interlocutor angry, exasperated or self-satisfied, do it purposefully.

By the time Blumenthal got his turn to question Gorsuch, the manner and matter of the judge's responses were predictable. It was obvious that he'd refuse to give an opinion on any Supreme Court precedent, other than to state that the case was legal precedent to which deference was due. Nor would he allow himself to be bullied into saying anything outside his carefully worded responses.

Annoyed at what he seemed to regard as the senator’s refusal to take a de facto yes answer, the judge committed himself ever more forcefully to what he thought to be the precedential value of Brown.

During the exchange, neither was willing or about to give an inch to the other. Am I being too feminist and harsh on the eminent senator and the equally eminent jurist? I confess that if my back gets up, I can be equally—if not more—pigheaded and determined than those two gentlemen. And proud of it I am, also. But don't we all, even alpha males, have to learn when it makes more sense to give in?

SWIMMING INTO THE NET

Here’s another possibility: Blumenthal knew exactly what he was doing. He wanted to turn as many of the Democratic senators as possible into committed opponents to Gorsuch’s confirmation. What better way than to demonstrate the judge's refusal to commit himself to agree or not with any established precedent? And perhaps in respect to Brown v. Board of Education, the senator wished to extract a commitment that the case was and would remain good law, nay that it was sacrosanct precedent and would remain without threat of repeal, at least with his vote used to assist any backpedaling or reversal.

If those were indeed Blumenthal’s goals, his method was brilliant, although he seemed pigheadedly obtuse. Let’s assume the senator had thoroughly sussed out Gorsuch’s personality and style. Let’s further assume that the senator knew the fish he was trying to land would never bite.

The judge was too determined to show that he was independent to agree with virtually anything in the form he was asked. Instead, he showed his rectitude by refusing to say whether he agreed with the holding of Brown, nonetheless throwing himself into the net the senator was holding to catch him. Gorsuch is now committed until his dying day that Brown is a proper reading of the 14th Amendment and will be preserved in whatever permutation it may raise its head. The ultimate moral of this story is that everything is a learning experience for the wide-awake lawyer.

Don’t just passively listen to what you see and hear. Reflect on it. Ask yourself: What does this have to teach me? Then take the ride in that mental car, not necessarily knowing where the particular road you are on will wind up. Reflect on and analyze the amazing turns in the road, and use them as an opportunity to improve your craft. In doing so, take care not to beat any dead horses.

Edna Selan Epstein is retired from the active daily practice of law. She established her own firm in 1989 and handled a variety of litigated matters. She has served on the book publishing board of the ABA Section of Litigation and on the editorial board of the section’s journal, Litigation.
Wrongful convictions are a double tragedy. An innocent person may rot away in a penal institution, and presumably the guilty culprit gets away with a crime.

Further, wrongful convictions, even in the absence of actual innocence, raise fundamental questions about fairness in the criminal justice system. Whether it's the pioneering work of the Innocence Project and its exonerations through DNA testing or the popular documentary series Making a Murderer, public awareness and consciousness have increased in recent years.

Prosecuting attorneys are supposed to be ministers of justice and, as a result, have enhanced ethical obligations. The ABA included enhanced duties in its Model Rules of Professional Conduct requiring prosecutors to reveal information about a wrongful conviction. Now, some states are extending this duty beyond prosecutors to all attorneys.

"All of these rules are a manifestation of a raised awareness of the phenomenon of wrongful convictions, which comes from the work of the innocence movement," says ethics expert Lara Bazelon, an associate professor at the University of San Francisco School of Law. "That there are innumerable people languishing in prison is an irrefutable fact. Innocence is a rallying cry that crosses political boundaries."

Ellen Murphy, who teaches professional responsibility at Wake Forest University School of Law, says, "There is no question that wrongful convictions are a systemic problem."

A DIFFERENT TAKE ON THE RULE

The ABA addressed the concern about wrongful convictions in Rule 3.8, Special Responsibilities of a Prosecutor. In 2008, the ABA amended it with Rules 3.8(g) and (h). Rule 3.8(g) says that if a prosecutor possesses "new, credible and material" evidence that creates a "reasonable likelihood" that a person was convicted of a crime they did not commit, the prosecutor must take steps to rectify the situation. The rule requires the prosecutor to disclose the information to the appropriate authority or court, or in some circumstances to the defendant.

Rule 3.8(h) says that "when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."

Two states have extended this requirement beyond prosecutors to any attorney who learns of credible evidence that a defendant was convicted of a crime they didn't commit. Keith Swisher, a legal ethics professor at the University of Arizona's James E. Rogers College of Law, says that in 2014, Arizona was the first state to adopt such a requirement.

In the Arizona Rules of Professional Conduct, Rule 3.10 says that if an attorney acquires new, credible and material evidence, they "shall promptly disclose that evidence to the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant's counsel or, if defendant is not represented, the defendant and the indigent defense appointing authority in the jurisdiction."

In March, the North Carolina Supreme Court approved Rule 8.6 of the North Carolina Rules of Professional Conduct. Similar to Arizona, it extends the obligation to report information about a possible wrongful conviction to all attorneys, not just prosecutors. This rule applies when a lawyer has credible evidence—even if it's protected by the confidentiality rule, 1.6—that a defendant didn't commit the offense for which they were convicted.

However, North Carolina has included exceptions to the rule when evidence is "protected from disclosure by law" or court order, when "disclosure would criminally incriminate a current or former client," or when "disclosure would violate the attorney-client privilege applicable to communications between the lawyer and a current or former client."

Rule 8.6 arose from a state bar subcommittee investigation into whether North Carolina should adopt the ABA's rule amendments, Murphy says. "In adopting Rule 3.8(g), the subcommittee determined that the duty to disclose certain evidence about wrongful convictions should extend to all members of the bar, not just prosecutors," she says.

Civil liberties scholar Erwin Chemerinsky (an ABA Journal contributor) says about the state rules: "I strongly support them and think it is an important step to dealing with the problem of wrongful convictions."

Although the attempt to rectify wrongful convictions is laudable, Arizona's Rule 3.10 and North Carolina's Rule 8.6 contain exceptions that some experts
say may swallow the rule.

“Rule 8.6 seems quite narrow,” Murphy says about the North Carolina measure. “For example, while innocence trumps confidentiality, it does not trump the attorney-client privilege. So the question for me is whether the rule, with the exceptions, includes reasonably likely scenarios where a nonprosecutor would learn of a wrongful conviction.”

Bazelon says there’s an issue with the approach of these states’ rules. “The narrowness of the Arizona and North Carolina rules is problematic,” she says. “Both rules talk in terms of those who are innocent of a crime as opposed to those who are wrongfully convicted. In each case, whether someone is actually innocent or wrongfully convicted, and the question of innocence is unclear or unresolved, the issue is the same—the justice system has broken down.”

ULTERIOR MOTIVES

According to Bruce Green, a legal ethics professor at Fordham University, one reason why Arizona and North Carolina adopted these rules is to appease prosecutors who question why they alone should have enhanced duties when it comes to rectifying wrongful convictions.

“Part of what the prosecutors complain about is the lack of parity,” he says. Some ask: Why should prosecutors have to correct wrongful convictions when defense lawyers don’t? “Of course, there are very good answers to that question, rooted in the different roles and clientele served by prosecutors and defense lawyers. But even so, rules applicable to members of the private bar make it easier for prosecutors to swallow this pill.”

Green points to rules in Alaska and Massachusetts as good examples of ways to avoid the broad confidentiality exception. For example, Massachusetts Rule 1.6(b)(1) says: “A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary … to prevent the wrongful execution or incarceration of another.”

Experts agree that whatever the motivation, extending rules to disclose evidence of wrongful convictions or actual innocence is a step in the right direction for criminal justice reform.

“I hope that other states will follow suit, but any trend has been slow going,” Swisher says. “The more important rule is the one that applies to prosecutors who learn that they might have convicted an innocent person. Practically speaking, prosecutors have the power and credibility with the court to expedite an innocent person’s release from prison.”
You’ve been asked to give a speech. Given that you see yourself as a professional speaker—you’d certainly see yourself that way—you accept. How can you maximize your chances of performing creditably?

Prepare, prepare, prepare. Of course, if it’s a subject you’re well-versed in, you may think you can wing it. Don’t try. Take at least a few minutes to jot down your three main points. Make sure you have three main points. You must have something worth saying. Write your points out as complete sentences—interesting sentences. Try your best to make the points nonobvious.

Then, for each point, plan one good fact and one good illustration of the point. One of each is enough. Both the fact and the illustration must be brief, clear and telling.

To begin in an engaging way, think how you might inject some humor into the first 60 seconds. Rack your brain on this one. It’s best if you can deliver your levity in a deadpan way, as if you’re not expecting laughter. If it doesn’t come, you won’t look foolish. If you’re good at inducing laughter that’s somehow germane to the topic, you’ll have the audience in the palm of your hand.

SET THE SCENE

Before a speech, you can do several things to enhance everyone’s experience of it. Ask the organizers how many people are expected—and encourage them to get good estimates, not rosy projections.

Be sure not to overset the room: Few things are more dispiriting than having 25 attendees in a room set for 200. If you’re realistically expecting 25 attendees, set the room for no more than 30. Have extra chairs available nearby in case you have an overflow crowd. It’s better for a room to feel packed, not vacant.

Even a small group of, say, five attendees can seem perfect in a well-arranged small conference room—perhaps at a round table where everyone can see each other.

Try to avoid a room setup in which any participants aren’t facing you. If the room is set up with round tables, half the participants will have their backs to you. Some might turn toward you, but some might not—and that’s uncomfortable because they’ll be the most likely to get distracted or distract those facing them. If you must have round tables, it’s best to put seats only at half-rounds so that everyone is facing the front.

If the tables are arranged into a U-shape in which you’re at the top of the U, avoid seating people inside the U. Anytime participants are facing each other, instead of the speaker, distractions will abound. And they can have a ripple effect across the audience.

Recently, I showed up to survey a room where I’d be speaking. I was one of several plenary speakers during a three-day conference, and the tables were set in a large square. Speakers were expected to sit in the middle of one side of the square, a full 80 feet from those at the far side. By removing the 6-foot table where I was to sit, I was able to enter the square and speak from the middle, approaching each participant at various points. Afterward, several told me what a dramatic difference this had made.

Another point to consider is acoustics. You’ll need to be heard. If it’s a smallish room with fewer than 20 attendees, you’ll probably be able to project well enough for everyone to hear comfortably. Or if it’s a law school classroom accommodating up to 120, you should be fine: Usually those rooms are acoustically designed for the unamplified voice.

But if you’re in an office building or other conference room with seating for more than 30, you’ll almost certainly need a microphone.

Which brings us to another point: Try to avoid being placed at a lectern with a fixed microphone. Request a lavalier mic. It’s not that you want to wander; it’s just good to be closer to the audience without a huge encumbrance in front of you.

If you’re giving a one-hour talk, you may need no seat at all. If you’re giving an all-day seminar, as I frequently do, you’ll want a four-legged wooden stool. It’s simple and versatile, and (most important) the audience will be able to see you.

STAY CENTERED

I’ve been assuming, by the way, that when you’re giving a speech, you’re the center of attention—not your slides. That’s as it should be. Visual aids should enhance your speech, not overshadow it.

An inexperienced, diffident speaker will dim the lights and foreground the slides. The speaker becomes a disembodied voice discussing slides—today, usually PowerPoint slides. In the most abysmal instances, the speaker will read slide after slide to the audience, adding a bullet point at a time and tediously reciting the words...
to the audience. This travesty of public speaking is known as “death by PowerPoint.”

The better approach is to give the slides supporting roles, not leading ones. Be a minimalist. Put little text on your slides and err on the side of fewer slides, not more. Use evocative artwork in tandem with what little text you use.

Then there’s the issue of manner. You’ve heard the advice that you must look up from your notes. But that’s not enough. An effective speaker looks audience members in the eye. People who “look up from their notes” often fixate repeatedly on a spot on the ceiling—meaning they don’t connect with the audience.

You want to be conversational but polished. That means curbing all sorts of bad vocal habits, from “um” to “er” to “you know” to “like” (you know the “like” I mean) to the sentence-starting “So...” when the meaning isn’t “Hence...” You must carry yourself appropriately—as if you’ve done this before (even if you haven’t). You should seem entirely comfortable with what you’re doing.

As in oral argument, you must welcome questions and avoid assuming that they’re hostile. You mustn’t answer defensively, and especially you mustn’t assume an air of omniscience. If you don’t know the answer to a question, say so.

**BEYOND THE BASICS**

Introductions—if they’re to be given—are really important. Among the most dismaying things a speaker can hear is being asked, two minutes before the start time: “Would you like an introduction? What would you like me to say?” The proper answer to any such query is: “No, thank you. I’ll introduce myself.”

An introducer must be prepared. That doesn’t mean prepared to read a printout from a website. It means giving some thought to the occasion, the audience, the speaker and the subject of the talk. It means being pithy and generally upbeat, so that you whet the audience’s intellectual appetite. Prepare well in advance—not moments before going onstage.

