WELCOME TO THE WEB 100

INSIDE:
- STATES PUSH JUSTICE REFORM
- SEX ASSAULT ON CAMPUS
- SPECIAL PROSECUTOR, THORNY CASE
- OUR CONSTITUTION IN CHINA
START HERE TO GET IT RIGHT

Get off on the right foot in your matters with effortless navigation to expert guidance.

Try Lexis Practice Advisor® today
LEXISNEXIS.COM/PRACTICE-ADVISOR
800.628.3612

650+ ATTY AUTHORS
91% ATTY AUTHORS CURRENTLY PRACTICING
260+ CONTRIBUTING LAW FIRMS
2x MORE PRACTICING ATTY AUTHORS*

*As compared to Thomson Reuters Practical Law network. Comparison data based on information available as of June 2017.
LexisNexis, Lexis Practice Advisor and the Knowledge Burst logo are registered trademarks of RELX Inc. Westlaw is a registered trademark of West Publishing Corporation. © 2017 LexisNexis. PA03211-0-0817
Patricia Brown Holmes:
“I have very long days
—as many as necessary.”

FEATURES

34 | Welcome to the Web 100!
Check out the 50 legal blogs, 25 law podcasts and 25 Twitter feeds we recommend for lawyers.
By Andrew Lefkowitz, Sarah Mui, Stephen Rynkiewicz and Jason Tashea

46 | Rallying for Reform
Criminal justice reform may be languishing at the federal level, but it's becoming a reality in the states with bipartisan support.
By Lorelei Laird

54 | From Campus to Courtroom
Sex assault investigations have become polarized and political.
By Wendy Davis

62 | You Only Live Once
Chicago attorney and Laquan McDonald special prosecutor Patricia Brown Holmes has done it all in her career—one that nearly came to a premature end.
By Erin Gordon
6 Letters
8 President’s Message
The ABA is working to address substance use and mental health disorders among lawyers.
9 Opening Statements
A Nixon Peabody partner spearheads a tech incubator to offer more opportunities to LGBTQ entrepreneurs.
10 The Global Wildlife Whistleblower Program offers rewards for prompt reporting of poaching.
12 Ten questions for Don Bush, a one-time Texas judge who became an EMT at age 70.
14 MAKING IT WORK Kirkland & Ellis’ Ashley Gregory shares lessons from the past that can propel your future.
15 Short takes and fast facts on the law / Cartoon of the month: See last month’s contest winner, and craft a caption for the current cartoon.
16 Docket
NATIONAL PULSE Legislators take aim at zero tolerance school policies.
18 NATIONAL PULSE Defense lawyers want to peek behind the curtain of probabilistic genotyping.
20 SUPREME COURT REPORT The justices consider limits on government surveillance powers over personal technology.
22 Practice
STORYTELLING How serendipity, Star Wars, Harvard prof Cass Sunstein and constitutional law intersect.
24 ETHICS Can lawyers text potential clients? When it comes to advertising, some states are saying yes.
26 WORDS Consider all your alternatives for how to best start a sentence.
28 Business of Law: Special Edition
BUILDING THE 21ST-CENTURY LAW FIRM Ethics opinions should reflect the present and future—not the past.
66 Your ABA
MEMBERS WHO INSPIRE Thomson Reuters’ Chang Wang walks the line to teach constitutional law to students in Beijing.
70 A new law championed by the ABA fights elder abuse and exploitation.
72 Precedents
Gen. Hideki Tojo is among 28 Japanese officials to stand trial for their involvement in war crimes.
ABA 2018
PARIS SESSIONS
JUNE 7–10
INTERCONTINENTAL PARIS LE GRAND HOTEL
PARIS, FRANCE

REGISTRATION INFORMATION
MEMBER PRICE $2,695 / NON-MEMBER PRICE $3,195

RATES INCLUDE:
• All CLE and Plenary Sessions, June 7-10
• Lunch with speakers on Friday and Saturday, June 8-9
• Welcome Reception and Dinner at the exclusive Cercle de l’Union Interalliée
• Reception at Hôtel de Ville
• Closing Reception and private viewing of the collections at Musée d’Orsay

GUEST PRICE $795

RATES INCLUDE:
• Welcome Reception and Dinner at the exclusive Cercle de l’Union Interalliée
• Reception at Hôtel de Ville
• Closing Reception and private viewing of the collections at Musée d’Orsay

PRE-TRIP TO NORMANDY JUNE 5-7, 2018
PER PERSON COST DOUBLE: 890 € / PER PERSON COST SINGLE: 1,150 €

Plan to join us for a special pre-trip to Normandy, France, June 5–7, 2018.
Stay at the charming Hotel Barriere Le Normandy, a seaside town of Deauville.
Visit Honfleur, Ste. Mere Eglise, Utah Beach, Pointe du Hoc, Omaha Beach and the American Cemetery. The trip includes a visit to Monet’s home and Gardens in Giverny and lunch at Moulin de Fourges.

VISIT AMBAR.ORG/2018PARISSESSIONS FOR MORE INFORMATION
As provided in Article 33 of the ABA Bylaws, the ABA Journal is published by

BOARD OF EDITORS  KATHLEEN J. HOPKINS, Chair, Seattle

EX OFFICIO  HILARIE BASS, President, Miami
ROBERT M. CARLSON, President-Elect, Butte, Montana
DEBORAH ENIX-ROSS, Chair, House of Delegates, New York City
MICHELLE A. BEHNKE, Treasurer, Madison, Wisconsin

EDITOR AND PUBLISHER  MOLLY MCDONOUGH
MANAGING EDITOR  REGINALD DAVIS
ASSISTANT MANAGING EDITORS  KEVIN DAVIS, LIANE JACKSON, VICTOR LL, SARAH MUI
ASSOCIATE EDITOR  LEE RAWLES
SENIOR WRITERS  TERRY CARTER, STEPHANIE FRANCIS WARD, DEBRA CASSENS WEISS
LEGAL AFFAIRS WRITERS  LORELEI LAIRD, JASON TASHEA
CHIEF COPY EDITOR  CHRIS ZOMBORY
ASSISTANT COPY EDITORS  SHIRLEY HENDERSON, JACKSON A. THOMAS
DEPUTY WEB EDITOR  ANDREW LEFKOWITZ
WEB PRODUCER  STEPHEN RYNKIEWICZ
DESIGN DIRECTOR  BOB FERNANDEZ
DEPUTY DESIGN DIRECTOR  BRENAN SHARP
PRODUCTION DIRECTOR  DEBRA MACDONALD
EXECUTIVE ASSISTANT TO THE EDITOR AND PUBLISHER  KENTASHA ORR

ADVERTISING & MARKETING
VP, SALES  SUZIE SMITH, 410-584-1980, SSmith@networkmediapartners.com
ACCOUNT EXECUTIVE  CARLY HEIDEGER, 410-316-9853, CHeideger@networkmediapartners.com
PRINT MARKETPLACE AD SALES  AWANYA ANGLIN-BRODIE, 443-689-7004, Awanya@networkmediapartners.com
PRINT CLASSIFIED AD SALES  DEBRA MACDONALD, 312-988-6065, Debra.MacDonald@americanbar.org
IN-HOUSE AD COORDINATOR  REBECCA LASS, 312-988-6051, Rebecca.England@americanbar.org
REPRINTS  JILL KALETHA, 574-347-4211, JKaletha@mossbergco.com

FOR CHANGE OF ADDRESS OR UPDATES, PLEASE CALL 800-285-2221

ABA JOURNAL  321 N. Clark St., Chicago, IL 60654, 312-988-6018, 800-285-2221
FAX: 312-988-6014  EMAIL: ABAJournal@americanbar.org
ABAJOURNAL.COM

ABA Journal December 2017 Volume 103, Number 12 (ISSN 0747-0088) ©2017. ABA Journal is published monthly by the American Bar Association. Editorial, advertising, subscription and circulation offices: 321 North Clark Street, Chicago, IL 60654-7598. Periodicals postage paid at Chicago, Ill., and at additional mailing offices. POSTMASTER: Send address changes for the ABA Journal directly to the American Bar Association’s Member Records Department, 321 North Clark Street, Chicago, IL 60654.
LawPay®
AN AFFINIPAY SOLUTION

The experts in legal payments.
The proven payment solution for lawyers.
Managing payments and growing revenue for over 45,000 law firms in the United States, LawPay is the only payment solution offered through the ABA Advantage program. Developed specifically for law firms, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind that your credit card transactions are handled the right way.

LawPay.com/ABA | 877-960-1621
OPENING SESSIONS
In “Jeff’s Law,” October, page 56, Attorney General Jeff Sessions is very selective in his memory. I can remember children having police dogs and water cannons turned on them in Birmingham, Alabama, and a church bombing that killed four little girls—also in Birmingham, Sessions’ home state. The truth is, he’s an ardent segregationist and would like to revert to Jim Crow.

George H. Sly Jr.
Wantage Township, New Jersey

I find it interesting that for such an article focused on the effects of the scientific method, there are such sweeping generalizations regarding topics such as crime. If people were in fear for their lives and homes and scrupulously locked doors and barred windows, even in medium-size towns in America, why not offer a statistic? If Sessions favors policies regarding crime reduction or prison management that have been categorically shown as false via studies, etc., why not give concrete examples? If Sessions suffers from a rose-colored historical viewpoint, perhaps the author suffers from an establishment viewpoint, i.e., a lack of actual basis for sweeping claims. That doesn’t encourage me to view the author’s editorializing with a great deal of confidence.

Linda Shirey
Phoenix

I’m not surprised that a Southern gentleman politician would desire the throwback days of the 1950s. After 40 years of law practice, 20 years ago my wife and I moved to Naples, Florida, for just that reason. We’ve never regretted it. It’s a shame the rest of the world can’t live as we do—unlocked doors and the car keys hanging over the visor.

Great article. He’s a complicated man with major responsibilities and looking for simple solutions. That’s one tall order! Good luck.

Harvey T. Siegel
Bonita Springs, Florida

FACE TIME OR WASTE TIME?
The use of facial recognition software described in “Face Time,” October, page 16, may seem like an efficient method of detecting criminals; however, the ABA Journal references Alvaro Bedoya’s finding about facial recognition software inaccuracies.