But if you’re asked to do an introduction right beforehand and, unavoidably, you must make it impromptu, do what you can to learn something quickly about the speaker. Think of some interesting but general facts about the topic. Make it short, and bow out.

Remember that as the introducer, you’re there to support—not to undercut—the speaker. So nothing you say should be in the nature of laying down a challenge. You’re there to urge the audience to give its full attention and to derive knowledge and enjoyment from what’s to follow.

Frequent speakers are among the best audience participants. Five rules: (1) Sit toward the front and center—you won’t have to fight for a seat. (2) Listen attentively. Neither whisper (or pass notes) to your neighbor nor check your cellphone. (3) Don’t interrupt. Make notes if you have questions to ask when the speaker invites them. (4) Look at the speaker. As a listener, don’t constantly avert your eyes. (5) Wait for a break before getting up and walking to the back of the room.

Approach the talk with a genuine willingness to learn. If you do that, you’ll definitely learn something.

Another suggestion: Project yourself into the speaker’s position and think critically about the speaker’s technique. What’s good and what’s bad about the presentation? You’ll be honing your own speaking skills while observing someone else’s.

One last thing: Don’t clutter your mind with worries up to the point of delivering a speech. Give yourself a mental rest beforehand. Proper preparation lets you relax.

*Bryan A. Garner, the president of LawProse Inc., has given more than 100 speeches a year for each of the past 26 years. He is the author of many books, including Garner’s Modern English Usage, also available as a mobile app.*
Dear Daliah:

Any tips for tracking time better?

Dear Readers:

We have all faced the black-hole time warp. You worked 10 hours, but your billable hours only record 4½. Where did all the time go? You were so busy that you had a granola bar for lunch at 4 p.m. just to soak up all the coffee from the morning client marathon.

Keeping track of all your time often fails because you’re distracted by the hundred different things coming at you or because you can’t re-create your day at the end when you finally have time to breathe.

Here are three ways to capture your time effectively.

Attorney Daliah Saper has been answering readers’ questions online about building a 21st-century law firm. This augmented version of her column looks at time—timekeeping and time-saving.
THE AUTOMATIC WAY

Stay ahead of the game, and use practice management software that integrates your billing and has customizable workflows all in one. Not being able to consistently reconstruct time can bankrupt a practice.

I asked my friend Alvaro Arauz at 3a Law Management, a legal practice consulting firm in Atlanta, for some technology recommendations. He says cloud-based software you can access from anywhere with an internet connection, such as Clio, MyCase or Rocket Matter, is used by many firms. These platforms can automate standard billable tasks, such as basic discovery, emails, text messages to clients, court hearing confirmations or cover letters.

The 0.2 and 0.1 hours can add up in a day but can be easily lost. With the proper services, predefined tasks convert into time slips with a click of a mouse without having to remember if everything was billed in the scope of the assignment. Keep in mind, the time slips can always be adjusted in the prebill phase.

The two things any firm of any size can streamline, Arauz says, are phones and accounting. Not managing either effectively also can make or break your practice.

Part of the accounting headache is the chore of reminding and following up with clients about payments. Then there’s the actual collection of payments; in some firms, it’s a bookkeeper’s part-time job.

New options are available to the modern lawyer, and PaySimple is exactly what it says—a simple software program that lets you schedule payments and accept e-checks and credit cards while it automates your billing process. Even the established merchant services LawPay and QuickBooks allow you to send a link to clients via email for them to pay their invoices or retainers.

Arauz says to take it all a step further by using practice management software that syncs with LawPay and QuickBooks. If the structure of your website allows it, which most do these days, there also are payment portals that can be added for either potential clients scheduling a consult online or existing clients who received an automatic emailed invoice.

The second thing to delegate are the phones. There are a variety of live answering services that range from $99 to $800 per month—services such as Ruby Receptionists, My Receptionist and PATLive. They give your clients the
impression that your practice has a front desk ambassador. Just remember the old adage that you get what you pay for, and try to stay in the $200 to $500 range. Ruby Receptionists is a quality and tested company. Script how you want your phones answered—when they get transferred immediately, i.e., when a judge calls; when to email your staff—and monitor it all with monthly reporting logs.

If you have a high-volume practice or a large number of weekly potential intakes (personal injury, bankruptcy, med-mal), Legal Intake Professionals will handle your entire intake process. Equally customizable on how to prioritize calls, it adds the extra level of capturing details that most answering services do not provide.

Once the intakes come in, a paralegal or an attorney contacts the potential client to engage them formally. However, the monthly price is slightly higher than most services but still less than the salary and payroll liabilities of an intake specialist plus a receptionist.

For the ultra-high-volume intake firms, there are plug-ins for your website or case management software that will email intake forms to potential clients and then enter them into your internal system automatically. Capturing the case information and data entry is the bottleneck of the intake process. Delegate it to the potential client and technology, Arauz says, all from an iPad on a couch in your waiting room.

THE REACTIVE WAY

If work and life keep you busy, use mobile apps to make sure nothing falls through the cracks. Before technology, lawyers had their hands tied behind their backs. Dialing into a server or a desktop on the weekends to enter time made it an insurmountable task. In a week slammed with juggling phone calls from clients, court appearances, interruptive status requests from partners, researching case law, drafting discovery and filing motions, even the most efficient billing workflow was at best a four-step process:

1. At the end of the day or, worse, at the end of the week, try to recall what happened.
2. Write the time down on a Post-it/notepad/back of your hand.
3. Manually enter data into a billing system.
4. Approve the slips for accuracy and consistency.

Today, Arauz recommends using apps such as Zapier, Dragon NaturallySpeaking or Siri to help convert your reactive life into a proactive billing system. Zapier integrates with things that keep your thoughts and work
in order—Dropbox, Wunderlist, QuickBooks, RingCentral, Excel, Clio, Basecamp. Zapier can automate your lawyer life, track the work you perform, and keep it all together in one app that communicates with all the others to make sure nothing gets lost.

Similarly, you can use Dragon NaturallySpeaking or Siri to dictate your time entries when you don’t have time to write it all down. The technology and accuracy of capturing what you are saying has improved dramatically over the years, as has the convenience of being able to email or send your dictation via text. I often dictate on long road trips or when I’m walking to the courthouse.

Don’t forget the apps that complement your desktop or cloud practice management software. Most of them can dial phone numbers or email directly from the app, which in turn captures the time as billable behind the scenes.

**THE PROACTIVE WAY**

Interruptions distract from efficiency and, ultimately, from capturing all your time. Build blocks of time into your schedule, so that you aren’t pulled in five directions at once and only accounting for 2½ of them.

If “shiny objects,” such as flashing voicemails, text pings or unread email counts are disruptive, create a calendar for concentration. Try a schedule as follows and adjust as necessary:

- Priority emails, 8 to 8:30 a.m.
- Priority phone calls, 8:30 to 9 a.m.
- Client work, 9 to 11 a.m.
- Emails and calls, 11 a.m. to noon.
- Priority items, 1 to 2 p.m.
- Client work, 2 to 3:30 p.m.
- Email responses, 3:30 to 4:30 p.m.
- Calls on the way home, 4:30 to 5:30 p.m.

While it won’t eliminate all the distractions, keeping close to this regimen can help you maximize your productivity and the chances of capturing all the time as you go.

**PRODUCTIVITY TALK**

Speaking of productivity, Arauz has advice on tackling other nonlawyer ing tasks.

He says, “There is a finite amount of time and energy in a day that cannot be re-created. If you overcompensate in one area, then another area suffers. So how do you juggle it all while maintaining sanity? The key to growth is delegation, either to a person or to technology.

“When you start your practice, delegate to technology. As you grow and can swallow the payroll pill, integrate staff and attorneys until law firm nirvana happens when your employees utilize technology to get even more done faster.”

Infamous culprits of wasted time

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include scheduling and confirming appointments, Arauz says. When things really get busy, every moment counts. Waiting on a consultation to not show up or a lunch meeting that you forgot to mark on the calendar takes up valuable time that could be better spent.

Setmore is free, online appointment-scheduling software on steroids, especially if you upgrade to the $25-per-month premium package. Aside from potential clients or clients booking meeting times intuitively by web, Setmore can be configured to send text and/or email reminders the day before the appointment, which minimizes the no-call no-shows that can inevitably happen in any practice. And it’s very customizable.

(You can retain that possessive control of your calendar, so that your work and life don’t double-book.)

Mixmax is another quick trick that takes all the effort and emails out of trying to find a time to collaborate with others, be it by phone, video or in person. If you average 300 emails per day that require your attention, you certainly don’t have to add another 30 emailed dialogues of “Can you meet at 2 p.m.? “No, I can’t. What about tomorrow at 10 a.m.?” And on. And on.

Send time slots that the emailed recipient can select once they have confirmed with their own calendar, and then it gets added to your calendar.

Add meeting agendas or previews to the scheduling team, use templates for scheduling automatic emails and branding, so that it looks like it’s coming right from your firm’s inbox.

It’s good to use the technology at the beginning. But keep it integrated in your processes as you grow with staff, so that they have the tools to help the firm succeed.

Remember, as I like to keep in mind: Time is money. So start accounting for it all. ■

Daliah Saper opened Saper Law Offices, an intellectual property, digital media, entertainment and business law firm in Chicago, in 2005. Saper is regularly interviewed for national TV, radio and publications, including Fox News, CNN, CNBC, ABC News, 20/20, the New York Times and the Chicago Tribune. She is an adjunct professor of entertainment law at Loyola University Chicago School of Law and can be reached at AskDaliah@ABAJournal.com.

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TO LEARN MORE, PLEASE VISIT AMBAR. ORG/INNOVATION
A Natural Successor

University of Virginia professor takes over part of civil procedure guidebooks, joins Supreme Court committee  
By Ed Finkel

A. BENJAMIN SPENCER HAS ALWAYS BEEN A PROCEDURALIST’S PROCEDURALIST, magnetically drawn to the intellectual intricacies of civil procedure. Already a well-respected scholar, Spencer’s influence in the field grew significantly in the past year.

The civ-pro pro has been tapped to annually update a portion of the influential, multivolume Federal Practice and Procedure guidebooks. Chief Justice John G. Roberts Jr. also appointed Spencer to the Advisory Committee on Civil Rules of the Judicial Conference of the United States in May.

Spencer’s love of civil procedure started in law school. He says he received his highest marks at Harvard Law School in the subject and learned from one of the very best: Arthur Miller, now a professor at New York University School of Law and one of the original co-authors of Federal Practice and Procedure.

“Being [Miller’s] student really laid the groundwork for all of this,” Spencer says. “I loved it so much from him that I decided to teach it.”

Spencer has gone on to teach civil procedure at a trio of law schools: the University of Richmond, Washington and Lee University and the University of Virginia, where he’s been since 2014. He also is an officer in the Judge Advocate General’s Corps of the U.S. Army Reserve and has written two books: Acing Civil Procedure and Civil Procedure: A Contemporary Approach.

Miller asked Spencer to take over the updating of the pleadings and motions section of the guidebooks. The Federal Rules of Civil Procedure covered, specifically 7 through 12, address what kinds of pleadings and motions are allowed in federal court, how claims should be pleaded and what kinds of defenses are available, and what constitutes sufficient service.

“To be asked to take over volumes from Arthur Miller, one of the original people who created this, was a big honor, particularly in light of the fact that I was his student,” Spencer says. “It’s a big responsibility. It’s cited by thousands.”

“He was a diligent student; he clearly had a love of law school,” Miller says. “Then he becomes an academic, and I start reading the stuff he is writing on pleadings—a subject I know a great deal about. It turns out he’s exceedingly prolific. He struck me as the...
The volumes of *Federal Practice and Procedure* are updated annually with a “pocket supplement,” and every so often, those are combined into a new hard-copy edition, which Spencer will produce in 2019. “The book needs to be revised, so intervening updates can be combined into a new book,” he says. That’s because at a certain point, “the physical book no longer reflects the state of the law.”

**PASSING THE TORCH**

Miller says he’s delighted that Spencer is taking over the pleadings and motions section. “He will keep those volumes in tip-top shape, both in content and accuracy,” Miller says. “I am a person of years, and it was appropriate for me to release some of my responsibilities.”

Spencer’s appointment to the advisory committee, effective Oct. 1, came about from nominations from various people without him knowing about it. “You don’t apply for this committee; it just happens,” Spencer says. “The committee is dominated by judges but typically has one law professor.”

When he begins that role, Spencer will be one vote on a 13-person body that amends the rules of civil procedure, one of five such committees of the Judicial Conference to which the U.S. Supreme Court, which has the ultimate responsibility, has delegated this function. He will serve a three-year term and will be eligible for a second three-year term, which most committee members end up serving. The committee has hearings around the country, makes decisions on how to amend the rules, and forwards those to the Supreme Court for its approval, Spencer says.