Facial recognition software is not always accurate and may lead to more events of incorrect identification of suspects. Inaccurate and incorrect results waste police resources and jeopardize innocent citizens. While police are questioning innocent people, the real perpetrator has plenty of time to make his or her escape or commit additional crimes. This inaccuracy of facial recognition systems may invade the rights of innocent citizens. The proposal to take photographs and bank them in case a crime is committed means innocent people are now available as potential suspects and increases the possibility of incorrect identifications. Instead, we should allocate resources to proven methods of correctly identifying criminals. With the increase in technology regarding DNA testing or fingerprinting, there should be more concrete ways to identify suspects in crimes.

Corinne Maupin
Cedar Lake, Indiana

CORRECTION
“E-Jury Consultant,” November, page 32, should have reported that Voltaire CEO Basit Mustafa previously worked in the office of IBM’s chief financial officer.
The Journal regrets the error.
President’s Message || By Hilarie Bass

Lawyers in Peril
ABA works to address attorney substance use and mental health disorders

In December, our thoughts turn to the holidays. For most, it is a joyous time, full of parties and quality time with family. But for many, this time of year is a reminder of those friends and colleagues that have been lost due to depression or addiction problems. There are few legal communities across this country that don’t have an example of a wonderful lawyer who is currently suffering through these issues, and we all know that stress brought on by holidays can exacerbate their problems.

Sadly, too many lawyers and law students experience chronic stress and high rates of depression and substance use. Studies show attorneys experience problematic drinking at a much higher rate than other populations. Depression, anxiety and stress are also significant problems in the legal community.

A landmark 2016 study conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs (CoLAP) found that 21 percent of licensed, employed attorneys qualify as problem drinkers. That compares to just 12 percent of highly educated workers in other professions. In addition, 28 percent of lawyers experience depression while 19 percent have anxiety symptoms. The study found younger attorneys in the first 10 years of practice have the highest incidence of these problems. These numbers represent the real-life suffering of our colleagues and are an important call to action. An attorney with an addiction problem or mental impairment is not only a risk to themselves, but also to their families, their clients, and to our profession.

A good lawyer must be a healthy lawyer. If left unaddressed, questions about lawyers’ health and competence will inevitably undermine the public’s trust in a profession dedicated to client service and dependent on that trust.

The ABA has studied this alarming evidence and has acted. Through CoLAP, we have a mission to assure that every judge, lawyer and law student has access to support and assistance when confronting alcoholism, substance-use disorders or mental health issues. CoLAP supports the work of state and local Lawyer Assistance Programs, which provide hands-on services to those in need.

In August, a coalition of groups, including CoLAP, released a comprehensive report titled, “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.” The report, issued by the National Task Force on Lawyer Well-Being, includes an ambitious roadmap to improving the mental health of lawyers. It proposes state bar action plans with simple checklists. We are hopeful this report will spark a broader conversation in the legal profession regarding substance-use disorders and heightened levels of depression and anxiety and guide policy changes and a cultural shift.

The recommendations focus on five central themes: (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession, (2) eliminating the stigma associated with seeking help, (3) emphasizing that well-being is an indispensable part of a lawyer’s duty of competence, (4) educating lawyers, judges and law students on lawyer well-being issues and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

In recognition of the significance of this issue, I have appointed a working group to develop model law firm policies on lawyer well-being. Other steps could include mandatory law school courses on the importance of personal well-being, discussions about eliminating alcohol from law firm marketing events and comprehensive mentoring programs for young lawyers to address the sources of stress such as debt and career advancement. Greater education aimed at prevention is needed, as are public awareness campaigns to eliminate the shame associated with substance-use disorders and mental health concerns.

The number of lawyers struggling with these issues is shocking. It is up to our profession to identify solutions to assist those already suffering, as well as to minimize those who will have to address these issues in the future. Instead of being disheartened, we should view this information as a clarion call. We need to change. ■

Follow President Bass on Twitter @ABAPresident or email abapresident@americanbar.org.
Firm Opens Technology Incubator
Partner creates more economic opportunity for LGBTQ entrepreneurs

WHAT STARTED AS A DISCUSSION about lack of funding opportunities for LGBTQ entrepreneurs evolved into a full-service incubator at Nixon Peabody’s San Francisco office. The white-shoe firm is now home to a rainbow crew of LGBTQ startups, with seven already part of the new StartOut Growth Lab and about a dozen in the pipeline.

“High-quality legal advice is often a challenge for any startup,” says Thomas Gaynor, managing partner of the firm’s San Francisco office, who initiated the tech incubator project. A gay rights activist for 30 years, Gaynor was concerned about the opportunity gap for LGBTQ-led businesses, particularly in tech.

So in March, the firm of 650 attorneys worldwide partnered with StartOut, a nonprofit founded in 2009 in San Francisco and New York City that supports LGBTQ entrepreneurs. The firm committed 2,300 square feet of office space to the project. The inaugural group includes...
Whistleblowing for Wildlife

Advocates hope rewards prompt reporting of poaching and other crimes

THE WORD WHISTLEBLOWER EVOKES names such as Edward Snowden, Daniel Ellsberg and Deep Throat. But the reach of today's whistleblower has begun to extend beyond the political jungle and into the animal kingdom through the Global Wildlife Whistleblower Program.

“The wildlife community had never been involved in whistleblower protection cases, and the whistleblower community had never been involved in wildlife protection cases. We blended the two,” says attorney Stephen Kohn, a partner with Kohn, Kohn & Colapinto in Washington, D.C., who founded the program.

The program has a referral network of 54 attorneys who, so far, are pursuing 16 cases that involve crimes against wildlife. Wildlife crimes have a broad definition that covers plants and animals—everything from illegal fishing to prohibited lumber imports.

Several current cases target the black market for ivory from poached elephants, an issue highlighted in a 2016 report by Interpol and the United Nations Environment Programme. The report found that in Tanzania alone, poachers kill about 3,000 elephants every year, generating a street value for ivory of more than $10 million.

Kohn saw an opportunity to utilize existing laws to provide relief to those in countries that lack a rule of law, yet are at the center of an extinction crisis. It was also a chance to develop a niche practice area.

Kohn’s program drew attention this year when it won a top award in the Wildlife Crime Tech Challenge, a competition run by the U.S. Agency for International Development.

The whistleblower program’s online Secure Internet Wildlife Crime Reporting System allows people to confidentially report violations and connects them with attorneys who help them apply for federal rewards.

Having handled whistleblower protection cases since 1984, Kohn thought federal criminal and civil statutes such as the False Claims Act and the Foreign Corrupt

2 OUT OF 3
POTENTIAL CLIENTS WILL CHOOSE
A FIRM THAT ANSWERS THEIR FIRST CALL OR EMAIL

Our dedicated team of legal virtual receptionists will handle your client so that your team can handle the case. We are here to be an extension of your firm, doing what we do best so that you can do the same.

answer1 | 800.771.8626 | ANSWER1.COM/ABA

Opening Statements

a social networking app and platforms for cybersecurity and video-centric marketing. Each company has at least one LGBTQ founder.

The incubator offers free development and legal advice, important services that can financially cripple fledgling companies, plus monthly events addressing themes such as business development and intellectual property. Participants are coached and mentored, with the goal of creating growth plans and attracting funding.

Gaynor says the gay community has progressed by leaps and bounds in terms of civil rights, but “economic independence is really the next stage.” Gaynor notes that tech’s “bro culture” can shield LGBTQ startups from getting ahead, drawing a comparison to disparities in the legal industry: “You can probably count on two hands the number of LGBTQ people running major law firms at this point.”

Offering up office space to the incubator was a no-brainer for Nixon Peabody, which, according to Gaynor, “has in its core DNA a commitment to equality and diversity.” And in a tech landscape that favors risk and produces a tiny proportion of so-called unicorn companies, it’s also an exciting opportunity for the firm.

“It’s not predictable who’s going to be the wonder project or wonder product that comes out. But wouldn’t it be wonderful if that happens as part of the StartOut Growth Lab?”

—Annalies Winny
SEARCH, SEIZURE & SURVEILLANCE: PRE-TRIAL LITIGATION & SUPPRESSION
A Trial Strategy and Resource Guide

SUMMARY:
Motions to Suppress are one of the most important and effective procedural tools that have traditionally leveled the playing field for the defense in court. But now modern law enforcement tools and techniques have raised new constitutional questions regarding our right to privacy and to be secure in our persons, houses, papers, and effects. In order to get that courtroom victory for your client, you need to be on the cutting edge of Fourth Amendment pre-trial litigation issues.

This brand-new edition from NACDL is the best way to stay up to date on the most important issues in Suppression and Fourth Amendment cases. Compiled from top-rated contributors, this new manual provides information you can immediately apply to your current cases. Available as a spiral-bound, hard-copy book containing over 500 pages of content including scholarly articles, sample briefs and motions, practice tips and techniques, and more!

ORDER YOUR COPY TODAY!
Call (202) 465-7661 | www.nacdl.org/TrialGuides

CHAPTHERS INCLUDED:
1. Recent Developments in Federal Search & Seizure Law
2. US Supreme Court 4th Amendment Update
3. Litigating Consent and Coercion in Searches
4. Challenging Computer Warrant Searches
5. Litigating DNA & Bodily Fluid Seizures
6. Home Searches
7. 4A Waivers and Other “Plea” Terms
8. Challenging New Surveillance Techniques
10. Biometric Data: The Frontiers of Face Recognition and How It Could Impact Your Cases
11. New Frontiers in Warrantless Surveillance: Drones and Spyware
12. Challenging Searches from the Streets to the Squad Car
13. Car Searches
14. Suppressing Evidence in Child Pornography Cases
15. Racial Profiling and the 4th Amendment
A Healthy Change

From plaintiffs to patients, this Texas lawyer successfully shifted careers at 70

RETIREMENT IS THE WRONG WORD to describe Don D. Bush's departure from his position as a magistrate judge with the Sherman Division of the U.S. District Court for the Eastern District of Texas. Transition is more like it, since Bush segued straight from law into medicine. After becoming a certified emergency medical technician and paramedic during his last months on the bench, the septuagenarian now pulls weekly shifts at a nonprofit urgent care clinic and with an ambulance service. For Bush, the shift was simply a new direction along a diverse and distinguished professional path, but will his latest career be his last?