Miller, a former member of the advisory committee, did not have a hand in selecting Spencer but thinks his protégé will be well-suited for such an important role. “If I were grading him, I would give him an A-plus,” Miller says.
SOMEDAY IN THE NOT TOO DISTANT FUTURE, legal aid questions may be answered in the cloud by the jurisprudential version of Alexa. But, not waiting for that day, legal aid providers are pushing forward plans to allow those seeking legal help to tell their stories through the internet at a site that could guide them through the available resources and appropriate contacts.

Microsoft is investing $1 million into a program partnership with the Legal Services Corp. and Pro Bono Net to develop web portals to access legal aid information. The funds cover the technology, implementation costs and services, which the LSC is hoping to have available by the second half of 2018.

In April, the LSC announced that legal aid assistance programs in Alaska and Hawaii were selected as state pilot programs because of their track records in meeting civil legal needs and their geographies, which pose challenges in the traditional delivery of legal services.

In June, the LSC released The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans, which reports that “86 percent of civil problems reported by low-income Americans in the past year received inadequate or no legal help.”

“Many studies have examined the magnitude of the justice gap,” says James Sandman, the LSC’s president, “and they all show that the vast majority of the legal needs of low-income people just don’t get addressed. And when they don’t, our legal system is not working as it was intended to work.”

“We need to make justice far more accessible to people who don’t have access to a lawyer,” Sandman adds.
The LSC convened a legal aid technology summit in 2012 and 2013 and later produced a report that envisions an integrated service delivery system. The system would include a unified legal portal in each state that employs an automated triage process to direct clients to the most appropriate help and guide self-represented litigants through the legal process.

**PORTAL LAUNCH CHALLENGES**

“Accessing legal assistance today is complicated and opaque,” Sandman says. “A Google search would have all kinds of resources, but it’s very hard to sort out, and so it’s a random situation as to who actually gets help. The portal will use an algorithm to put to use the information provided by the user.”

The hope is that the portals can be one-stop shopping. “Right now, the whole legal aid landscape is very fragmented, by state, by county, by court, by family law court,” says Dave Heiner, deputy general counsel at Microsoft and chairman of the board of Pro Bono Net. “There are a lot of legal aid organizations to help you, and some of the ways you can get a lawyer are automated, while others aren’t.”

“The next great step forward is natural language,” Heiner adds. “Just speak and have the computer understand the meaning of the words, like Alexa [Amazon] and Siri [Apple]. So it might be something like ‘I’m being evicted from my apartment; what should I do?’

“The system will ask appropriate questions, like ‘Why didn't you pay the rent?’ And the user would say, ‘The landlord didn’t provide heat.’”

Representatives from the pilot states are stoked to be part of the program. “This is an ideal fit for Alaska,” says Stacey Marz, director of the Family Law Self-Help Center for the state court system. “We’re excited to participate in the building of an electronic gateway for clients, regardless of their geographic location.”

Sandman says there is no downside to launching the portal program in the midst of the Legal Services Corp.’s budget battle with the Trump administration. “Congress is not going to eliminate funding for LSC,” Sandman says. “Microsoft is backing this for both initial funding and program management services technology, and they’re handling the cost of implementation.”
Call it a banner (and bandana) Legal Rebels year. And talk about accomplishments: This year’s 13 Rebels are providing new ways to help immigrants find legal assistance, businesses comply with accessibility laws, drivers deal with parking tickets, and lawyers do their time and billing—painlessly.

One Rebel rose from a devastating family health issue to provide legal services for firms that hire people with criminal records. One uses her experience as a “Deafblind” woman to teach firms how to work with employees who have disabilities. One lives on friends’ couches to keep down expenses as her litigation management business takes off.

We also feature a professor handling a program that combines lawyers, business students and STEM entrepreneurs to grow projects from idea to product; two women whose legal service helps lawyers and law firms find pro bono projects; a crew using artificial intelligence to augment legal research; and a lawyer/IT director whose work has affected criminal record expungement, bail reform and class action work.

It’s an extraordinary list of people improving access to justice, helping lawyers work more efficiently and providing service to society.

Check out their miniprofiles in the pages ahead, written by Terry Carter, Lorelei Laird, Victor Li, Jason Tashea and Stephanie Francis Ward. Read more details about these efforts at ABAJournal.com/legalrebels.

While you’re there, check out our past Rebels, find (or add) some legal practice strategies, read fresh ideas provided by our New Normal contributors and listen to podcasts, including our latest Trailblazer series speaking with the daring doers who were changing law practice before Legal Rebels began.
When it comes to information, Casetext CEO Jake Heller, 32, thinks the open-sourced and open-knowledge movement can be the great equalizer. So he launched the company in 2013. Similar to crowd-sourced sites such as Wikipedia, Casetext relies on users to provide annotations, descriptions, references and tags for cases and statutes. Three years later, Casetext added the Case Analysis Research Assistant, an artificial intelligence researcher, something that lawyers had told him was impossible. But Casetext’s vice president, Pablo Arredondo, 38, thought it was. “I had previously worked in patent law,” he says. “What I realized was that companies such as Apple or Google had tools that were innovative and beautiful. But the tools used by their outside counsel were not.”

For the company’s chief operating officer, Laura Safdie, 32, its main mission is to give lawyers tools to enable them to function more effectively. “All of our ideas come from people who tell us things like: ‘I used to hate doing that when I practiced law’ or ‘I wish I had that when I was practicing law,’” she says.

—Victor Li
Leading the Way for People with Disabilities

Haben Girma, a Harvard Law School graduate, has limited hearing and vision and refers to herself as “Deafblind.”

“It should be one word, no hyphen, and I prefer to capitalize the D because it’s a cultural identity,” says Girma, 29, a former Skadden, Arps, Slate, Meagher & Flom fellow whose work centers on consulting and public speaking about the benefits of fully accessible products and services, as well as hiring people with disabilities.

Before she went into consulting, she practiced litigation for 2½ years with the nonprofit Disability Rights Advocates and represented the National Federation of the Blind in an accessibility lawsuit brought against Scribd, a digital library subscription service. The case settled in 2015 after the company lost its summary judgment motion in the U.S. District Court for the District of Vermont.

“Litigation is powerful, but I feel like a lot of the accessibility barriers are due to lack of education,” Girma says. “I feel like I have a unique talent to inspire and motivate people to remove those barriers.”

—Stephanie Francis Ward
His ‘Chat’ Is Not Just Talk

Joshua Browder, a 20-year-old London native, is a self-described terrible driver who took action on his ton of traffic tickets—and created an online application that is providing legal help far beyond the highway.

He spent the summer before he enrolled at Stanford University in 2015 working on DoNotPay, an Android app and legal chatbot that assists motorists in challenging their traffic tickets.

Browder says DoNotPay has overturned more than 375,000 tickets. But he didn’t stop there. Last August, he modified his chatbot to help the homeless in the U.K. apply for public housing.

In March, DoNotPay began to help refugees file applications for asylum in the United States, the U.K. and Canada.

“Only a couple hundred people have used it,” Browder says. “While that’s many orders of magnitude smaller than the parking ticket bot, [the refugee issue] is much more important.”

And in mid-July, Browder announced that the legal chatbot will cover nearly 1,000 additional legal areas, including consumer rights, employment law and landlord-tenant disputes.

“I still like the name DoNotPay,” says Browder, recognizing that his creation has moved far away from its original incarnation. “Maybe I’ll change it to DoNotPay Lawyers.”

—V.L.

HELPING FIND PRO BONO THAT FITS

Felicity Conrad and Kristen Sonday met at Gratitude Migration, a New Jersey Shore art and global music festival.

But rather than focusing on the festivities, they spent most of the evening talking about a pro bono asylum case Conrad had recently won for a South American man and how technology could amplify social justice.

Conrad, 28, had recently left an associate position with Skadden, Arps, Slate, Meagher & Flom, where she practiced international litigation and arbitration.

“I was working at the time at a hedge fund and was itching to get back in a startup. I had just wrapped up my role at Grouper,” says Sonday, 30, referring to the former social club app that paired groups of friends for drinks. Sonday previously worked as its director of international operations.

This year, the pair launched Paladin, a platform that helps organizations manage, staff and track pro bono efforts.

“Our platform makes sure that the right attorneys are seeing the right opportunities,” says Conrad, who is the CEO. The service started in New York City, Baltimore, San Francisco and Chicago and is now available across the country, says Sonday, the chief operating officer.

“Learning about the nuances related to pro bono has been fascinating to me,” Sonday says.

—S.F.W.
Ryan Alshak and some friends developed a great app that involves digital profiles. But no one was going to beat down any doors to get it. “We had a cool product but not a business,” Alshak says. The answer, he realized, was in an adage: The biggest problems are the biggest business opportunities. Alshak, then a second-year associate at Manatt, Phelps & Phillips in Los Angeles, contemplated what he liked least about law practice: keeping time sheets. He checked with about 20 colleagues and keeping time kept coming up.

Alshak, 30, left the firm in April 2016 to pursue that business opportunity. The result is Ping, an automated timekeeping program that has promise for radically changing how BigLaw lawyers keep track of their billable minutes—more precisely, eliminating the bother. All the apps, programs and devices lawyers use, from Microsoft Word to Excel and browsing the web to talking on the phone, would feed into a log of what has been done on what matter for what client and for how long.

As far as a goal of handling 100 percent of billing, just how far Ping might get is an open question. “Some lawyers have asked if we could account for thinking about a case in the shower,” Alshak says. “We’re not going to plant a chip in the brain.”

—Terry Carter
Barreling toward partner track at Gibson, Dunn & Crutcher in New York City, Alma Asay took an abrupt exit to start a legal technology company. “It surprised me how much I loved my job” at Gibson Dunn, says Asay, 35. However, she recalls thinking in February 2012: “If I was ever going to try anything else, it should be now.”

Today, she is the founder and CEO of Allegory Law, a litigation management software company.

With no permanent home address, Asay has been staying on couches of friends and family to extend her financial runway.

Allegory is a platform that helps prepare evidence, build binders and manage depositions while cross-referencing every aspect of a case.

Allegory’s genesis was a series of spreadsheets that Asay made as an associate under the tutelage of Orin Snyder, a Gibson Dunn partner. Asay’s early spreadsheets “mapped the case in a way that was simple, transparent and accessible,” Snyder says. Asay’s “ability to put together disparate parts of a case was her talent,” Snyder says, and that’s why Allegory works.

Asay’s ideal outcome for Allegory is to scale through partnerships. “I think Allegory can be really powerful teamed up with a larger company,” she says. Snyder thinks Asay either will be Allegory’s successful CEO or an acquired CEO looking for her next challenge. “Either way, she’ll be rich,” Snyder says.

—Jason Tashea

Teaching Startup Law as Startup Products Start Up

From the late 1980s to mid-2000s, Cornell Law School professor Charles Kenji “Chuck” Whitehead was steeped in BigLaw securities and deals work. He also had top leadership positions as a hybrid banker and a lawyer in big finance companies involved in venture capital and securities.

Then he decided to do what he had an eye on years earlier as a student at Columbia Law School—teach.

Now, Whitehead, 55, has put his nonacademic experience to even greater use, bringing LLM students into the mix last year at Cornell Tech, a New York City-based, Silicon Valley-style incubator in technology and entrepreneurship. Cornell Tech already had advanced students in business, computer science and engineering, as well as experience in wielding big data in analytics and machine learning.

The program has its law students advising on startup products and participating in their development. His inaugural class of 12 LLM students graduated in May. Whitehead says he selected that dozen from about 100 formal applications.

Prospects get two questions 24 hours in advance—one is hypothetical and the other is to pitch their own startup concept. “It’s not to see what they know but how they work under pressure when pushed with questions,” he says. “It’s a skill you pick up as an in-house lawyer.”

—T.C.
Negotiating Better Access for the Disabled

Compliance is a frequently used word in legal matters related to the Americans with Disabilities Act. But Lainey Feingold says simply meeting the law’s standard is not enough. “It’s about integrating technology, web development and usability,” says the Berkeley, California, sole practitioner, whose work centers on digital accessibility for people who are blind. “When technology becomes a compliance issue, our creativity is lost, our enthusiasm is lost, and things get stuck in the law office.”

Rather than litigation, Feingold finds solutions through structured negotiation, a collaborative dispute resolution method. Businesses like it because the process is cheaper and often faster than litigation, she says. Also—because the settlement agreements always include extensive product testing, input and feedback by people who are blind—it works better for her clients.

The law firm of Goldstein, Borgen, Dardarian & Ho brought in Feingold, 61, to work on a matter after a blind lawyer approached the firm about there being no accessible ATMs.

Feingold contacted Citibank in 1995, and a preliminary agreement was reached in 1999, with terms that included the ATMs being equipped with text-to-speech screen readers. The final agreement was entered in 2001.

Similar agreements regarding talking ATMs were reached with other financial institutions, including Bank of America and Wells Fargo. Those discussions led to structured negotiations that involved online banking accessibility, Feingold says.

If a business needs time to get resources together and systems in place, Feingold is understanding, according to Susan Mazrui, AT&T’s director of public policy. But when it’s an issue in which the business is unresponsive, the lawyer will respond accordingly.

“Because she is so kind and gentle, they don’t know she is brilliant and fierce,” Mazrui says. —S.F.W.

Making the System Work for Modest-Means Clients

Mindie Yocum was the mother of a 2-year-old, with another child on the way, when she got the worst kind of news. Her husband, Scott, was closing up at work when three men broke in, stabbed him nearly 30 times, cleaned out the cash register and cut the phone lines. He survived—but that’s when their legal troubles began. The workers’ compensation insurer insisted that he go back to work in a week, which was not medically possible. Their first lawyer did nothing to help, and 18 months went by before they hired a second, who did secure a settlement. Then the whole process started over again with Social Security Disability Insurance, which took five years to grant his benefits. The family lost its home, health insurance and more.

The experience turned Yocum into an informal advocate for families in situations such as hers. But she needed more. “I realized that I need a bigger voice and decided to one day run for office and go to law school,” says Yocum, 42. “I knew that I could do more to help more people that way.”

The Yocum Law Office opened its doors just outside Columbus, Ohio, in 2015, providing legal services aimed at people of modest means. In particular, Yocum offers legal services as an employment benefit, partnering with organizations that employ or serve people who have a legal barrier to employment, such as a criminal record. Services include on-site workshops, one-on-one counseling, and flat-fee legal services for those who need more.

Yocum says small-business accelerator SEA Change helped her develop her business model. But she also got help learning to run a law practice from the Columbus Bar Association’s incubator program, Columbus Bar Inc., which gave her 15 months to “make mistakes and have people support you through it.”

—Lorelei Laird
Matthew Stubenberg’s legal career is shaped by the Great Recession.

In 2010, he started law school at the University of Maryland, where he “fell in love with criminal defense.” However, upon graduation in 2013, the legal market was still recovering, and he was without a job. That was when Stubenberg learned how to code.

Inspired by his law school clerkship, Stubenberg, 29, wanted to help attorneys navigate Maryland’s courthouses. He learned the programming language Java and created Not Guilty, a smartphone app that digitized the paper documents with judges’ information.

Now the IT director at the Maryland Volunteer Lawyers Service, he creates scalable solutions to chronic problems faced by underfunded legal aid and criminal justice programs. Since 2015, Stubenberg has operated the website MDExpungement, which informs a user whether their case is expungable and auto-populates appropriate court forms. The tool has created more than 33,000 expungement filings and generated enough filing fee waivers to save Marylanders $756,600, he says.

And to improve the efficiency and scope of MDExpungement, he created the Client Legal Utility Engine, or CLUE, a database from public court documents with 7.5 million civil and criminal cases that date back to the 1980s.

With increased technical savvy, Stubenberg says his optimism for creating in the legal tech space has grown.

“One thing I believed when I first started in legal tech was that many of the good ideas had already been taken,” Stubenberg says. He now says that the area is still new, and “a majority of the good ideas have yet to be conceptualized.”

—J.T.
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Like most life-changing journeys, the path of professional and personal discovery that Philippe Sands has traveled over the past several years started with a modest first step.

In 2010, Sands, a barrister in London whose work included numerous cases that involved alleged human rights violations, including genocide and crimes against humanity committed during civil wars and other conflicts, was invited by the law faculty of the Ivan Franko National University of Lviv in Ukraine to lecture on his work in the human rights field.

Lviv is off the tourist path, but it encapsulates Europe’s bloody history during the 20th century. Between the early days of World War I in September 1914 and
the closing days of World War II in July 1944, control of the city changed eight times, including the Austro-Hungarian Empire, Russia (before the revolution), Poland, Nazi Germany, the Soviet Union and, today, Ukraine.

The city’s changing fortunes are reflected in the various names it has been given over the years: The Poles called it Lwow; the Soviets identified it as Lvov; and the Germans named it Lemberg.

The city enjoys a rich cultural and intellectual history. Its university was founded in 1661, and Sands was drawn to the fact that two of the leading originators of international criminal law principles—which would play an important role at the Nuremberg trials of Nazi leaders following the end of World War II—attended the law school at the Lviv university within a few years of each other. They had studied international law under the same professor.

Without the efforts—and persistence—of those two legal innovators, the Nuremberg trials and the subsequent growth of international criminal law would have unfolded in a much different way, says Sands, a professor and director of the Centre on International Courts and Tribunals at the University College London.

Hersch Lauterpacht and Raphael Lemkin devoted much of their professional lives to defining and advancing the legal grounds for holding perpetrators responsible for atrocities committed in the course of conflicts. But they approached the issue from different directions.

Lauterpacht focused on the killing of individuals as part of a systematic plan—what he called “crimes against humanity.” Lemkin studied the killing of many individuals with the intention of destroying an entire group—and coined the term genocide.

FAMILY MATTERS

But Sands had another, more personal reason to accept the invitation to lecture at Lviv. His grandfather, Leon Buchholz, was born there.

Sands knew his maternal grandfather well. Buchholz had attended Sands’ wedding in New York City, and Sands visited him many times in Paris, where he lived in his later years before his death in 1997. But he did not talk about the years before 1945, so Sands viewed the trip to Lviv as an opportunity to try to fill in some gaps in the family history.

That quest required Sands to engage in some serious detective work, but he was up to the task.
“I’m a litigator, and litigators are like a dog with a bone—once you’ve got it, you don’t let go,” Sands says. “I’ve got an inquiring mind. I’m curious about things.” Nevertheless, he says, “I was stunned” to discover the connection between his grandfather, Lauterpacht and Lemkin. “That invitation opened a door.”

Sands’ research revealed numerous coincidences. Lauterpacht’s son Elihu, for example, was one of Sands’ teachers and mentors at the University of Cambridge in England.

But they knew each other for three decades before they realized that Lauterpacht and Sands’ great-grandmother had lived on the very same street, known as East West Street, in the town of Zolkiew near Lviv.

Sands did not plan to write about the experience. But at a meeting with his editor, he was describing the trip to Lviv, and the editor urged him to consider writing a book. East West Street: On the Origins of “Genocide” and “Crimes Against Humanity” was the result, which was published in 2016 by Alfred A. Knopf.

East West Street is a work of nonfiction. But as it weaves the intertwining stories of individuals against the backdrop of the sweep of 20th-century European history, including the Holocaust and the legal redemption of the Nuremberg trials, the book takes on a novelistic tone.

A PAINFUL PAST

Such a story would be incomplete without a villain. For that role, Sands offers up Hans Frank, a lawyer who began to defend members of the Nazi Party in Germany in the late 1920s and was Adolf Hitler’s personal lawyer through much of the 1930s, including Hitler’s first years as German chancellor.

After Germany and the Soviet Union invaded Poland in September 1939, Hitler appointed Frank as governor-general of German-occupied Poland. In that position, Frank was responsible for implementing the Final Solution there, a task he carried out efficiently and enthusiastically, all while living in comfort at the historic Wawel Castle in Krakow and hoarding some of Poland’s greatest works of art.

Frank was captured by the U.S. Army in 1945 and indicted for war crimes. He was one of the defendants convicted at Nuremberg, and he was executed by hanging in October 1946. Sands says Frank’s actions led to the deaths of the families of Lauterpacht, Lemkin and members of his own family.

Sands’ work also led to the production of a documentary film. In 2013, while he was still writing the book, Sands published an article in the Financial Times that described his work. The story focused on the struggles of Niklas Frank, Hans Frank’s son, and Horst von Wächter—the son of one of Frank’s key subordinates, Otto von Wächter—coming to terms with the actions of their fathers during World War II. While Frank has condemned his father, von Wächter has not been able to disown his.

Frank was 7 years old the last time he was with his father, who was being held in a Nuremberg prison awaiting his execution. “I can’t forgive my father,” Frank says. “This I can’t do, and this I will never do.”

Nor can he maintain his relationship with von Wächter. “I’m not his friend anymore because he’s defending his father in the most stupid way,” Frank says. “He should at least acknowledge that our fathers were both guilty.”

BRINGING THEIR STORY TO OTHERS

The Financial Times piece caught the attention of David Evans, a British film director whose credits include Downton Abbey. He has been friends with Sands since they went to Cambridge together, where Sands directed him in a student play.

“The stories of Horst and Niklas were extraneous to the book, but they were compelling,” Evans says.

Soon Evans and Sands were traveling to Bavaria to see Frank; the only other member of the crew was a cinematographer. “Initially, we set our sights on something very humble—the testimony of these two men,” Evans says. “At least it would be something for the archives. I changed my view on day one. As a director, you can see when something will grab an audience.”

What Our Fathers Did: A Nazi Legacy (in Britain, the title is My Nazi Legacy) premiered at the Tribeca Film Festival in New York City in early 2015. It played at a number of other festivals (winning the best feature award at the Jerusalem Film Festival) before it was released later that year to the general public. PBS also broadcast it.

The most compelling person in the film might be von Wächter, whom Evans credits for exposing himself to sometimes fierce criticism from Sands and Frank. “His view was that his father was a good man caught in a bad system,” Evans says. “He has a very peculiar moral compass, but one that’s been consistent throughout his life.”

Evans says the documentary process changed his attitude toward the law. “I never actually pondered what lawyers and judges do until working on the film,” he says. “I feel like I understand much more the need for legal process and the courts.”

Sands agrees that the project was an experience that caused him to think about the purpose and future of international law.

“It’s a work in progress,” he says. “As Winston Churchill said about democracy, it may not be perfect, but it’s the best system we’ve got. As I tell my students, it’s a long, long game.”

James Podgers, a former ABA Journal assistant managing editor, is a lawyer and freelance writer in Chicago.
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In 2010, Qismat Amin was an interpreter with the U.S. Army in Afghanistan. Later, the Taliban and the Islamic State group threatened him for working with the U.S.—and he was afraid “every second of my life.”

They didn’t find him, but they stole all of his family’s crops.

“They said, ‘We can give them back if he gets back and talks to us and tells us: Hey, I’m not working for America anymore,’” says Amin. “But... obviously this is like a trap, and they just wanted me to come over and kill me.”

By then, Amin was living in the city of Jalalabad—hiding. He lived in constant fear that he’d be recognized and killed. He was afraid, he says, “every second of my life.”

Amin’s predicament alarmed former U.S. Army Capt. Matthew Ball, who had worked with the interpreter while deployed to the Shinwari district. In the fall of 2015, when Amin’s application had been pending for nearly three years, Ball was done with active duty (he still serves in the Army Reserve) and entering Stanford Law School. There, he got in touch with the Stanford chapter of the International Refugee Assistance Project, which mobilizes law students and lawyers to help refugees, including SIV applicants. With IRAP’s help, he organized his fellow students to...
write to their congressional representatives, asking them to intervene in Amin’s case. When that went nowhere, Ball contacted the media.

Ball still isn’t sure whether any of it helped. But last fall, Amin’s application began moving through the system again. On Feb. 8—more than four years after he applied for the SIV program—he landed at San Francisco International Airport. Ball and a group of Stanford Law students were there to greet him. Shortly after arriving, Amin was living with Ball and his wife in the Bay Area and making plans for graduate school.

The lengthy delays Amin experienced are not uncommon, says Ball, who’s heard from a lot of veterans concerned about their own interpreters. In fact, the U.S. Department of State says 9,562 Afghans and 248 Iraqis had pending applications somewhere in the SIV process as of Dec. 31, 2016.

According to the State Department, the average government processing time for Afghan applicants was 480 days as of April. That’s up from 270 days the previous year. For Iraqis, the average wait time as of April was 305 days, up from 269 a year ago. By far the longest step was the security checks, called “administrative processing” by State and “a bureaucratic black hole” by Ball. Though security checks are an essential part of the process, advocates for SIV applicants say they can stretch out for years, putting applicants’ lives in danger.

Those delays aren’t the only problem. There aren’t enough visas allocated for all of the applicants from Afghanistan, so the government stopped taking new applications in March. A congressional bill to add more visas was sent to committees that same month. Because Congress must renew the program every few years, it can be—and has been—used as a political bargaining chip, despite the life-or-death stakes.

The primary Iraqi SIV program has expired, though it’s still granting visas allocated in prior years. And this year, the situation has been further complicated by President Donald J. Trump’s executive orders banning admission of travelers from certain Muslim-majority countries. One of the first people to be caught in the original travel ban was an Iraqi SIV holder. That caused an outcry, and SIV holders were exempted within a week.

Nonetheless, there have been at least two incidents in which SIV holders from Afghanistan, whose nationals were never banned, were put into deportation immediately upon arrival in the U.S.

MEDDLING WITH THE MILITARY

All of this jeopardizes not only individual SIV applicants—and their families—but also the goals of the U.S. military, advocates say. “Anybody who’s worked with an interpreter abroad knows that we have to rely on those people,” says Ball. “We can’t do anything we have to do if we don’t have good interpreters. And we can’t have good interpreters if the image that we have as a country is that we don’t keep our promises.”