You've been an army officer who's served in Asia and Southeast Asia during Vietnam, a name partner with a national litigation practice and many significant verdicts to your credit, and you became a federal magistrate judge in your mid-50s, overseeing a criminal docket considered to be among the busiest in the country. Why this latest career transition into medicine?

I've always had an interest in medicine. When I was in college, I worked in a hospital as a lab tech. My twin brother is a doctor. He went to medical school; I went into the army. My youngest daughter is a pharmacist, and my son is an ER doctor. For years he's been doing medical mission work in Haiti, so I always thought that was something I would be interested in doing with him.

Have you been able to do that yet?
Yes, we went in March of this year. I went down with my son, my daughter-in-law and three of my grandchildren. We spent two days in the mountains and two in a village; and in four days, we saw around 700 people. It was wonderful to be able to do it. The people down there have nothing. It really does open your eyes to the fact that our nation is truly a blessed nation. I'll probably go back next May to do a medical mission on a boat. We'll go to various ports that aren't always accessible during the regular mission.

Tell me about the work you do for the nonprofit medical clinic.

Two days a week, I volunteer at the QuestCare Clinic, a Watermark Community Church Partnership. It's an urgent care clinic staffed by volunteers. We only ask for a $10 donation if you can give it; otherwise, the medical care is free. Our waiting room is generally filled up every day; and we serve people from 80 to 90 countries, many of whom are refugees. In any one day, I will draw blood; I will run glucose tests, mono, flu, strep and pregnancy tests; take EKGs or do ear lavage. I might put a splint on somebody or give a steroid shot—whatever is ordered, I do.

You also work for an ambulance service. What do you do there?
I do critical care transports, taking people to nursing homes or from the hospital to rehab. For the most part, it's monitoring patients to make sure they get from place A to place B in good shape. But if they go south, you definitely have to know the protocol.

Why did you leave the bench—was there a mandatory retirement age?
No, I could have stayed. I think there's a magistrate judge who's 100 years old. Frankly, I'd done everything I had wanted to do or could do as a magistrate judge. I knew the job, so it was time to move on.

Luckily you had an exit strategy.

I did. I thought about it and decided to get my EMT certification. I did basic online-type courses on weekends; but I didn't feel like I had enough training, so I did my advanced EMT training. I did online courses and training courses for intubation and blood draws. I got all through that and thought I'd like some more training. So my last five to six months on the bench, I enrolled in paramedic school at night with about 40 other students. I remember the first night I walked in, I looked at all these young people and thought, “Oh, my gosh, what am I doing?”

Across all of your training, the classes and the hundreds of hours of clinical rotations, did the people you worked with know you were a judge?

Yes, and I think they got a big kick out of it. I did most of my clinicals in a hospital ER, and a lot of the doctors there knew my son. I also knew a lot of doctors because I played golf with them, so it wasn’t like I was coming in from the cold.

Do you ever miss being a practicing lawyer?

I miss the days of being in court, trying cases. But I don’t miss the contention.

How does the stress of a medical emergency compare with the stress of a high-stakes trial?

I think it’s more stressful to be a lawyer. In a trial atmosphere, the stress is there all the time. You’re always worried, wondering, “Did I do this right?” With something like a cardiac arrest, the stress level is higher; but the peak is right there, and once that’s done it’s over. If you haven’t brought them back in 10 to 15 minutes, you’re probably not going to bring them back.

Do you ever think about continuing your medical education?

I think about it, but my age is a limiting factor. If I was 55, I might want to become a nurse or a nurse practitioner, but it’s just not realistic at this point. And then my wife says, “No more school.” She’s proud that I am a paramedic, and I am enjoying it. It gives me a way to help people, and it’s a good way to transition into another phase of my life from army officer to lawyer to judge and now to paramedic. If I was young enough, I might say I would go back to practicing law. There are a lot of people who need immigration help and veterans who need help working with the VA. Maybe I will figure out a niche and do that.

—Jenny B. Davis
Opening Statements

MAKING IT WORK

Lessons from the Past Can Propel Your Future

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. Visit workingmother.com for more.

By Ashley Gregory

FOR ME, THIS CAREER HAS ALWAYS BEEN about having choices and the freedom to create the life I wanted. Growing up, I was aware of the consequences of women not having economic independence. I was particularly influenced by my grandmother in Michigan, a talented local radio host who was limited by her time and circumstances. She was confident, smart and accomplished—everything I aspired to be. But that wasn’t enough to secure her place in the world or a sense of security. When her marriage faltered, she lost all of that. Having a significant career was nonnegotiable for me as a result.

Looking back, my certainty was probably naive. When I started at a firm, I didn’t appreciate how low the odds of making partner for women were. I couldn’t have imagined that—20 years out of law school—the percentages of law firm equity partners who are women would not be much better than when I graduated. Regardless, I think my doggedness was the single most important factor in my success.

Fresh out of law school, I didn’t know exactly what being a corporate lawyer would look like. It turned out it was a great fit for me—I found my niche in debt finance and truly enjoy it. But on the way, there were periods when the job engulfed almost everything else in my life. When you are developing the skills, judgment and expertise necessary to advance, your life will sometimes be out of balance. Luckily I had a wonderful and understanding partner, and our shared goal of building a family and future together sustained me. Being able to focus on the bigger picture compelled me to keep going.

Every professional woman has a unique support structure, and I am always fascinated by how the women I know rely on their partners, family, friends and paid professionals to enable them to pursue their career goals. I am fortunate that my wife, Amy, and I aren’t burdened by traditional gender norms of who is supposed to do what. We have a fluidity about our home responsibilities that shifts with the demands of our careers.

The important thing to remember about having a career that allows you to have choices is to actually make the choices that are right for you. Amy and I knew that adoption was how we wanted to have our family. It was a long and unpredictable road that led to our precious son. Once he was in our lives, I wanted to be around for as much of his early years as possible. I took every day of my maternity leave and wouldn’t trade that time for anything. He just turned 3, and I have made it a point to be home for his bath and bedtime ritual most nights. For me, choices like that make this career continue to be sustainable.

Now as a senior partner, I have made it a priority to be a mentor and resource for the women behind me. I am the co-chair of Kirkland’s gender subcommittee and vice-chair of the New York recruiting committee. I think about the brilliant and talented women in earlier generations who did not live in a society that supported their ambition and about how far our own has to go to do so for all women and girls. I am filled with gratitude for what I have achieved and determination to do what I can to make this career a reality for more young women. My grandmother’s legacy demands nothing less.

Ashley Gregory is a corporate partner in Kirkland & Ellis’ New York City office whose practice focuses on debt financing. She primarily represents public and private corporate borrowers and private equity clients in connection with complex financing transactions.
**Hearsay**

**666**
No, it’s not just the sign of the devil. It was also the amount of the 2009 pay raises given to some professors at the Cleveland-Marshall College of Law. The revelation came during a lawsuit by former professor Sheldon Gelman, who claimed the school retaliated against him for unionizing the faculty—in part through a “symbolic” raise of $666 that carried satanic references. The 6th U.S. Circuit Court of Appeals at Cincinnati rejected Gelman’s arguments, finding his organizing was not a motivating factor in the unusual pay raise or any adverse employment actions.

Source: lifter v. Cleveland State University (Sept. 12).

**Did You Know?**

**29%** of a lawyer’s workday is spent on billable time, which equates to a measly 2.3 hours in an eight-hour workday. The analysis was compiled by Clio for its annual trends report, which was based on data from more than 60,000 attorneys.


**No. 1**
South Dakota is now the top venue for corporate lawsuits, displacing Delaware as the favorite spot for in-house counsels and business executives to file lawsuits, according to a report by the U.S. Chamber of Commerce’s Institute for Legal Reform. Vermont, Idaho, Minnesota and New Hampshire closely follow the top ranking. Delaware finished at No. 11, after being first for 15 years. Researchers speculate that Delaware fell out of favor in part because of its treatment of class action lawsuits.

Source: 2017 Lawsuit Climate Survey: Ranking the States (Sept. 12).

**Say What?**
Of the 42 U.S. attorney candidates nominated by President Donald Trump for the nation’s top federal prosecutor jobs, only one is a woman. After taking office in 2009, President Barack Obama nominated 12 female U.S. attorneys out of 42.

Source: buzzfeed.com (Sept. 10).

**Cartoon Caption Contest**

**CONGRATULATIONS** to M. William Morgan of Jackson, Mississippi, for garnering the most online votes for his cartoon caption. Morgan’s caption, at right, was among more than 75 entries submitted in the Journal’s monthly cartoon caption-writing contest.

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

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

“If I can charm a snake into doing this, imagine what I can do with a jury!”
—M. William Morgan of Jackson, Mississippi
JOSEPH WAHL, A 16-YEAR-OLD STUDENT, INADVERTENTLY BROUGHT TWO CREDIT CARD-SIZE KNIVES in his backpack to Brandywine High School in Wilmington, Delaware. He later explained that they were part of the inventory from his eBay business. School officials still punished him with a mandatory suspension under its zero tolerance policy on weapons. Wahl and his father, Patrick, later sued and settled with the Brandywine School District, which agreed to revise provisions in its student code of conduct. "When my son was suspended, it never occurred to me how stupid some of these policies are," says the father, whose actions led to passage of a bill in the state legislature that gives schools greater discretion when "weapons" are found. "How did it help to keep him out of school? I knew my son would be fine, and that we had the means to fight this. But what about less fortunate kids?"

Michigan State Rep. Andy Schor can relate to the Wahl story. His then-second-grade son brought a small Swiss army knife to school to sharpen his pencil. Unfortunately, another student pointed out that his son had a knife. "At
this point, the school had no choice but to suspend him for several days,” Schor recalls. “The old system just doesn’t allow flexibility to consider the incident. A knife is a knife is a knife. A child gets suspended or expelled. It’s the law.”

Partly because of this incident, but more from hearing countless stories of a similar nature from constituents, Schor and several of his colleagues introduced a measure that provides greater flexibility to school administrators in these situations. The governor signed the bill into law, and it went into effect Aug. 1.

More than 25 states have amended their laws on zero tolerance in schools during the last five years. The Pennsylvania legislature is considering a bill that would amend the language of existing law and switch the application of zero tolerance policies from the broad category of “weapons” to the more specific “firearms.” The Pennsylvania measure also provides that students may be subject to “out-of-school suspension and expulsion only after other behavioral supports and interventions have failed” unless the student’s conduct was of a violent or sexual nature.

In 2016, Illinois passed a law providing that “school officials shall limit the number and duration of suspensions and expulsions to the greatest extent practicable.”

START OF A MOVEMENT

There is a growing awareness that zero tolerance policies are not the best way to do business. “School discipline, more than any other issue, is robbing the children of many communities of the possibility of a productive future,” says University of South Carolina law professor Derek W. Black, author of Ending Zero Tolerance: The Crisis of Absolute School Discipline.

“Positive legislation is tricky because there is no silver-bullet solution,” Black says. “Ending suspension alone would be counterproductive. Students will continue to misbehave, so we have to engage them constructively, not ignore them.”

It’s not hard to find extreme examples of overreaction. A one-size-fits-all approach to discipline can convert zero tolerance into zero judgment.

“Schoolteachers and administrators are legally constrained by a zero tolerance approach,” Schor says. “If a student brings a butter knife to school to put peanut butter on a sandwich, it counts as possessing a knife. Regardless of the intent or actual threat level, the student faces suspension or worse.”

Kavitha Mediratta, executive director of the Atlantic Fellows for Racial Equity program based at Columbia University, has examined what she terms the “racially based efforts of zero tolerance school disciplinary policies” on children’s education.

“Eliminating disparities will require much more attention to their root causes,” Mediratta says. “School systems need to train administrators and staff on implicit bias and take steps to make sure all schools have access to preventative mental health and behavioral services for their students.”

“The spate of recent zero tolerance legislation is part and parcel of a broader cultural shift over the thinking about criminal justice and punishment in society,” says Max Eden, a senior fellow at the Manhattan Institute. “Zero tolerance arose in the time when get-tough criminal justice policies were in vogue, such as the broken windows policing strategy in New York City.”

And it was all the rage in the 1990s with the Gun-Free Schools Act of 1994. The federal law was passed in response to a rise in school violence. Intolerance to weapons often extended to other facets of discipline, including clamping down on any violent-themed student speech.

While zero tolerance policies had their supporters, many became worried about inconsistent application and overly harsh results. As far back as February 2001, the American Bar Association passed a resolution opposing zero tolerance policies with a discriminatory effect.

One of the most persistent criticisms of the policies involves racial disparities. Many studies have found racial biases in schools’ exclusionary discipline policies.

“There are a multitude of intersecting school-based factors that impact racial disproportionally,” says Dorothy Hines-Datiri, an assistant professor at the University of Kansas and co-author of “The Effects of Zero Tolerance Policies on Black Girls,” a paper published in February in the journal Urban Education. Hines-Datiri cites racism, teacher bias, institutionalized racial exclusion and a mindset that treats black and brown children worse than white kids.

Hines-Datiri says her study found black girls were punished disproportionately for behavior issues compared to white girls—even for similar infractions.

“Now, there is a sense among many that zero tolerance policies have racial disparities and are a result of some teacher bias,” Eden says. “It is fair to assume that some aspects of disparities in school discipline are a result of teacher bias, but the recent movement has gone above and beyond.”

Some worry that the pushback against racial disparities, an admitted problem, may be fueled in part by a political agenda. “While there are very legitimate concerns with questionable suspensions, expulsions and arrests, there is also a racial and political undercurrent involved with the school-to-prison pipeline movement,” says Kenneth S. Trump, president of National School Safety and Security Services, a private consultancy.

SAFETY CONCERNS

While there is little support for inflexible zero tolerance policies, some say that the pendulum may have swung too far, and that limiting certain forms of exclusionary discipline could make schools less safe.

“To limit the option of exclusionary discipline and expulsions has tied teachers’ hands and has had negative consequences in the classrooms,”
The Docket

says Eden, who authored the report School Discipline Reform and Disorder: Evidence from New York City Public Schools 2012-16. “There is evidence in New York City and in some other cities that such policies were associated with a reduction in safety.”

Further, any attempt to reduce racial disparities and lessen the number of serious exclusionary disciplines must take into account that some students will commit actions that necessitate swift punishment. “There are differences between student conflicts that fall into traditional disputes mediated and sanctioned with disciplinary consequences versus violent, aggressive assaults leaving students or staff with serious injuries,” Trump says.

Some contend that school officials need flexibility regarding school discipline issues. A one-size-fits-all punishment does not work except for the obvious cases of when someone brings a loaded gun to school or commits a serious act of a violent or sexual nature.

Experts stress the need for alternative forms of classroom management, engagement and discipline. “I advocate for a multi-prong strategy that seeks to reduce misbehavior on the front end,” says Black. “This includes the provision of quality and engaging academic opportunities, the necessary staff and services to counsel students who are at risk of misbehavior, and disciplinary systems based on positive behavioral supports and restorative justices.”

With those things in place, Black would prohibit suspension and expulsion for all but the most serious infractions.

The Docket

Code of

Science

Defense lawyers want to peek behind the curtain of probabilistic genotyping

By Jason Tashea

THREE YEARS AGO, a man with a gun walked into a Shell gas station in Norton Shores, Michigan, and announced a robbery.

After grabbing the till, the robber escorted the clerk into the storeroom to get a carton of cigarettes. In the next few seconds, the clerk grabbed a gun and fired 10 shots as the robber ran for the door. As he fled, the robber left behind a shoe on the store's floor.

Security footage failed to capture the robber's face or the license plate of the getaway vehicle. After collecting non-DNA evidence from the shoe, police were led to El-Amin Muhammad, 40, a repeat offender with a violent history, and charged him with the stickup.

Prosecutors admitted at the time that their case against Muhammad was circumstantial. However, the prosecution used DNA analysis software, called probabilistic genotyping, to interpret the sweat found in the forlorn shoe. This analysis employed an algorithm to create a likelihood ratio that compares DNA samples. According to one of these tools, Muhammad was the largest and most likely contributor to the sample.

He was sentenced in 2016 to serve 25 to 38 years for armed robbery.

POSSIBLE OR PROBABLE?

With the use of DNA evidence increasing across the United States, DNA labs are using probabilistic genotyping to analyze hard-to-interpret samples. However, some scientists and lawyers worry that the privately held computer code behind these tools is limiting its reliability and hindering due process.

Traditional DNA analysis is challenged when there are multiple contributors to a sample or the quantity of DNA recovered is too small. Without a better analytical tool, these samples are often inconclusive, says Dan E. Krane, a professor of biological science at Wright State University.

Probabilistic genotyping is not a technique that defines the sample itself; rather it is an interpretive software that runs multiple scenarios—like the risk analysis tools used in finance—to examine the sample. This contrasts with traditional DNA analysis, which assesses whether a DNA type is present or absent.

Bjorn Sutherland, forensic development manager at the New Zealand-based Institute of Environmental Science and Research—the probabilistic genotyping company used in the case involving Muhammad—says that his software, STRMix, “enables users to compare the results against a person or persons of interest and calculate a statistic, or ‘likelihood ratio,’ of the strength of the match.”

By leveraging computer processing, probabilistic genotyping “gives us more information to work with,” says Chris Lindberg, a deputy district attorney in San Diego. Many, like Lindberg, are excited for this technology because it analyzes samples in a way that would have been too labor intensive previously. The cost of these tools varies by company and number of licenses purchased.

Last year, San Diego joined jurisdictions in Indiana, Louisiana and New
York, among others, deploying this technology in its investigations. Sutherland says this technology has been around for less than 10 years, but the statistical models the tools use have been around for decades.

This science has created a cottage industry. Besides STRmix, those receiving the most attention in the U.S. are the Forensic Statistical Tool, used by the Office of the Medical Examiner in New York, and TrueAllele, created by the Pittsburgh-based company Cybergenetics.

In September 2016, a report on forensics from the Presidential Council on Science and Technology noted that “probabilistic genotyping software programs clearly represent a major improvement over purely subjective interpretation.” However, the report added, “careful scrutiny” is still needed to determine whether methods are scientifically valid and if the software correctly implements those methods. The report clarifies that analyzing the software “is particularly important because the programs employ different mathematical algorithms and can yield different results for the same mixture profile.”

**SCIENCE UNDER SCRUTINY**

Built on biology, computer science and statistics, the world of probabilistic genotyping is niche. With few people who can understand these tools, the challenge of analyzing them is compounded by the fact that companies developing these tools “black-box” the computer code. This means there is no or limited capability to review the math; therefore, it cannot be independently challenged.

Richard Torres, a staff attorney in the DNA unit of the New York Legal Aid Society in New York City, and scientists such as Krane are concerned about the lack of transparency.

“My biggest issue is with access to the code,” Torres says. “It’s a confrontation issue,” a reference to the Sixth Amendment right to confront a witness who makes a claim against a defendant. Torres argues that an algorithm behind a genotyping tool is speech that makes a claim against a defendant—so the defense has a right to confront and question the algorithm, not just the scientist who made it.

Organizations like Cybergenetics and the Institute of Environmental Science and Research provide defense counsel with access to the tool and supplemental materials such as validation studies, but the information is incomplete to protect the company’s intellectual property. Less frequently used tools, including Lab Retriever, LRmix and LikeLTD, have their source code available for download without limitations.

Defense access to the source code has been litigated around the country with mixed results.

In California, *People v. Chubbs*, a cold murder case from the 1970s, brought this issue to light in 2012. The prosecution used evidence from TrueAllele, saying DNA found on the victim and Martell Chubbs’ samples was “1:62 quintillion times more probable than a coincidental match to an unrelated black person.” The trial court determined that Chubbs was entitled to examine the source code under protective order.

On appeal, this decision was overturned in 2015. The appeals court said that Chubbs’ stated reasons to access the source code, even under protective order, did not outweigh the trade secret protections. Further, the court writes, “access to TrueAllele’s source code is not necessary to judge the software’s reliability” because validation studies and expert testimony are sufficient to make that determination.