The death threats are very real. Betsy Fisher, policy director for IRAP, says she’s worked with clients whose immediate family members were kidnapped and killed in retaliation for their work with the United States. Often, she says, this was done because the extremists—generally the Taliban, Islamic State group, al-Qaida or local militias—couldn’t get to the employees themselves, who were living on U.S. military bases.

“I think assassination of family members is extremely common,” Fisher says. “But … if the military presence there is downsized and you’re out of a job, you don’t have a military base to live on anymore.”

As a result, she says, many SIV applicants move to another city within their home countries, or sometimes to another country. Stories of self-imposed house arrest, like Amin’s, are not unusual.

In 2006, after this problem came to light, Congress passed the first SIV program, which provides 50 visas per year to interpreters from either Iraq or Afghanistan, plus their immediate families. (Families don’t count toward the visa limits in SIV programs.) The program has no end date, but it’s very small. Congress added two SIV programs later, which offer more visas but on a temporary basis. The Afghan Allies Protection Act of 2009, which expires in 2020, currently authorizes 8,500 visas for Afghans who had worked for or on behalf of the United States in any capacity. Similarly, the
Refugee Crisis in Iraq Act authorized 2,500 visas for Iraqis. It expired Sept. 30, 2014, but applicants who’d taken the first step before that date are still being processed.

But the bulk of applications from all of these programs are stuck in administrative processing. When creating the two temporary SIV programs, Congress required the departments of State and Homeland Security to report on them quarterly. Numbers from the most recent reports, issued in April, show that 95.9 percent of Iraqis and 31 percent of Afghans with pending SIV applications were in administrative processing. For both nationalities, administrative processing took up a third to half of the time, which averaged just under 200 days in each program.

Fisher says while these are security checks, it’s not clear what exactly is being done—or which agencies are doing it. For security reasons, the federal government doesn’t publicly disclose specifics, even to applicants. But there are a lot of checks, she says, and they all have to agree. That can cause problems.

“Sometimes one person will be approved by various agencies, but then another agency will be on hold, whether it’s because they are working on other things that week or because they have access to a different database, and they’re looking into it,” she says. “So it takes a lot of time to get everybody on the same page.”

That can lead to another problem, she says, where one agency takes so long that a prior step in the process expires. “If one person’s medical checks are approved, but then the security checks take a long time ... you might have to start the process over,” she says. “So you can have kind of cyclical delays in some cases.”

Ball, the Stanford Law student, adds that government officials have told him a common name could also be an issue. “It could be something as simple as there could be somebody else named Qismat Amin who popped up on a list somewhere, and they have to do due diligence,” he says.

Scott Cooper, director of national security outreach for Human Rights First, adds that bureaucratic mistakes also happen. Through his group’s Veterans for American Ideals project, which advocates for the SIV program, Cooper learned the story of an Afghan interpreter named Zia. Zia had to quit working for the U.S. when he got death threats from the Taliban, so he applied to the SIV program. He and his family waited more than three years, during which time he tried to keep a low profile while driving a taxi in Kabul.

But when the visas finally arrived, there were only five visas for his six children. His advocates had to get help from Congress in order to fix what looked like a simple mistake. Thanks to that intervention—and a crowdfunding campaign by Marines who’d worked with him that paid for their plane tickets—the entire family is now living in Oregon.

Cooper, who spent 20 years in the U.S. Marine Corps and retired as a lieutenant colonel, stresses that security checks are extremely important. But they can raise false red flags when applicants are asked whether they’ve ever had contact with extremist groups. “If someone had to pay a toll because they were going through a Taliban checkpoint, then they will report that,” says Cooper, who served five tours in Iraq and two in Afghanistan. “That in turn, requires a waiver for them to be able to be granted refugee status, because by paying the toll, the implication is that they were supporting al-Qaida, the Taliban or the like.”

Advocates note that this security measure is on top of the thorough checks that Afghan and Iraqi nationals must go through before they’re hired by the United States to begin with. Amin says he passed a security interview with the Army and
produced a document from local police, showing he had not been convicted of any crimes.

And even aside from all of that security vetting, Cooper notes that the SIV process requires applicants to bring the federal government a lot of documentation about who they are. That includes a letter of recommendation from their direct supervisor, approval from the head of the organization that employed them, the background check and screening from the hiring process, passport biodata, birth certificates, fingerprints and medical results.

And ultimately, Ball says, “there is no better vetting than spending years fighting the Taliban alongside Americans.”

**REFORM EFFORTS**

Despite these problems, advocates say the process has actually improved. In 2013, media reports about slow SIV processing and seemingly arbitrary denials started appearing. According to data from the State Department, a total of 5,848 out of 27,000 visas, or 22 percent, had been issued in the Iraqi program in the fiscal years 2008 through 2013; and only 987 out of 7,500 visas, or 13 percent, had been issued in the Afghan program in the fiscal years 2009 through 2013.

The dismal statistics and negative publicity helped create a push to speed up processing times. At an April 2013 hearing of the Senate Committee on Foreign Relations, Sen. Jeanne Shaheen, a Democrat from New Hampshire, cited the *New York Times* when asking then-Secretary of State John Kerry about the backlog for Afghan applicants. Later that year, Congress put some reforms of the SIV programs into the National Defense Authorization Act—the bill that provides national military funding—for fiscal year 2014. The bill required processing in the two temporary programs to finish within nine months, except in high-risk cases. It also required quarterly public reports on visa processing times.

“Secretary Kerry, starting in 2014, made a conscious effort to say, ‘We’re going to get this fixed; we’re going to put more manpower and resources behind it,’” says Cooper.

Things did improve—but Cooper says it didn’t last. The first quarterly reports, issued in April 2014, said average processing times were down to 239 calendar days for Iraqis and 287 for Afghans, excluding steps that were the applicant’s responsibility. But over the next two years, processing times gradually increased. As of April, the average processing time was still 305 calendar days for Iraqis and 480 for Afghans.

“It’s a 14-step process, and the delays, quite honestly, are a lack of ability to get them processed,” says Cooper. “And I don’t want to be unnecessarily critical of the State Department, but they’ve been slow.”

So slow, in fact, that IRAP filed a lawsuit, *Nine Iraqi Allies v. Kerry*, in February 2015. One plaintiff, called Mr. Alpha in court papers, was injured along with his son when militants burned down their house with them inside. The militants then found the family’s new home and threatened them, so they fled to Amman, Jordan.

Even there, the threats continued, requiring Alpha to change his home and car. When the lawsuit was filed, his application had been pending more than five years.

“Congress clearly stated that the whole process for applications should take nine months, and it’s never taken within that nine-month period” on average, Fisher says. “So we weren’t challenging the security checks, but were challenging on behalf of clients who had been waiting in some cases five years for a visa.”

That lawsuit was ultimately settled out of court, but not before a public ruling on the government’s motion to dismiss. The district court in Washington, D.C., found that under the Administrative Procedures Act, agencies must take action on applications within a reasonable amount of time. Though the 2014 NDAA did include an exception to the nine-month time limit for high-risk cases, the court said, Congress could not have intended that to apply to all cases. Otherwise, the exception would “swallow the nine-month rule in its entirety.”

**POLITICAL FOOTBALL**

That settlement was announced in March 2016, and no similar high-profile case has followed. Instead, SIV advocates have turned their focus to a different problem: increasing the number of visas available in the Afghan SIV program.

That program is authorized to issue 5,500 visas by the end of 2020. But in March, the State Department announced that it would stop conducting visa interviews under the program because the number of already pending applications was enough to claim all remaining visas.

According to a Congressional Research Service brief, there were 1,908 visas available under the program as of Jan. 29. But the State Department said as of Dec. 13, 2016, there were more than 13,000 applications pending. That means there were, at that time, about 11,000 Afghans who wouldn’t get visas, even if they qualify.

SIV advocates predicted that gap well in advance. Indeed, the State Department asked Congress to authorize 4,000 more visas in fiscal year 2017. (Cooper says the extra visas must be funded with appropriations; thus, the agency cannot unilaterally issue more.) But the NDAA for fiscal 2017 passed the House of Representatives with no new visas.

Advocates for the program hoped that the Senate would intervene when it got the bill in the summer.
of 2016. The Senate Armed Services Committee includes two longtime advocates for the SIV programs in Shaheen and Sen. John McCain, R-Ariz. Those legislators, plus Sens. Jack Reed, D-R.I., and Thom Tillis, R-N.C., did try to pass an amendment to the NDAA that would have authorized 4,000 more visas. (All four are on the committee; McCain and Reed are veterans.)

They had to get agreement from the Senate Judiciary Committee, whose chairman is Sen. Chuck Grassley, R-Iowa, and whose immigration subcommittee chair was at that time Sen. Jeff Sessions, R-Ala., who is now U.S. attorney general. Both opposed that many new visas, citing concerns about costs, security screening and whether that many new visas were needed. As a compromise, Shaheen and McCain agreed to 2,500 new visas.

Even that smaller number failed to pass the Senate, despite its bipartisan support. Sen. Mike Lee, R-Utah, blocked passage of several NDAA amendments in June 2016 in an effort to get consideration of an unrelated amendment. That upset McCain, who suggested on the Senate floor that if an Afghan ally was killed as a result, there would be blood on Lee’s hands.

“People are going to die, I tell the senator from Utah,” McCain said, in remarks broadcast on C-SPAN June 9, 2016. “They’re going to die if we don’t pass this amendment and take them out of harm’s way. Don’t you understand the gravity of that?”

The Senate recessed for the summer without passing either amendment. Ultimately, the committee that reconciles the bills passed by the two houses of Congress authorized 1,500 more visas—a number that supporters knew would not be sufficient. This spring, Shaheen, McCain, Reed and Tillis introduced a bill that would add 2,500 more visas.

“For these Afghans, it really is no exaggeration to say that this is a matter of life and death,” Shaheen said, according to the Congressional Record. “Interpreters who served the U.S. mission are being systematically hunted down by the Taliban; and unless Congress acts, this program will lapse, and we will abandon these Afghans to a harsh fate.”

Shaheen’s remarks also referenced the other major political obstacle to the SIV program: Trump’s executive orders on travel from majority-Muslim countries. As she noted, the original “travel ban” barred Iraqis from entering the country for 90 days—with no exemption for SIV holders. One of the first high-profile cases related to the ban concerned an Iraqi SIV holder detained at New York’s John F. Kennedy International Airport for 18 hours.

A backlash—from the military as well as immigrant advocates—quickly led to an exception for SIV holders. The second executive order, issued in early March, left Iraq off the list of countries whose citizens would be barred. However, because the Iraqi SIV program is closed to new applicants, many former allies now try to get in as refugees; and refugees will still be expressly banned by the order if it goes into effect. The U.S. Supreme Court will hear oral arguments during its next term.

DETENTION QUESTIONS

And while Afghan nationals were never banned, there’s evidence that in practice, if not by law, Afghan SIV holders have problems entering the United States. In two incidents in March, U.S. Customs and Border Protection detained and attempted to deport Afghans with valid SIVs.

At least one of these SIV holders, a man detained at Newark International Airport, remains in custody as of press time, and—because authorities convinced him to sign a document relinquishing his visa—has been forced to file for asylum to avoid deportation.

These detention cases are sealed, and the federal government declined to comment publicly on either, except to say that CBP officers may further scrutinize visa holders at their discretion. Increased news reports of arbitrary denials of entry, aggressive Immigration and Customs Enforcement arrests and more suggested that the agencies were indeed flexing their muscles in the weeks following the inauguration.

The International Refugee Assistance Project’s communications manager, Henrikke Dessaules—whose organization has worked with SIV holders for years—points out that this kind of treatment is new.

“We can only assume that this has something to do with CBP using their discretionary powers,” she says. “Maybe this will be the new reality for our clients.”

Amin has been working to settle into his own new reality. Just after his arrival in the U.S., he was living with the Ball family and waiting for his green card, which would allow him to work. He has plans to go back to school and earn a master’s degree to further his undergraduate degree in business.

But the fate of other U.S.-Afghan allies remains uncertain. The Trump administration has taken a hard line on immigration, particularly from majority-Muslim countries—but it has also shown a willingness to pursue military priorities.

Cooper, the retired Marine now with Human Rights First, says that veterans, as a rule, care a great deal about the SIV program.

“I think you are hard-pressed to find anyone who served in uniform that doesn’t ... support the special immigrant visa program. It’s almost unanimous,” he says. “I’ve never heard anyone that served over there that hasn’t said that absolutely, these folks deserve to come in here—they saved our lives.”
Female lawyers are working for income fairness—by suing their firms

By Stephanie Francis Ward

Traci Ribeiro is single and has no children. Practicing law, the Chicago insurance-defense attorney has said, gives her significant joy.

“It’s what I do for fun. So the usual defenses firms use for not paying women fairly, they couldn’t use those with me even if they wanted to,” the Sedgwick partner said last November, shortly after she filed an Equal Pay Act lawsuit against the firm.

The lawsuit initially was filed in the Superior Court of California in San Francisco, where Sedgwick was founded. The firm won motions to move the complaint to federal court and compel arbitration, based on the firm’s partnership agreement. By April the parties had reached a provisional settlement, according to a federal court filing; and David Sanford, Ribeiro’s lawyer, said that neither he nor she would comment on the case further. On Aug. 3, a receptionist with Sedgwick’s Chicago office told the ABA Journal that Ribeiro was no longer with the firm.

Ribeiro is one of two female partners and three former partners who have sued their law firms in the past two years, charging gender discrimination in compensation. All are represented by Sanford, a Washington, D.C.-based employment lawyer, and claim that male partners with comparable or inferior performance earned more than they did.

The lawsuits’ allegations aren’t surprising, but the fact the women came forward is. Although statistical data repeatedly shows that women at large law firms earn less than their male counterparts and have fewer leadership opportunities, regardless of work experience and practice areas, suing for gender discrimination continues to be seen as career suicide for someone who does not want to leave big-firm life or feels she can’t afford to.

Sanford, who has also brought gender discrimination actions against Greenberg Traurig and Howrey (which folded in 2011), said in November he was representing 12 different lawyers charging gender discrimination against their firms. Most of the matters, he said, are not public, but those that are get significant media attention.

“That makes it seem like a new thing, but
it’s not for me or my firm,” Sanford said. “What I have observed is that there is an increasing groundswell in interest and support for this kind of action. When courageous people step forward and shine a spotlight on pay and promotions practices in the workplace, a lot of people take note.”

Law firm disputes frequently go to arbitration, and almost all of the agreements require confidentiality, says Merrick Rossein, an employment professor at the City University of New York School of Law. He’s also a member of the American Arbitration Association’s national panel for employment resolution.

“I’ve had a number of different cases, but I’ve certainly seen more gender and age discrimination cases than other cases,” Rossein adds. “One of the patterns in terms of gender is that women complain early on that they didn’t have the same type of mentoring as men and weren’t assigned cases which would lead in a direction where they could be seen in the firm as fully contributing associates. And certainly the very competitive firms are based on old male models. Some of that has been eliminated, but it’s still there in too many firms.”

Two of Sanford’s clients claim they were frequently assigned underutilized associates who often lacked the legal skills of those paired with male partners. All say law firm management was significantly or exclusively male, and the firms had a culture that favored men over women.

“Early on, it became apparent to me that women were perceived to be treated as second-class citizens,” says Kerrie Campbell, who in August 2016 filed an employment discrimination lawsuit against now-merged Chadbourne & Parke. She continued to practice with the law firm until April, when she was expelled by the partnership.

Seventy partners voted in favor of the expulsion, Law360 reported, and hers was the only vote in support of her staying. (Norton Rose Fulbright announced its merger with Chadbourne on June 30.)

SUE BUT STAY

The choices faced by female lawyers in such situations don’t provide much appeal: Stay silent and see no change. Leave and hope for better opportunities elsewhere.

Or sue, facing repercussions no matter whether they leave or stay for the legal battle.

“Should I have gone to another firm and hoped not to expect the same thing? I don’t know if that’s going to be the case, so why not just fight it. It’s about fairness first and foremost,” Ribeiro said in November. “As long as they keep letting me have staff, then I keep making them money. So it’s not in their best interest to push me away.”

Ribeiro, who in her lawsuit claimed to be Sedgwick’s third-highest business generator, sought class action status, but no one had joined her by the time the case settled. Campbell’s lawsuit, which now includes Norton Rose, was filed in the Southern District of New York and also seeks class action status. Its other plaintiffs are Mary Yelenick, a former partner who is now of counsel at the firm, and Jaroslawa Z. Johnson, who previously was managing partner of Chadbourne’s Kiev, Ukraine, office.

The third lawsuit, filed May 12 against Proskauer Rose, has a Jane Doe plaintiff. The U.S. District Court for the District of Columbia filing, which does not seek class action status, alleges that in addition to the Equal Pay Act, Proskauer violated the Family and Medical Leave Act.

The Proskauer partner joined the law firm in 2013 and claims she was told that if she generated at least $7 million in revenues a year, she would be paid more than $3 million annually, according to her complaint. That didn’t happen, her lawsuit says, and she was rebuffed after expressing an expectation to earn at least $2.75 million.

Last year, Proskauer paid a new male partner about 65 percent
more than the plaintiff, though his client originations were only 63 percent of what she had, according to the suit. The filing mentions another male partner who earned 40 percent more than she did. She and the man had approximately the same amount of client origina-
tions, but she had more than twice as many billable hours, the complaint states.

Interestingly, Kathleen McKenna—an employment partner in Proskauer’s New York City office—represents Chadbourne in the gender discrimination lawsuit filed by Campbell. That’s unusual, says Ariana Levinson, a labor and employment professor at the University of Louisville’s Louis D. Brandeis School of Law.

“Maybe [the plaintiff] realized she had a case against Proskauer when she was working on or heard from colleagues about the Chadbourne case,” Levinson says. “I would think Proskauer might complain that they were targeted by David Sanford in an effort to pressure them not to defend these types of cases, but I haven’t heard anything like that yet.”

According to the Proskauer partner suing the firm, colleagues became increasingly hostile after her compensation complaints, and things got worse when she stepped down as first-chair in a trial one month before it started due to a family emergency.

Like Ribeiro, the Proskauer partner has an arbitration clause in her contract. Sanford, who would not comment on the client’s identity, maintains the arbitration clause does not apply to her situation. The lawsuit claims she was diagnosed with severe hypertension, a heart valve condition and esophagitis. She is seeking more than $50 million in damages.

“The hostile, discriminatory and retaliatory treatment she has faced at work made her sick. The harm she has suffered is part of the compensatory damages we are seeking,” Sanford says.

In a statement about the lawsuit, Proskauer asserts that the median compensation for male and female equity partners is almost identical before the firm considers other factors, like specialty and experience. It also states that out of 49 partners in the plaintiff’s department, she’s been among the top five earners.

“She claims it is unfair that she was 18th in client origina-
tions among equity partners, yet only 32nd in compensation for 2014–2016,” the statement reads. “Here’s what she is not telling you—in that same three-year period, she ranked 32nd in revenue generation and 134th in realization among all partners, which reflects the lower profitability of the revenue for which she claims credit. In 2016, she ranked 40th in revenue generation and 165th in realization.”

Released May 15, the statement also claims the plaintiff’s lawsuit is “riddled with situations that never occurred.” And it notes that the woman has worked with different law firms. Like Ribeiro and Campbell, the Proskauer plaintiff is a lateral partner.

“The plaintiff left each of her two prior firms after just four years and just completed her fourth with ours,” the statement reads. “That might be her view of partnership. It is not ours.”

Proskauer filed a summary judgment motion in June, arguing that the plaintiff is an equity partner, not an employee.

GOOD IDEA?

If female law partners think they are being treated unfairly, bringing legal action may not be the best way to advocate for themselves, says Lauri Damrell, an employment partner with Orrick, Herrington & Sutcliffe in Sacramento, California. Damrell, whose clients include law firms, advises getting as much feedback as possible and being self-reflective.

“If you have concerns early on, talk with mentors and understand the reasons for their decisions,” she says. “Don’t get to the point where you feel like you’re on your last rope.”

“To say that there’s not discrimination out there is foolish,” Damrell says, “but I’ve also seen instances where the employee bringing the claim had some issues where they were not self-aware.”

Even if someone is an excellent attorney, she adds, that does not mean the person would be the best partnership choice for a law firm.

“What is valuable to one firm
may not be valuable to another, depending upon their mix of lawyers, practice areas, clients, geography and so many other factors,” Damrell says. As far as partnership and promotions, “it’s really hard to write down and specify criteria. Part of the decision is the right mix. You might be a great candidate, but the firm doesn’t need someone in your lane.”

But figures quoted by the ABA Commission on Women in the Profession in its 2017 report A Current Glance at Women in the Law show more than lane choice may be involved.

The fact is that in October 2015, the National Association of Women Lawyers and the NAWL Foundation reported after a study of the 200 largest law firms that 30 firms’ responses showed a typical female partner earned 80 percent of what a typical male partner did, the commission points out. The commission also notes 2015 figures from the U.S. Bureau of Labor Statistics showing female lawyers’ weekly salary was 89.7 percent that of male lawyers, up 6.7 percentage points from the previous year.

That being said, it seems that all law firms need partners with significant business, and the three plaintiffs claim they have or had that. Some of them claim they had significantly more business than many male partners, yet were compensated similarly as men who had less business than they did. The NAWL found no firms reporting having a female as the highest earner.

Ribeiro, formerly a special counsel at the Chicago insurance-defense firm BatesCarey, joined Sedgwick in 2011 as a contract partner. A client suggested the move, and in 2012 she was promoted to nonequity partner.

That same year, Ribeiro discovered that female associates who worked for her earned $40,000-$50,000 less than comparable males at the firm. She brought that to management’s attention in September 2012 and advocated for raises on the women’s behalf.

“What really stood out was that the women were more profitable, had higher hourly rates and billed more hours than the men,” she said. Later that year, Ribeiro discovered she, too, was underpaid.

“I could tell that the men who had no business made almost the same as me,” said Ribeiro, who suspected that sticking up for her female associates had something to do with her alleged compensation discrepancy.

According to the lawsuit, the head of Ribeiro’s practice group stated at a November 2016 equity partner meeting that Ribeiro “needed to learn to behave.”

“And in order to teach her to behave, [that lawyer] recommended lowering Ribeiro’s compensation for the year,” the lawsuit states. It goes on to assert that he labeled her as a problem employee, although he never had any personal interactions with her.

Sedgwick did not respond to interview requests.

According to the complaint, no other equity partners made efforts to correct the group leader’s behavior. However, a female equity partner did tell Ribeiro that based on generated revenue, she should have received significantly more compensation.

Between 2012 and 2015, Ribeiro said, she tried to work with the firm regarding her compensation and continued to pursue an equity partnership. In 2015, she met with the recently elected chair of the firm. When she shared concerns about what she saw as unfair treatment, the complaint says, he implied that it was her fault that she had not yet made it to equity partnership.

He did not have suggestions about what she could specifically do to improve, according to the lawsuit, but did ask if her caseload could keep less productive partners in the California offices busy.

The lawsuit, which sought $200 million in damages, compares Ribeiro to the plaintiff in Price Waterhouse v. Hopkins, a landmark suit in which plaintiff Ann Hopkins claimed she was denied partnership at the accountancy firm due to sex discrimination because the firm saw her as not fitting its idea of what a woman should look or act like. In 1989, the U.S. Supreme Court found that the Title VII ban on sex discrimination includes treatment of those who don’t conform to gender norms.

‘ENOUGH IS ENOUGH’

Shortly before Ribeiro contacted the Equal Employment Opportunity Commission, Sedgwick promoted one person to equity partner. The lawyer was male, and Ribeiro suspected that he had less than 10 percent of the revenues that she did.

“Ribeiro is decisive and assertive. Those skills enable her to obtain successful client outcomes, which resulted in her being entrusted with additional client engagements,” her lawsuit states. ”But because she is a woman, Sedgwick’s male leadership perceives her as a second-class citizen who should be kept in her place.”

“It’s gotten to the point where some of us are willing to say enough is enough,” said Campbell, the former Chadbourne partner suing the firm, who was first interviewed in October, before she was expelled from the partnership.

“I’m bringing the lawsuit because I think discriminatory treatment needs to stop,” she said in a subsequent interview in July.

“Many women who have been treated unfairly do not try to seek a remedy because it is difficult. But nothing will change if people do not stand up.”

Campbell, a former Collier & Shannon partner who handles disparagement cases for consumer safety product companies, joined Chadbourne in 2012 after her old law firm merged with Manatt Phelps & Phillips. She brought with her 20-plus clients, according to the complaint, and in 2014 generated more than $5 million in collections for the firm.

Like Ribeiro, Campbell said the firm saw her business generation as a coincidence. Based on the offer letter when she joined, Campbell said, she expected to earn annual compensation of at least $750,000 plus a merit bonus.
“What I actually received was far less than expected,” said Campbell, describing Chadbourne’s compensation system as “vague, murky and confusing.”

Chadbourne based partner compensation on a points system determined by the five-member management committee, according to a court memo filed by Campbell’s lawyers in support of her request for collective action. Until recently the committee had no female members, and the points awarded are determined by anticipated revenues. The committee routinely overvalues male partners’ anticipated contributions, according to Campbell’s complaint. It also alleges that female partners frequently are awarded a lower number of points, while men who are equally or less productive receive higher point values.

In the court memo, Campbell’s lawyers assert that the average base pay for Chadbourne’s female partners in 2016 was 21 percent less than their male counterparts. Also, the filing argues that for 2015, only 28 percent of the female partners received merit bonuses. Comparatively, 44 percent of the male partners received bonuses that year.

Campbell claims that she demonstrated the ability to generate more than $2 million in revenues when she joined Chadbourne in 2014, based on her collections at Manatt, and for that she was awarded 500 points. Campbell asked that her points be increased to 850.