This view is shared by Mark Perlin, CEO of Cybergenetics, the company at issue in the *Chubbs* case. He thinks that full algorithmic transparency is not necessary, and that the scientific process can and should police forensic science.

The challenge here, says Erin Murphy, a law professor at New York University and author of *Inside the Cell: the Dark Side of Forensic DNA*, is that genotyping software validation studies are done almost entirely in-house by the company itself, putting their validity into question.

She says that “one of the key ways to understand the strengths and weaknesses of these programs is to make them really transparent.”

Siding with Murphy, Judge Valerie Caproni of the U.S. District Court for the Southern District of New York determined in *Johnson v. U.S.* in July 2016 that the Forensic Statistical Tool’s “source code is ‘relevant [and] admissible,’ ” at least during a *Daubert* hearing, a pretrial hearing where the admissibility of expert testimony is challenged. Caproni provided a protective order, which she later lifted when journalists at ProPublica filed a motion arguing that there was a public interest in the code. The source code is now available online.

With this debate ongoing, requiring access to source code may be insufficient, says Nathan Adams, a systems engineer at Forensic Bioinformatics, a Fairborn, Ohio-based consultancy led by Krane.

“Even if it’s an open sourced program ... and there is interest” in doing an evaluation, there are resource and ability limitations, says Adams. “The field of forensic DNA hasn’t emphasized the skill set of software quality assurance,” he adds.

Frank Pasquale, a law professor at the University of Maryland and author of *The Black Box Society*, agrees with Adams, saying it is a “huge problem” to find experts in computer science, biology and law.

“Before we mass-deploy these things, we have to make sure these experts are equally spread out,” he says.

Without any indication that the proliferation of these tools will wait for a cadre of experts to be created and deployed, courts and scientists will continue to grapple with questions using the resources they have.

Acknowledging this debate, Rhonda Roby, the supervising DNA criminalist at the Alameda County Sheriff’s Office forensic biology unit in California, strikes a balanced tone. “I think the bottom line is that it’s a critical time, right now, to closely evaluate and not dismiss the technology,” she says. “It’s that good that we need to consider it.”

---
The high court considers limits to the government’s surveillance powers over personal technology  
By Mark Walsh

In 2011, the police and the FBI used data from cellular telephone towers to help connect a suspect to a string of armed robberies of Radio Shack and T-Mobile stores in the Detroit area. The authorities didn’t rely on a warrant based on probable cause but on a broad court order under a 1986 federal law, the Stored Communications Act. They collected more than 120 days’ worth of records from two wireless carriers for the cell-site data of the suspect’s mobile phone. The records helped show that the suspect, Timothy I. Carpenter, was in close proximity to the stores at the time of the crimes. Combined with other evidence that Carpenter was the leader of the robbery ring, the records led to his conviction on federal robbery- and weapons-related charges.

Carpenter challenged the warrantless collection of cell-site data as an unconstitutional search under the Fourth Amendment. He lost in the lower courts. But the U.S. Supreme Court granted review of a case that several legal observers predict will have enormous implications for privacy in the digital age for generations to come.

“It’s hugely important,” says Orin S. Kerr, a professor at the George Washington University Law School and an expert on the Fourth Amendment. “This is the case that is going to determine the limits on the government’s surveillance power at the state and federal level in new technologies for years to come. I think the justices know that.”

Andrew G. Ferguson, a professor at the University of the District of Columbia law school and a privacy expert, says the case affects cell towers and individuals’ data from email, smart watches, activity-tracker bands and so-called smart appliances—devices as conventional as refrigerators, which now have some models that connect to the internet.

“This is not about just one technology and one criminal defendant,” says Ferguson, author of The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement. “It is really about how the Fourth Amendment will or will not protect all Americans in the digital age.”

The closely watched case was scheduled to be heard Nov. 29, which falls under the court’s December argument calendar.

TRACKING STORED COMMUNICATION

Authorities initially arrested four suspects in spring 2011 in the string of robberies at Radio Shack and T-Mobile stores. One suspect identified an ensemble of 15 others who had participated in some or all of the crimes, which involved small groups of robbers entering a store, herding employees into the back at gunpoint, and ordering them to fill bags with new smartphones.

Court testimony later suggested that Carpenter organized a string of such robberies in Michigan and Ohio during a four-month period. He supplied the guns and typically waited in the getaway car, testimony showed.

The police received Carpenter’s cellphone number from the informing suspect. The FBI sought orders from federal magistrate judges to require the release of cell-tower information for Carpenter’s phone. The magistrates granted the orders under the Stored Communications Act, which requires the government to show “reasonable grounds” for believing that the records were “relevant and material to an ongoing investigation.”

Carpenter’s cellphone provider, MetroPCS, provided 186 pages of the suspect’s “call detail records” that covered 127 days, while Sprint provided records for Carpenter’s phone for two days in Warren, Ohio, where one robbery took place. (Sprint was the roaming provider in that area because MetroPCS did not have its own towers there.)

At trial, FBI Special Agent Christopher Hess, a cellular analysis specialist, testified for the prosecution. “If you dial a number and you hit send, that tower information is populated in the call detail record,” he said.

Hess identified eight calls to or from Carpenter’s phone that happened around the time of four of the robberies. He presented maps of the cell towers that connected those calls to demonstrate that Carpenter’s phone was within a half-mile to 2 miles of the crime scenes. On cross-examination,
the agent acknowledged that he could not say that Carpenter’s phone was located within a particular spot or intersection, and he agreed that the cellular analysis was “not an exact science.”

At closing argument, a prosecutor argued to the jury that the cellular data provided another overlay of corroboration, showing that Carpenter was “right where the first robbery was at the exact time of the robbery, the exact sector.”

The cell-tower evidence may well have been, in this case, another layer of corroboration. There also was incriminating testimony from seven of Carpenter’s accomplices. Carpenter was convicted of all six robbery charges he faced under the federal Hobbs Act and five of six firearms charges. He was sentenced to 116 years in prison.

THIRD-PARTY BUSINESS RECORDS

But on appeal, Carpenter pressed his motion to suppress the cell-tower evidence, which the district court had rejected. The 6th U.S. Circuit Court of Appeals at Cincinnati also turned away his arguments, holding that Carpenter lacked any property interest or reasonable expectation of privacy in the cell-tower records acquired by the government under the Stored Communications Act.

The 6th Circuit panel acknowledged that in United States v. Jones, a 2012 Supreme Court case about long-term GPS monitoring of a suspected drug dealer, five justices had agreed that people have a reasonable expectation of privacy in information very similar to cell-site data. But the appeals court said Carpenter’s case was different because it “involves business records obtained from a third party.” Those records are closer to the landline call records that the high court had held were not entitled to Fourth Amendment protection in Smith v. Maryland in 1979.

“Cell-site data—like mailing addresses, phone numbers and IP addresses—are information that facilitate personal communications, rather than part of the content of those communications themselves,” the 6th Circuit said. “The government’s collection of business records containing these data therefore is not a search.”

Nathan Wessler, an American Civil Liberties Union lawyer representing Carpenter, says the Smith decision and the Stored Communications Act were products of an era when few Americans were carrying phones in their pockets.

“In this case, law enforcement went to Mr. Carpenter’s cellphone providers and got more than four months of cellphone records that created a granular map of everywhere he went,” Wessler says. “That is a chilling power.”

DIGITAL CRIME AND PRIVACY

U.S. Solicitor General Noel J. Francisco argued in the federal government’s brief that the “third-party doctrine” long recognized by the high court applies here.

“Cellphone users voluntarily reveal to their providers information about their proximity to cell towers, so the providers can connect their calls,” Francisco said in the brief. “Users cannot reasonably expect that the providers will not reveal that business information to the government.”

John M. Castellano wrote an amicus brief on the federal government’s side for the Arlington, Virginia-based National District Attorneys Association. He says prosecutors use cell-site location data as an important investigative tool. They also use grand jury subpoenas and court orders short of a warrant to investigate identity theft, fraud, public corruption and other offenses. Those investigations would be seriously hampered by any restriction on the third-party doctrine, he says.

“You don’t always have probable cause at the time you are issuing a subpoena,” says Castellano, the deputy executive assistant district attorney for the Queens County DA’s office in Kew Gardens, New York. “The nature of crime has changed. It has taken full advantage of the digital era.”

But Wessler of the ACLU says the government “misreads Americans’ expectations of privacy in the digital age and sets the bar way too low.”

Ferguson of the University of the District of Columbia wrote an amicus brief on Carpenter’s side for a group of scholars of criminal procedure and privacy. The basic thrust is that the third-party doctrine is ill-suited for an age in which smart devices that transmit all manner of personal information to third parties are pervasive.

These include cellphones, smart cars, smart homes and smart medical devices within the body.

“It used to be that police officers had to sit in hot cars drinking cold coffee to conduct surveillance,” Ferguson says. “The idea of a 1970s-era law about old telephone technology governing this area just doesn’t make a lot of sense now.”
U.S. Supreme Court justices tend to be storytellers, weaving complex and persuasive narratives about the meaning of the Constitution. So while working on this article, I considered the creative, inspired and spontaneous discoveries that all writers—including Supreme Court justices—invariably make and then draw upon.

I took breaks from my writing to watch Neil M. Gorsuch’s confirmation hearings on television. Gorsuch was playing his hand carefully and close to the vest, refusing to give away any clues about how he would rule in pending or possible future cases. He also discounted his own feelings and hedged around personal beliefs regarding matters that might come up before the court. When provoked, he repeated the pragmatist’s mantra that the role of judges is simply to “follow the law and decide cases.”

Gorsuch embraced the label of being an “originalist.” He conveyed a softer version of originalism than his more severe textualist predecessor, Justice Antonin Scalia, had. Gorsuch observed that discovery of the original meaning of the law as enacted—and of the Constitution—is not an “ideological thing,” and that all judges and justices are originalists and literalists of a sort, employing and deferring to original textual meanings, whether of a statute or of the Constitution itself.

The hearings seemed haunted by the ghost of Judge Merrick Garland. But Gorsuch, handsome and personable, did not come across as an ideological extremist. He claimed to be a judge who voted consistently with the majority and had only been reversed one time, “maybe.”

I turned off the TV. Clearly, there was something missing from Gorsuch’s testimony. And some of it had to do with the topic of this Journal article: how Supreme Court justices do not simply uncover the original meaning of constitutional texts. Nor are they merely technicians or craftsmen applying law to the facts. Justice requires great artistry. And there are profound and unacknowledged forces that shape judicial stories, fitting law with desired—but seldom predestined—outcomes. Indeed, the entire narrative arc of our constitutional law saga is full of surprise, mystery and plot reversals worthy of a great novelist.

Gorsuch’s evocations of simple judicial mantras as shorthand for the work of appellate judges was an obvious cover story. He failed to acknowledge the creative, inspired and spontaneous discoveries that all storytellers, especially Supreme Court justices telling stories about the meanings of our Constitution, inevitably make and then draw upon.

NARRATIVE JURISPRUDENCE

Legal philosopher Ronald Dworkin famously compares the evolution of constitutional law with the writing of a chain novel in which a group of writers creates new chapters built upon the choices made in previous chapters by other authors. Dworkin emphasizes the constraints and demands that earlier chapters impose upon subsequent authors. Think here, obviously, of the limitations of precedent and stare decisis.

My version of Dworkin’s analogy these days is with the development of the complex master plots of multiseason, serial TV programs such as The Sopranos and The Wire or, more recently, Breaking Bad, House of Cards or Homeland. In these shows, the narrative arcs of meta-stories are reinvented over multiple seasons by collaborative and ever-shifting casts of writers, directors and actors. Creative possibilities are compounded exponentially by the consciousness of multiple authors working together across time.

Likewise, the narrative arcs of episodic multiseasonal constitutional law sagas are collectively reshaped in ways never originally intended or anticipated. Unfolding storylines must fit or cohere with what has come before.

Of course, this is certainly not how Supreme Court justices typically understand their own work. But then, honestly, the justices are not paid to be completely candid or self-effacing about their internal creative processes, especially in their public pronouncements.

CREATIVE TRANSFORMATION

Harvard law professor Cass Sunstein has adopted the term serendipity in attempting to explain the creative forces—both demands and constraints—at work in literature and in law. The Merriam-Webster dictionary defines serendipity as: “the faculty or phenomenon of finding valuable or agreeable things not sought for.”

Sunstein puts it this way: There is an “immense role of serendipity and happenstance in the creative imagination. ... Serendipity imposes serious demands on the search
for coherence in both literature and law (and history and life as well)."

In an essay reprinted in the Washington Post, “How Star Wars Explains Constitutional Law,” Sunstein reviews Chris Taylor’s book, How Star Wars Conquered the Universe: The Past, Present, and Future of a Multibillion Dollar Franchise. The book provides a point of departure for Sunstein’s playful meditation on “the force” of serendipity in constitutional law, and it illustrates how storytellers—both moviemakers and Supreme Court justices—often conceal or refuse to acknowledge authorial responsibility for serendipitous creative decisions, with claims that their discoveries were externally predetermined.

For example, akin to Gorsuch’s testimony, Star Wars creator George Lucas makes the originalist claim that the master plot of the narrative arc of the Star Wars saga was predetermined and codified in a book Lucas identifies as The Journal of Whills. But Taylor’s behind-the-scenes reconstruction of the writing of the Star Wars screenplays exposes Lucas’ claim as “wildly inaccurate,” a pretextual cover story, akin to the stories the justices tell to the public and, more important, retrospectively tell to themselves. Lucas did not originally anticipate that Darth Vader would be Luke Skywalker’s father. (It is an “originalist myth,” Sunstein wrote, that the character’s name is a play on “dark father.”)

Writing the final scene of The Empire Strikes Back, Lucas had Vader say to Luke (aka Lucas?): “Join me, and we can rule the galaxy as father and son.” These words produced an aha moment of creative discovery for Lucas, revealing unexplored narrative possibilities and suggesting new directions in future, yet unwritten episodes of the saga.

What does this have to do with constitutional law? Sunstein argues that similar creative transformations occur in legal storytelling, especially when justices determine constitutional meanings. For example, what was once merely a shard of interpretive dicta in an earlier Supreme Court decision may morph into the holding of another case years later, suggesting a story arc about the meaning of the Constitution serendipitously rediscovered in the reverberations of a different time.

Sunstein’s takeaway “I am your father” moments are just as pivotal in the epic sagas of constitutional law as in Star Wars and allow constitutional texts to cohere with new meanings over time. He identifies Brown v. Board of Education as one iconic “I am your father” decision. In my capital punishment class, we read Furman v. Georgia’s revelatory holding that the Eighth Amendment now proscribes the death penalty as cruel and unusual punishment as another. A mere four years later there was an abrupt “I am not your father after all” reversal in Gregg v. Georgia, after the composition of justices on the court and popular political sentiments had shifted. Sunstein also observes that for many years federal and state governments punished speech determined to be dangerous.

According to Sunstein, the robust protection now afforded to political speech protected as free speech (under the “clear and present danger” test) came about in the “I am your father” decisions of New York Times v. Sullivan (1964) and Brandenburg v. Ohio (1969), revisiting the meaning of the First Amendment and rethinking the law that had come before it.

There is also the influence of a contextual history that often bleeds into Supreme Court decisions alongside any originalist designs, as well as the broad meanings conveyed by the literal language of the Constitution. Meaning is never exclusively derived from an archaeological dig into language divorced from the context of the times in which we live. According to Sunstein, it is not accidental that current protections against racial discrimination are a product of the 1950s; expansive protections of religious liberty came out of the 1960s; the ban on sex discrimination in the 1970s; and sharp constraints on affirmative action in the 1980s and 2000s. Nor is it an accident that newfound protection afforded to individual gun owners was rediscovered by originalists in the 21st century.

Sunstein observes: “Nothing here was inevitable and without contingent social forces and judgments ... radically different constitutional settlements would have emerged.”

CODA

I finished reading Sunstein’s essay and Gorsuch was confirmed. If I ever meet Justice Gorsuch, I may suggest that there was more to his cover story than he realized. Or simply say: “May the force be with you!” Perhaps he will have no idea of what I am talking about; but perhaps he will understand after all.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.
Can Lawyers Text Potential Clients?

When it comes to advertising, states are saying yes—at least so far

By David L. Hudson Jr.

Technological advances have provided attorneys with new ways to contact prospective clients and increase their client base. One such avenue is through text messages, or short message services. Recently, a North Carolina ethics opinion explained that attorneys can advertise through a text message service that provides subscribers a choice of whether to initiate live telephone conversations.

The hypothetical in the opinion involves a lawyer handling workers’ compensation cases who buys advertising with ABC Texting. The lawyer’s ads are sent via text messages to ABC Texting subscribers with the following: "Injured at work? We can help."

Ethics Opinion 1, issued in April, provides that such a text message ad is permissible, as long as it complies with other ethical rules on advertising and applicable federal and state law. Rule 7.2(a) of the North Carolina Rules of Professional Conduct, which mirrors Rule 7.2(a) of the ABA Model Rules of Professional Conduct, allows lawyers to advertise services through written, recorded or electronic communications—provided that they comply with Rule 7.1 and Rule 7.3.

For example, North Carolina Rule 7.1 prohibits lawyers from engaging in false and misleading advertising, as does the ABA Model Rule.

Furthermore, Rule 7.3 prohibits lawyers from directly soliciting prospective clients via advertising unless they are family members or close friends, former clients or other lawyers. However, the North Carolina ethics opinion reasons that texting through a service that gives subscribers the option to receive the messages is not a solicitation.

"Text message advertising as described herein is akin to billboard or banner advertisement directed to the general public," the opinion reads. Therefore, the lawyer may advertise through ABC Texting.

"Based on the subscriber-based nature of the ABC Texting SMS, I agree with the conclusion that these texts are directed at the general public," says Ellen Murphy, a professor at the Wake Forest University School of Law who specializes in professional responsibility issues.

First Amendment expert Rodney A. Smolla, dean of the Widener University Delaware Law School, concurs. “Given that the participation by subscribers is entirely voluntary, I believe it is appropriate to treat this form of advertising as mass media advertising and not as a targeted solicitation,” Smolla says.

FRAUGHT WITH ‘UNDUE INFLUENCE’

The opinion also addresses whether the texting company could engage in the following exchange:

ABC Texting: Thank you. A representative will contact you soon.
Subscriber: Yes
ABC Texting: Lawyer can help. May we contact you at this number? If so, type yes.
Subscriber: Yes
ABC Texting: Have you or someone you know been injured at work? If so, type yes.
Subscriber: Yes

In this scenario, if the subscriber answers yes to both questions, the texting company provides the subscriber's cellphone number to the lawyer, who then can contact the client directly.

“The result would be different if texts were targeted to specific persons,” says ethics expert Peter A. Joy, a professor at the Washington University School of Law in St. Louis. "Then those texts would be like sending direct mail advertising or email."

North Carolina Rule 7.3 generally prohibits such direct in-person, live telephone or real-time electronic contact. ABA Rule 7.3(a) provides that "a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain," unless the contacted person is another lawyer, a family member or close friend.

The reason is a concern regarding possible abuse and coercion. Comment 2 to ABA Rule 7.3 warns that such a "situation is fraught with the pos-
sibility of undue influence, intimidation and overreaching. However, in the above scenario, the subscriber registered with the texting company and expects to receive various advertisements. Furthermore, as the opinion reads, "the subscriber is given the opportunity to accept or decline" the lawyer's offer to contact the subscriber.

The ABA's Standing Committee on Ethics and Professional Responsibility is considering amendments to the ABA Model Rules on lawyer advertising, according to committee chair Barbara S. Gillers. She says the proposals concern Rules 7.1 through 7.5 and are likely to include provisions pertaining to texting. The project was discussed during the Leadership Conference of the ABA Center for Professional Responsibility, held in Chicago in October. Gillers says the committee plans to release a working draft of its proposals this month, followed by public hearings at the ABA Midyear Meeting in February.

DRAWING THE LEGAL ADVERTISING LINE

Other states have addressed the propriety of lawyers using text messaging to advertise. In 2013, an Ohio ethics opinion reasoned that text message advertising is generally permissible under Rule 7.2(a). "Because text messaging may be considered both an 'electronic communication' and a 'written communication' under the Rules of Professional Conduct, a plain reading ... indicates that lawyers may use text messages to advertise their services," according to the opinion.