According to the lawsuit, Andrew Giaccia, then Chadbourne’s managing partner and now vice chair of the U.S. management committee at Norton Rose, claimed Campbell’s 2014 revenues were a “fluke,” and told her that she was “no Andrei Baev.” Baev, who was a new lateral partner, was guaranteed 1,350 points by the law firm for two years, according to the complaint.

A project finance and corporate transactions attorney who worked in the firm’s London and Moscow offices, Baev left in May to join Reed Smith. According to Campbell’s lawsuit, Baev’s total collections since he became a partner were about $101,000. That equaled approximately 2 percent of Campbell’s contributions to firm revenue.

“Nevertheless, under Chadbourne’s male-dominated leadership and compensation system, Baev has easily made many hundreds of thousands of dollars more than Campbell,” the complaint states.

Baev says, “The information about my collections is far from being correct, as [is] most of the other information provided in the complaint by Ms. Campbell, as it was denied by the firm in the firm’s response to the complaint.” He says that Campbell “provided not completed and twisted information to make her personal point without disclosing other relevant parts.”

Baev notes transactional work, with fees collected after a deal is completed, sometimes takes several months to close. “My practice in nature is very different from Ms. Campbell’s practice,” he says.

Baev adds that, “although the exact numbers are confidential, my total collection of legal fees from the matters that I originated for the firm in 2014-2016 exceeded the collections of Ms. Campbell on her originated matters for the same period of time.”

Campbell said that when she joined the law firm, she had the impression that there was only a one-tier partnership. Then she discovered that besides setting compensation, the management committee could hire and promote partners without the general partnership’s knowledge.

“I don’t for one second believe that I have ever been an equity partner. I am nothing more than an employee who was told what to do,” Campbell said. “The management committee hides information from the general partnership, refuses to disclose financial decisions and all compensation decisions are made in secret.”

**ATMOSPHERE OF CHANGE**

Campbell was asked to leave the firm in 2016, according to her complaint. The stated reason was that her practice did not fit with its strategic direction. It was suggested that she’d be a “partner in transition” and leave as soon as possible. “The management committee decided to ‘incentivize’ Campbell’s speedy ouster,” the complaint says, by making her salary at the firm that of a first-year associate.

Campbell stuck around instead. She tells the *ABA Journal* that after she filed, the partners in her hall moved to a different part of the floor. Few if any would speak to her after she was asked to leave.

“I have the distinct impression that no one wants to be in the elevator with me,” she said in October. “We are in the business of handling disputes every day. We show professionalism and work through our problems. I feel like this is the opposite of how professionals should conduct themselves.”

Chadbourne tells a different story. In its answer to Campbell’s complaint, it alleges she didn’t generate the revenue that she claims. The November 2016 filing details a high-net-worth client she brought to the firm who allegedly refused to work with her due to dissatisfaction with how she handled a previous matter. He did agree to work with a male Chadbourne partner, according to the court filing, and the matter brought in approximately $1.5 million. Campbell had previously
estimated the work would generate $2.1 million and received credit for the amount in 2014, according to the law firm.

In a statement sent to the ABA Journal, Chadbourne denies all claims that Campbell made against the firm:

“No business purpose could be served by deliberately undermining or underpaying a lateral partner,” the statement says. “In fact in the past, Chadbourne has asked other partners—many of whom are male—to transition from the firm when they did not deliver on their business objectives. Much of what this case reflects is the legal profession’s ongoing struggle with lateral hiring as it is well-known that a large number of laterals do not succeed.”

Various motions in the action are pending before the court, Sanford says. In June, Chadbourne lost its predisclosure motion for summary judgment.

While some question whether filings like Campbell’s will be successful, others think they might have a good chance, given case law and the changing structures of law firm partnerships. Over the years, federal courts have held that some workers with a partner title are actually employees under Title VII of the Civil Rights Act because they don’t control the operations of the firm and have their pay and tasks set by others.

In 2002, the 7th U.S. Circuit Court of Appeals at Chicago found that a group of Sidley & Austin partners who brought an age discrimination claim against the firm were unlikely to be considered employers under federal law, given that a 36-member committee controlled the firm. The opinion notes that the firm had 500 partners, and only those already on the committee could elect others to the group. The lawsuit settled in 2007 for $27.5 million.

“In this new structure of law firms, where you have a lot of different classes of citizens, from the outside it looks like someone is a partner. From the inside, you need to know what that means,” says Stewart Schwab, an employment professor at Cornell Law School.

“If you can show that the male partners are making a lot more money than the female partners, I think those will be good claims.”

According to the National Association of Women Lawyers survey, men account for 82 percent of law firms’ equity partnerships. Still, if someone wants to continue practicing law in a large-firm setting, suing for gender discrimination is risky, Rossein says.

“I’m always concerned about people being able to move on with their careers,” the CUNY law professor says. “It’s hard to give good advice, but maybe the best advice to give people is the advice to move on.”

Alternatively, the promotion of such fears could be a way to keep people from suing, according to Sanford. Francine Friedman Griesing, his client who sued Greenberg Traurig, now has her own litigation firm. Her law firm website lists 14 other attorneys. Similar clients have gone in-house or joined different law firms, Sanford says, and some have become mediators and expert witnesses.

“It’s a big world, there are a lot of opportunities, and people within the law who are talented and well-trained can do a lot of things,” Sanford says.

ON HER OWN

Campbell is the primary income earner in her family, and she and her husband have six children. Complicating things are partnership contributions Campbell made to Chadbourne before she was expelled. They totaled more than $200,000, and she took out a loan to make the payments. The contributions have not been returned, according to Sanford.

“It’s resulted in a financial disaster for me and my family,” Campbell says. “There are payment terms that have extended into years, and I’ve got these contract agreements to pay interest.”

By July, Campbell had opened her own law firm in Washington, D.C.

Levinson, the University of Louisville law professor, suspects that when a female partner enters arbitration with a firm regarding employment discrimination, the word gets out—despite confidentiality clauses—particularly among other law firms thinking about hiring the partner.

“There’s code speech, like ‘not a team player’ or ‘can’t get along with staff,’ ” Levinson says. “There’s all kinds of things they can say to signal that someone is a troublemaker, and people know.”

Damrell agrees. “We’re still in a culture where people will judge, and I think the judgment around bringing a lawsuit is gender blind,” she says.

But clients may see things differently. According to both Campbell and Ribeiro, theirs have been supportive.

“They know me, and they know how hard I work and how accessible I am. They have no doubt that I am not being paid equally,” said Ribeiro in November, adding that when her lawsuit got media mention, clients often checked in to see how she’s doing.

“My answer is ‘OK,’ but I’d rather be practicing law with no distractions.”
ABA president’s goals focus on young people and the future

By Lee Rawles

ABA President Hilarie Bass has had a long and successful career as a commercial litigator for Greenberg Traurig in Miami, where she serves as co-president. In one recent case, she was able to recover tens of millions of dollars for her construction industry clients from the Chinese manufacturers of defective drywall.

But her community service with organizations such as the United Way and her pro bono work have been just as impactful.

In 2010, as the pro bono attorney for two foster children, Bass helped bring an end to a Florida state law barring gays and lesbians from adopting children. At the time, although her young clients had been raised by gay foster parents, the couple could not formally adopt the children. Bass led the team that represented the brothers during the two years it took for the case to work its way through the courts.

“She had a passion for this issue,” said Judge Cindy Lederman of Florida’s 11th Judicial Circuit in a video that honors Bass for receiving the 2017 Judge Learned Hand Award from the American Jewish Committee. “I ruled that the law was unconstitutional, and she was the first to put on evidence from the child’s perspective, and how this related to the rights of the child, the permanency issues relating to the child, but also the well-being of the child.”

Bass’ experience in that case was foremost in her mind when she decided on a pro bono project for her presidency, which began at the close of the 2017 ABA Annual Meeting in New York City in August, and will last through the 2018 annual meeting.

“I found the experience of representing children incredibly inspiring, and it made me want to do more,” Bass says. “It is why I decided that the pro bono focus of my year will be homeless youth. There are 350 homeless shelters in this country with significant homeless youth populations, and my hope is that we can pair law firms, lawyer groups and bar associations with each of those homeless shelters. The goal is to make a commitment that we will provide at least one day a month of free legal advice to the homeless youth.”

According to Bass, there are about a dozen common legal needs experienced by homeless young people, such as accessing their birth certificates, re-entering school or applying for benefits. “There are recurring legal issues that would be relatively easy for a lawyer to resolve, but that might be overwhelming for a homeless youth to tackle without assistance,” she says. “Many times these simple legal problems can be resolved expeditiously and make a real difference in the ability of that child to move forward with their lives.”

FOCUS ON THE FUTURE

In some ways, Bass’ career path has been straightforward. She graduated magna cum laude from George Washington University after majoring in political science. She graduated summa cum laude from the University of Miami School of Law and has been with Greenberg Traurig since she was a summer associate there as a 2L, over 30 years ago.

She did take a detour in between college and law school. “I had done a lot of acting throughout my youth in South Florida,” Bass says. “I graduated college in three years, so I was only 20, and concluded that I would give my acting career one last shot because I was not ready to go to law school. Instead, I moved to New York and studied acting with Lee Strasberg for three years.”

Though she didn’t make acting her
permanent career, it was not wasted time. "I think as a litigator, anything that makes you more comfortable talking in front of people is a positive," Bass says. "So certainly my acting experience was helpful."

Bass, who as an alum donated $1 million to the University of Miami School of Law, is concerned with making sure today’s law schools are properly preparing students for their own futures. "One of my major initiatives is the creation of a commission on the future of legal education, which the ABA Board has already authorized, and we have lined up some of the top experts in the field."

The commission will be looking into the decline in bar passage rates. "Whether there are changes in the test that have caused the decline in bar passage rates, whether there could be enhanced transparency to help law school deans better prepare their students—there are a lot of unanswered questions," Bass says. "But we know that many of the states across the country are individually looking into questions about the bar exam. Instead of addressing this issue state by state, it makes sense for the ABA to get involved because one of the things we do best is bringing the relevant players under the tent."

Technology training will be another focus of the commission. The skills required of future lawyers may be significantly different than what law schools are currently teaching. Bass hopes that through the embrace of technology, lawyers will be able to shrink the access-to-justice gap.

Another of Bass’ major initiatives for her year as bar president will be conducting the first longitudinal study on why a significant number of women have left the practice of law. For Bass, who established the Greenberg Traurig Women’s Initiative to help female lawyers advance in their careers, this is a huge concern.

After law school, the number of male and female law graduates is “about 50-50, and they enter the profession in relatively equal numbers,” Bass says. “But by the age of 50, less than 25 percent of the attorneys who remain in the profession are women."

“Most of us assume that women left the practice of law in their mid-20s or 30s as a result of having children or balance issues. But what the recent studies have shown us is that most of the women are actually leaving in their 40s and 50s. That happens to be the time at which one would expect women to be reaching the highest levels of their career, due to their experience and expertise,” she says. “And these women are not altering their practice setting by opening their own firm or going in-house. But instead, they are simply saying: ‘I’ve had enough. I no longer want to be a practicing lawyer.’ “

“Given the important resource that the profession and the industry is losing, we think it’s critically important to figure this out,” Bass says. “And I’m happy to report that we’ve gotten tremendous support from law firms and in-house counsel throughout the country; we’ve already raised more than $350,000 for this effort."

The project will kick off in November with a conference at Harvard Law School, and the intention is to have the study results available before Bass leaves office. “The plan is to conclude our research and come back to the House of Delegates with some proposed policy changes by next August,” she says.

PUBLIC CONFIDENCE

Last year, the ABA Board of Governors approved the creation of the Task Force on Building Public Trust in the American Justice System. During Bass’ tenure as president, the recommendations of that task force will begin to be implemented.
These recommendations include working on alternatives to court fees and fines for people without the economic means to pay them and developing implicit-bias training for people in all levels of the criminal justice system. Implicit bias is an issue in which Bass has already been a leader for the ABA. As chair of the Section of Litigation, she was a driving force behind the creation of the Task Force on Implicit Bias in the Justice System.

Another element of the working group’s task is to develop public engagement programs, Bass says. “For example, going into local communities and high schools to explain what happens when there’s a police shooting: Who makes the decision about whether to bring charges, what is a grand jury, what is an indictment, how does that process play out?”

Another way Bass intends to build public trust and accomplish the ABA’s mission of educating people about the rule of law is through the creation of ABA Legal Fact Check. Legal Fact Check will release advisories through a website and press releases whenever current events prompt questions about the law. When there is public debate about what the U.S. legal system has to say about a particular issue, Legal Fact Check will provide context and clarity.

“So, for example, if someone makes a statement such as: ‘An American citizen who burns the flag should have their citizenship revoked,’ ABA Legal Fact Check will within hours come out with a short and simple nonpartisan statement saying that in 1989, the U.S. Supreme Court held that burning the flag is a First Amendment right,” Bass says. “We hope that we can become a resource for both our citizens as well as the media. We want everyone to know that when there is a dispute about what the law is, they can look to the American Bar Association for confirmation.”

Bass will focus on her initiatives and on the association’s long-term needs. Two challenges the past several presidents have faced are increasing membership and retaining younger lawyers. In Bass’ view, once younger attorneys are shown the benefits of the ABA and the lawyers. In Bass’ view, once younger attorneys are shown the benefits of the ABA and the opportunities for public service it presents, they’ll become much more engaged.

“I think it’s up to the older lawyers to do a better job of explaining the value to younger lawyers of bar association participation,” she says. “Because certainly when I was a young lawyer, I didn’t see much value in the idea of leaving my office in the middle of the day and going to spend two hours at a bar lunch. But one of the lawyers in my firm came and said, ‘You’re going to go.’

“And of course once I showed up, I learned the value of it and continued to participate.”

Iman Boundaoui grew up knowing that good fortune is not earned.

“You don’t choose the circumstances that you were born into,” she says. “Fortune is a gift. So you think: How can you use it to empower people, to inspire people, to encourage people?”

She learned a lot about that by watching her father. An immigrant from Algeria, Boundaoui’s father worked two jobs while he earned his PhD in math and statistics. Once his career took off, he was driven to help other immigrants.

Every Saturday, he provided free computer classes in a small office that he rented and equipped. His class grew from one or two students to a couple dozen, all eager to improve their chance for employment.

“I saw that, and I learned from that,” says Boundaoui, now a civil litigator at Drinker Biddle & Reath in Chicago and a member of the ABA Young Lawyers Division. “I grew up with a passion for that.”

That passion drove her to become a coordinator of the Travelers Assistance Project, launched as a rapid response to President Donald J. Trump’s executive order to ban foreign travelers in the wake of the president’s ban.

**FLIGHT SERVICE**

Boundaoui was among 300 Chicago-area lawyers who volunteered to help at-risk travelers at O’Hare International Airport’s Terminal 5.

She sat with families whose relatives were questioned for up to six hours by U.S. Customs and Border Protection. She counseled travelers who inadvertently waived their green card rights because they thought they were helping expedite the process. She consoled tourists whose valid visa dates were slashed from six months to 12 days.

“They didn’t even know it was happening,” Boundaoui says. “And you have no right to legal representation unless you’re an American citizen.”

When the courts rejected the travel ban, Boundaoui watched for a response from the CBP. It wasn’t what she expected.

“More people are being denied at the border, despite having valid visas, than ever before,” Boundaoui says. “More people’s electronics are being searched than ever before.”

Of course, the CBP has the ultimate discretion to pull people into secondary inspection. But there’s a different environment, which appears to be discriminatory, she says.

Immigration lawyers have confirmed her fears, saying they see an intensity in border inspections unlike anything they have ever experienced. The most likely targets are foreign nationals from developing countries, Boundaoui says.

Operating under the umbrella of the Council on American-Islamic Relations in its Chicago office, the Travelers Assistance Project maintained an on-site presence at O’Hare long after the effort ended at most metropolitan airports. Lawyers were available 18 hours per day, every day of the week, for four months.

CAIR also created a website, which helped the volunteers organize and allowed foreign travelers to submit their itineraries, so Chicago lawyers could watch for them.

“We’re fighting for everyone. We’re fighting for humanity—all backgrounds, all nationalities, all religious groups,” Boundaoui says. “And our volunteer group...
is just as diverse.”

TAP eventually left the airport and was coordinating with travelers through the website and by phone.

However, a U.S. Supreme Court opinion in late June that allowed parts of the travel ban to take effect for some foreign nationals sent TAP lawyers back to O’Hare just before Independence Day weekend. Boundaoui says volunteers planned to stay for at least a couple of weeks, staffing two five-hour shifts daily to monitor the effects of the ruling.

“We continue to see the same treatment,” she says. “We don’t really sense a huge difference.”

However, she says, that could change when the cap on refugees, set at 50,000, is reached. She is uncertain what will happen to refugees who had obtained the appropriate documents or were working with resettlement agencies.

Meanwhile, the TAP founders have created a broader volunteer group called the Chicago Legal Responders Network to address issues beyond travel.

“This isn’t the first or the last fight for justice we’ll have under this administration,” says Boundaoui. “And we have to leverage the energy while people still care.”

The group has grown to more than 1,400 lawyers, students and social service providers in the Chicago area. They volunteer when local human rights organizations express a need.

IN HER FATHER’S FOOTSTEPS

Helping others is a legacy for Boundaoui that was instilled by her father, who died when she was 11. She remembers with amazement the outpouring of support from the community. To this day, she encounters people who stop her to talk about how her father touched their lives.

She hopes to follow in his footsteps. “I feel it’s the most important thing. When I leave this world, I want to look back and say, ‘I didn’t lose sight of that,’” she says.

As she strives to live up to her father’s values, she acknowledges a different type of struggle sparked by another family legacy.

Boundaoui has worn a hijab for 13 years. It creates a barrier with so many people, she says, evoking the stereotypes and biases about covered women.

“The hardest thing I’ve faced didn’t happen in a single moment,” she says. “It wasn’t an event. It’s for people to see me for who I am—my character, my value and my personality—in the state that I am as a covered woman.”

There’s always a wall, she says, and covered women “are the ones who have to fight to bring that wall down. There’s a ‘social tax’ you pay for looking different, and you know when that tax is expected.”

Steeled by her convictions, Boundaoui is willing to pay the social tax. She works harder to connect with people who are distracted by her hijab.

In the course of it all, she’s learned a lot about how people come together when they think their values are under attack. She says the human potential for love and caring is immense.

“I saw that come to life in Chicago in such an incredible way,” she says. “There is a shining light in all of us.”

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always “unplug,” I really try my hardest and I believe my kids know I am deeply invested in their lives.

Truly, the best part of my day is when I get to lie with each of my kids after the light is turned off and ask about their days. And while hearing their stories (if they feel like talking) is amazing, what is even more exciting is when they ask me about my day and what I did from leaving them in the morning until coming home. They are engaged and interested in what I do and—perhaps I am imagining things—proud of their mommy.

So my advice for working women? Enough with the minimizing: “I let myself feel OK about not being able to give 100 percent in everything I do.” We do give 100 percent, and our kids, spouses, bosses, colleagues and friends know it. They just may not have the energy to keep up. ■

Katy Mickelson is a partner at Beermann Pritikin Mirabelli Swerdlove in Chicago, where she serves the legal needs of all types of parties in myriad family and matrimonial law matters.

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Protecting Whom?

ABA opposes legislation that could endanger unaccompanied immigrant children

By Rhonda McMillion

The ABA is opposing federal legislation that it maintains would strip critical legal and other protections from unaccompanied immigrant children at the U.S. border and undermine the fairness and integrity of the nation’s immigration system.

Contrary to the bill’s title, the Protection of Children Act of 2017 would “eviscerate” the current protections that “recognize the particular vulnerability and needs of these children,” Thomas M. Susman, the ABA Governmental Affairs Office director, wrote to the House Judiciary Committee in June.

“As a country that prioritizes the welfare of children in our legal system and otherwise, we should not significantly diminish protections in place to ensure the appropriate treatment and adjudication of unaccompanied children,” Susman wrote.

Susman explained that the current framework protecting unaccompanied children was carefully crafted by Congress as part of the bipartisan William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, a law that was most recently extended in 2013.

Section 235 of that act requires that unaccompanied children be carefully screened, limits the time they may be held in the custody of Customs and Border Protection, and provides for access to counsel to represent the children in legal proceedings.

The Protection of Children Act, also known as H.R. 495, would subject all unaccompanied children to an expedited screening process by CBP officers and increase the length of time children may be held in custody from 72 hours to 30 days.

“Law enforcement agents are not equipped with training and child-welfare expertise to screen a child for specific signs of trafficking, fear of return or persecution,” Susman emphasized. “That assessment should be made by a trained child welfare specialist—and if one is not available, the child’s lawyer.”

In addition, he explained that the current 72-hour limit guarantees that unaccompanied minors are quickly moved to appropriate placement. They are safeguarded from remaining for lengthy periods of time in temporary CBP holding centers that are ill-equipped for the proper treatment and handling of children.

**RESTRICTING ACCESS**

Proposed changes to two forms of legal relief most often used by unaccompanied children—special immigrant juvenile status and asylum—also would greatly increase the chance that a child deserving of humanitarian protection may be returned to face persecution or abuse and neglect. The bill would remove the right of an unaccompanied child to first present his or her asylum claim to an asylum officer in a nonadversarial setting. It would also restrict the eligibility criteria for SIJ status only to children who have experienced abuse, neglect and abandonment by both parents instead of just one. This change would eliminate the ability of some children to reunify with one of their parents if they were abused by the other.

The association is also concerned about language that would weaken measures in place to help children obtain counsel. These measures are crucial in light of obstacles the children face because of their age, lack of education, language and cultural barriers, and the complexity of U.S. immigration laws.

Even under the current system, only about 50 percent of children have legal representation, and a provision in the bill that all children appear before an immigration judge within 14 days would make obtaining legal counsel even more difficult and undermine the fairness of the proceedings.

“Legal representation not only protects the child but also often improves the efficiency of the court process and helps ensure that the child and his or her sponsor understand the responsibility of appearing in court,” Susman wrote.

Despite Susman’s urging, the House Judiciary Committee approved the bill.

While recognizing that previous surges of unaccompanied children at the southwest U.S. border presented difficult challenges for immigration officials, the ABA will continue to urge Congress to oppose legislation that threatens due process and other safeguards for immigrant children and asylum-seeking children.

The association maintains the Immigrant Child Advocacy Network, created by the ABA’s Working Group on Unaccompanied Minor Immigration, as a hub for resources related to pro bono representation of children in removal proceedings.
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7 Deaths Point to Cyanide-Laced Pain Reliever

Mary Kellerman, a 12-year-old living in Chicago’s northwest suburbs, awoke one Wednesday morning with a headache and a sore throat. She walked to her medicine cabinet and grabbed a bottle of Extra-Strength Tylenol. Within seconds of taking two capsules, she fell to the floor, dead from what paramedics first thought to be a heart attack.

That same morning, across a suburban swath north and west of Chicago, others died in rapid succession: postal worker Adam Janus at home in Arlington Heights; a Winfield mother of four after a trip to the drugstore; a worker at a Lombard phone center as she left the restroom. And at Janus’ home later that same day, Sept. 29, 1982, his brother and sister-in-law also dropped dead—after complaining of headaches—while planning his funeral. By the time flight attendant Paula Prince expired in her Chicago apartment, the terrifying fact was apparent: People were dying from Tylenol laced with cyanide.

What ensued was something close to public panic. TV and radio exploded with any available fact or conjecture. Police cars with public address systems roamed Chicago, warning citizens not to ingest the popular pain reliever. Though Johnson & Johnson had helped rule out widespread adulteration of the product, the company recalled it anyway, while offering up a hotline and $100,000 reward.

Hundreds of investigators had converged on the metro area by the time a handwritten letter arrived at Johnson & Johnson headquarters a week after the first deaths. It read: “Since the cyanide is inside the gelatin, it is easy to get buyers to swallow the bitter pill. ... So far, I have spent less than $50 and it takes me less than 10 minutes per bottle.”

The letter demanded $1 million to stop the killings. The envelope was quickly traced to a defunct Chicago travel agency. After questioning the owner, investigators zeroed in on Robert and Nancy Richardson. She was a former employee who’d gone unpaid when the company folded; he was a husband who took abnormal interest in her claim. The two had disappeared from Chicago weeks before the Tylenol deaths, but evidence emerged that they were not who they pretended to be.

In Kansas City a few years earlier, James William Lewis and his wife, LeAnn, had been suspects in a neighbor’s death. He’d been charged, but the case was tossed because of flawed police procedures. Both were also suspected in a series of low-yield financial frauds.

The extortion letter placed them in New York City; and Lewis, the troubled child of migrant workers, seemed to enjoy the notoriety of a high-profile pursuit. As they moved between flopshouse hotels, he wrote taunting letters to newspapers and, at one point, called a radio talk show. He was caught when recognized while reading Kansas City and Chicago newspapers at a New York library annex.

Though Lewis admitted penning the extortion letter, he was adamant that he had not committed the murders. He said the letter was intended to focus attention on his wife’s ex-employer and evidence that money had been diverted from travel agency bank accounts. Lewis was sentenced to 20 years in prison for the extortion attempt and an unrelated credit card fraud.

The Tylenol murders remain unsolved. Lewis, released in 1995, continues to be the prime suspect. In 2010, his home in Cambridge, Massachusetts, was raided in search of new evidence. But in 2011, investigators gathered DNA from convicted Unabomber Ted Kaczynski to determine whether he should be a suspect.

Still, the murders had an enduring impact on public health and perceptions of corporate responsibility. In 1983, Congress passed the Federal Anti-Tampering Act, making it a crime to interfere with consumer products. Johnson & Johnson’s response to the corporate nightmare, grounded in transparency and disclosure, became a model for modern crisis management. So successful was the company’s approach that it was later able to re-release Tylenol capsules in triple-sealed containers, now an industry standard.
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