Opinion 2013-2 then explains that a directed text message is not a real-time electronic communication that would constitute an impermissible solicitation. Rather, the opinion determines that the text message "is more akin to an email than a chat room communication."

"Text messaging is still a degree more direct than email. But unlike email, text is restricted, at least practically, to shorter communications," says Keith Swisher, a legal ethics professor at the University of Arizona. "Text messaging approaches, but does not cross, the line between permissible legal advertising and generally prohibited real-time solicitations. Put simply, while text messaging is fast and direct, it is not as fast and direct as in-person or telephonic solicitation."

In 2015, the Florida Bar Standing Committee on Advertising decided that texting potential clients was a forbidden form of solicitation similar to telephone solicitation. However, later that year, the Florida Bar board of governors overruled that decision and stated that lawyers could send such messages to prospective clients, as long as they complied with the advertising rules for written and email communications.

"These [rules in Florida] are onerous, requiring the text to include attorney qualifications, disclosures about how the lawyer obtained the contact information, and a statement that the individual should delete the message if they have counsel already," says Murphy of Wake Forest.

Smolla, who has represented lawyers charged with violating advertising rules, says the key question involving texts is whether "to treat a text message as a targeted written communication or as a real-time electronic communication." He says that because texts "can easily be ignored—and given that the interaction is not typically understood as in real time, such as a phone call or a live electronic chat—many bar authorities, and indeed First Amendment principles, should allow such lawyer-initiated texts."

However, Swisher of the University of Arizona says lawyers should give recipients an opportunity to opt out of receiving such messages. "Because text messaging is such a direct, arguably invasive and almost real-time communication, it is preferable where possible to give the recipient the ability to consider the communication and then take the next steps, if any," Swisher says.

Joy from Washington University adds that "the ABA issued opinions on lawyer websites in 2010, email communications with one's client in 2011, and instances where lawyers should take special security precautions to protect against unauthorized access to client communications sent via email in 2017. "When it comes to new technology, responsible lawyers should use common sense and, when in doubt, ask their state bar ethics authorities for advisory ethics opinions," Joy says.
How to Start a Sentence

Consider all your alternatives, and sprinkle in some conjunctions, too

By Bryan A. Garner

As professional rhetoricians, readers of this column should know what the most important part of a sentence is: the end. Many writers mistakenly think it’s the beginning: They begin a disproportionate number of sentences with the grammatical subject, and they rarely depart from the subject-verb-object pattern. Boring legal writers create paragraphs of sentence after sentence beginning with a client’s or litigant’s name; interesting writers, by contrast, spice their prose with syntactic variety.

But to say that the end of a sentence should pack a punch isn’t to say that the beginning is unimportant. Most authorities agree that it’s the second most important position. Often it provides the setup for what follows. A sentence might begin with an adverbial of time: “Last April, John died.” Or maybe it would include an adverbial of place: “While visiting Columbus last week, John died.” Notice how the poignancy is lost if we were to write: “John died last April” or “John died while visiting Columbus last week.”

Of the who-what-when-where elements of exposition, when and where often occur toward the beginning of a sentence, and who and what just after.

STARTING WITH ADVERBIAL ELEMENTS

Keep in mind two principles for creating readable prose: (1) A fair percentage of sentences should begin with short contextualizing phrases, often adverbial. (2) A fair percentage should begin with one-syllable transitional words—normally But, Yet, So or even And. These principles are intended to dispel two widely circulated superstitions—to the effect that writers shouldn’t do either of those things. But if you analyze high-quality writing and the teachings of reputable writing specialists, you’ll find these qualities are highly desirable.

As an empirical matter, in high-quality (professionally edited) published writing, you’ll find that typically less than 50 percent of the sentences begin with the noun that functions as the grammatical subject. Some 10 to 30 percent of the sentences will begin with adverbial phrases. And 10 to 20 percent will begin with conjunctions—either subordinating (If, Because, Although, etc.) or, more commonly, coordinating (But, Yet, And, So, etc.). These stats mean that skillful writers vary their syntax. They don’t get stuck in a rut.

There’s a superstition abroad that sentences should not begin with prepositional phrases (which typically introduce adverbial elements). Where this canard comes from is anybody’s guess. It leads to ungainly sentences like this one:

Johnson denied in his deposition that he had ever been at the fairgrounds.

Better:

In his deposition, Johnson denied that he had ever been at the fairgrounds.

Or another lumbering example:

The judge cited in her decision summarily denying Redell’s petition a concern that the entire budget could be depleted on just a few large fuel-cell projects.

That sentence could be punched up by starting with the adverbial phrase, allowing you to keep subject and verb together:

In summarily denying Redell’s petition, the judge cited a concern that a few large fuel-cell projects could deplete the entire budget.

Note that the revision also puts the oomph at the sentence’s end.

I sometimes wonder whether lawyers who ask me if it’s wrong to start a sentence with a preposition aren’t confusing their parts of speech: It’s the sentence-starting conjunction that schoolteachers traditionally, and erroneously, warn against.

STARTING WITH CONJUNCTIONS

As professional writers have long known, conjunctions are a terrific way of starting a fair number of sentences. They’re typically one-syllable starters that tie one sentence to another quickly and tightly. Consider these examples—just a few of countless possibilities—by major legal writers:

But: “This simple—almost austere—style is much harder to maintain when wading through the morass of legal doctrine. But it is surely worth striving for.” (Peter Tiersma)

Yet: “Some writers appear to treat duration as the criterion for distinguishing between ownership and lesser interests. Yet the holder of an easement, like the owner of land, has a transmissible and indeterminate right over it.” (Tony Honoré)

So: “Although his feet and body were pretty cold, he could move around and manage to stand this. So he stayed and sold out his papers and went back home about the usual time.” (Clarence Darrow)

And: “But if the parties who do not pay are to be discharged for something less than ‘objective impossibility,’ then, it would seem to follow, parties who do
should equally be discharged for something less. And so they were.”
(Grant Gilmore)

This conjunction-as-starter word choice surprises many who haven’t seriously studied the art of writing after high school. What happens, normally, is that when grade-school children first start learning to write, they quickly become addicted to And at the head of a sentence—sometimes in almost every sentence. In trying to wean them off this bad habit, their teachers overcorrect by imposing an absolute prohibition against sentence-starting conjunctions.

Some of those kids grow up to be lawyers, who in law school became accustomed to ponderous prose. They like multisyllable sentence-starters such as However, Accordingly, Consequently, In addition, Additionally and Furthermore. Grammatically, there’s nothing wrong with these cumbersome connectives; it’s just that they weigh down the prose.

Some readers might counter: “Why use connectives at all?” The answer is that it’s a cardinal rule of smooth stylists to make the prose flow, and the best way to achieve fluid, readable prose is to join sentences and paragraphs as smoothly as a carpenter joins boards. Or, to change the simile, sentences and paragraphs ought to be joined as surely as railroad cars are joined into a full train. In fact, the expert use of connectives—especially the single-syllable ones like But, Yet and So (none followed by a comma)—is probably the greatest subliminal contributor to cogency and clarity in prose.

It’s always been so. In the accompanying charts, you’ll see some case-sensitive big-data searches comparing alternative sentence-starters in millions of English-language books. The start date is 1700. Notice the frequency with which But has always been at the head of sentences; only recently has However started to close in—doubtless because of the fear instilled by those misguided teachers. (Remember, too, that many of these However aren’t the contrasting ones, but instead the ones that mean “to whatever degree.” Those However are unobjectionable.) As a sentence-starting adversative, as grammarians call it, But has always greatly outpaced the contrasting However.

If these points surprise you at all, then start being more alert when you’re reading stuff that you enjoy. You’re sure to find a fair number of capitalized Buts not followed by a comma—probably twice as many as Ands. But very few Howevers.

Bryan A. Garner, the president of LawProse Inc., is the co-author of two books with the late Justice Antonin Scalia: Making Your Case and Reading Law. In January, Simon & Schuster will release his memoir Nino and Me: My Unusual Friendship with Justice Antonin Scalia.
CHANGE THE RULES!

ETHICS OPINIONS HAVE TO REFLECT THE PRESENT AND FUTURE—NOT THE PAST

BY CAROLYN ELEFANT
One of the most enduring purposes behind the ABA Model Rules of Professional Conduct and corresponding state ethics standards is to protect clients and the public from “overreaching, overcharging, under-representation and misrepresentation.” (See Ohralik v. Ohio State Bar, 1978.)

More than a century after the 1908 adoption of the association’s first set of guidelines, the ABA Canons of Professional Ethics, the clients whom ethics standards protect and the lawyers governed by them have changed drastically. Yet in substance and form, ethics standards remain stagnant—and the same lofty principles that once inspired the best in lawyers will soon render us irrelevant.

**ARCHAIC RULES**

In substance, today’s legal ethics standards are so utterly out of sync with the lifestyle, social conventions and technology savvy of today’s consumers that they actually breed mistrust.

Imagine an encounter with an alien that hails from a planet where placing one’s hands around a new acquaintance’s throat is intended as a sign of respect. Yet without this background, you’d understandably feel distrustful and threatened if greeted by a stranger who has a firm vise around your neck. The same is true of ethics standards in the modern world: They require lawyers to act in a manner that is so alien in today’s society as to arouse suspicion.

Consider the two following scenarios.

**Case 1:** Penny Prospect, a mom seeking a divorce, arrives at your office for a consult. You think the meeting went well, but you never hear back. It turns out your instincts weren’t wrong—Penny was leaning toward retaining you—until she viewed your profile on LinkedIn and saw a disclaimer that states: “This profile is attorney advertising.”

In a decade of using LinkedIn (including as recently as that morning when she updated her profile in anticipation of searching for a higher-paying job), she has never seen a disclaimer like this. She knows LinkedIn’s user agreement prohibits advertising. Doesn’t this lawyer understand terms of service?

Penny’s concerns aren’t allayed when she clicks a link to the lawyer’s blog and once again sees “This blog is attorney advertising” underneath the blog caption. Penny doesn’t bother to read the posts; she assumes that if they’re advertising, they won’t be very valuable.

Penny wonders what’s wrong with this dude. He’s so caught up in promoting himself online that he won’t have time to handle her case. Ultimately, Penny heads to LegalZoom, which doesn’t have the same advertising disclaimers, and signs up for the do-it-yourself divorce package that includes attorney review.

**Case 2:** Noah Newbie is a recent business school graduate seeking to incorporate an online business. After the meeting, you hand him a 15-page retainer agreement and ask him to sign it and send it back with a check.

Noah leaves the office and tosses the retainer agreement into the trash can. He doesn’t understand a word of it. Plus, he’s always paid bills by credit card. He’s not sure that he still has a checkbook.

He decides to search his lawyer’s ratings online, but there’s not a client review or testimonial to be found. Because Noah always

---

**Save time and money when you select tech and support services for your small firm through ABA Blueprint.**

**TECHNOLOGY**  **MARKETING**  **INSURANCE & RETIREMENT**  **OFFICE & VIRTUAL ASSISTANT**

![ABA Blueprint Logo]

**VISIT ABABLUUEPRINT.COM**
Association Formal Opinion 748 (2015) requires disclaimers in LinkedIn profiles. State Bar of California Formal Opinion 2016-196 treats a blog as advertising that's subject to advertising rules if the attorney makes known their availability for service. And New York State Bar Association Ethics Opinion 1132 (2017) finds Avvo Answers and similar sites to constitute unethical fee splitting, as did a 2016 advisory opinion from the South Carolina Bar.

As these examples bear out, the parade of horribles that regulators envision—fee splitting with nonlawyers injecting their interest into the attorney-client relationship, testimonials and reviews that might dupe clients into hiring an unqualified lawyer, making objective and useful information online available through a LinkedIn profile or a blog without prominently labeling it as advertising (I'm stumped to figure out what kind of harm that could ever cause) —doesn't intimidate today's clients at all.

Most of today's clients have seamlessly, thoroughly integrated social media and "sharing-economy" platforms, as well as online payments and content-based marketing, as part of their daily lives. They've acclimated to the cultures of each online universe they inhabit and grown adept at distinguishing between causal informational websites and biographical profiles, and chatty personal exchanges and paid advertising. So when lawyers can't conform their conduct to these mores, they're first viewed with suspicion or annoyance and, ultimately, ignored.

OUTDATED, UNAVAILABLE

There are at least two problems with how ethics opinions are issued and circulated. First, with technology changing so rapidly and bar committees short-staffed, regulators can't keep pace. By the time they issue an opinion, it might already be outdated, as was the case when a New York opinion banned lawyers from listing "specializations" on their LinkedIn pages only to have the site eliminate the specialization category by the time the ethics opinion was issued.

The second problem is that the legal ethics opinions that govern lawyer conduct may be inaccessible to lawyers. Opinions in my home state of Maryland are only available to state bar members unless some news outlet publishes them. And in states where such opinions are freely available, online search tools can be primitive, if they exist at all.

Meanwhile, most commercial research services do not have a complete library of ethics opinions, so lawyers who want to summarize current ethics rules on a certain issue might have to visit two or three sources.

As a result, just as legal ethics have made lawyers checks ratings before making a purchase, he’s disconcerted about why he can't find any for his lawyer: Were they so bad she paid to have them removed?

Then Noah discovers a site called Avvo Answers, where he can ask questions about incorporating a business for $39. Noah searches for a New York lawyer. When he can't find one, he discovers that several bars, including New York, have banned lawyers from doing business on Avvo. Apparently, it's unethical for the site to take a cut of the $39 fee you pay to talk to a lawyer.

Noah doesn't get it. Isn't it a common online business model for the platform providing goods or services to take a cut of the sale? That's how Etsy and Airbnb work—heck, Uber is killing it. Noah can't believe this rule is really intended to protect clients. It's probably a way to force clients to have to trek to a stuffy, old lawyer's office and fork over $1,000.

It looks like his mentor, who heads a successful startup, was right after all: Noah is going to have to start his corporation at Rocket Lawyer by himself. Noah sighs, thinking it was easier to find his fiancee online through a dating site than it is to hire a lawyer.

REAL RULINGS, FALSE FEARS

These aren't fantasy scenarios; they are based on actual ethics opinions. New York County Lawyers Association Formal Opinion 748 (2015) requires disclaimers in LinkedIn profiles. State Bar of California Formal Opinion 2016-196 treats a blog as advertising that's subject to advertising rules if the attorney makes known their availability for service. And New York State Bar Association Ethics Opinion 1132 (2017) finds Avvo Answers and similar sites to constitute unethical fee splitting, as did a 2016 advisory opinion from the South Carolina Bar.

As these examples bear out, the parade of horribles that regulators envision—fee splitting with nonlawyers injecting their interest into the attorney-client relationship, testimonials and reviews that might dupe clients into hiring an unqualified lawyer, making objective and useful information online available through a LinkedIn profile or a blog without prominently labeling it as advertising (I'm stumped to figure out what kind of harm that could ever cause) —doesn't intimidate today's clients at all.

Most of today's clients have seamlessly, thoroughly integrated social media and "sharing-economy" platforms, as well as online payments and content-based marketing, as part of their daily lives. They've acclimated to the cultures of each online universe they inhabit and grown adept at distinguishing between causal informational websites and biographical profiles, and chatty personal exchanges and paid advertising. So when lawyers can't conform their conduct to these mores, they're first viewed with suspicion or annoyance and, ultimately, ignored.

OUTDATED, UNAVAILABLE

There are at least two problems with how ethics opinions are issued and circulated. First, with technology changing so rapidly and bar committees short-staffed, regulators can't keep pace. By the time they issue an opinion, it might already be outdated, as was the case when a New York opinion banned lawyers from listing "specializations" on their LinkedIn pages only to have the site eliminate the specialization category by the time the ethics opinion was issued.

The second problem is that the legal ethics opinions that govern lawyer conduct may be inaccessible to lawyers. Opinions in my home state of Maryland are only available to state bar members unless some news outlet publishes them. And in states where such opinions are freely available, online search tools can be primitive, if they exist at all.

Meanwhile, most commercial research services do not have a complete library of ethics opinions, so lawyers who want to summarize current ethics rules on a certain issue might have to visit two or three sources.

As a result, just as legal ethics have made lawyers
irrelevant to clients, the challenges in accessing and researching ethics opinions have made legal ethics irrelevant to lawyers.

NEEDED CHANGES

What can be altered to make lawyers and legal ethics more relevant in today’s fast-changing world? Here are a few suggestions:

View ethics in context.

In issuing ethics rules that govern social media, online advertising and novel business platforms, regulators must do so in the context of how clients currently use and understand these activities.

When regulators consider their work, they must evaluate whether a particular online activity would deceive or otherwise harm a reasonable consumer well-versed in using that platform in other contexts, rather than whether it might mislead a client who stepped out of the 18th century.

Second, regulators must recognize that client protection goes beyond merely preventing the harm that might result from a specific situation. Instead, they also must evaluate whether the harm of banning a particular activity outweighs the harm of allowing it. For example, although there’s always a possibility that an online review might be deceptive, given that most of today’s clients rarely make a purchase without reviewing a provider’s ratings and testimonials online, the low risk of harm that might flow from lawyers posting deceptive online reviews is readily outweighed by the harm to clients deprived of a source of information they’ve grown accustomed to in other industries.

Have hands-on experience.

On my blog, MyShingle, I would never review an online product unless I first viewed a demo and then experimented with the technology. The same principle should apply to regulators: Before passing ethics judgment on LinkedIn, Avvo Answers, Facebook or any of the many online platforms in existence today, they should have a minimum of 10 hours of hands-on experience using and testing the product.

Not only would this hands-on experience lead to more accurate descriptions of a particular technology in an ethics decision, but most likely it would show regulators that the platform is relatively benign.

Move toward uniform rules.

As lawyers do business across the internet, uniform regulation is more important than ever. Most obviously, creating consistency across all 50 states would help those lawyers caught in the crosshairs of conflicting jurisdictions. But consistent rules benefit clients, too.

Because lawyer profiles on LinkedIn or Avvo Answers are visible in all 50 states, a client who lives in a more restrictive jurisdiction where a disclaimer is required may begin to think that their lawyer is inferior when compared to other lawyers living where disclaimers are not necessary.

The most significant benefit of uniform rules is that regulators could collaborate on one set of rules and ethics opinions, rather than 50. This is essentially what happens today, albeit less efficiently: One state addresses a new technology issue, and then two or three dozen other bars write pretty much the same thing. Why not stop the charade of state independent oversight of ethics and encourage regulators from all 50 states to work on one set of rules?

Make rulings freely available.

For legal ethics to play a relevant part in regulating lawyer conduct, the rules and ethics opinions interpreting them must be accessible and searchable. This means regulators must remove their ethics opinions from behind the pay wall and place them where they’re available to all lawyers.

As we march through the 21st century, the goal of protecting clients remains as important as it has always been. But to be able to protect clients, we lawyers must first ensure that we remain relevant.
THANK YOU TO OUR DONORS

The ABA Fund for Justice and Education, the 501(c)(3) charitable arm of the American Bar Association, thanks its most generous donors for investing in public service and educational programs during the 2016-2017 bar year (September 1, 2016-August 31, 2017).

Legal services create a ripple effect and transcend the person being helped, impacting their family, career, and community. ABA FJE President’s Club donors contribute $1,000 or more every year, and harness the power of the legal profession to address the legal needs of our society.

INDIVIDUALS ($1,000+)

Ronald D. Abramson
Martha C. Adams
Mark D. Agrast
Gerald Aksen
Mark H. Alcott
Dennis W. Archer
Joan C. Arnold
Kim J. Askew
T. Maxfield Bahner
Erica Babkes
Hon. Patricia Banks
Hon. Rosemary Barkett
Ariena M. Barnes
Helaine M. Barnett
Hilarie F. Bass
William R. Bay
John M. Beal
Michelle A. Behnke
Herbert J. Belgrad
Frank and Ranlet Bell
Herbert N. Beller
Gregory M. Bergman
Gregory A. Jones
Leslie S. Johnson
Jenny L. Johnson
Harry S. Johnson
Justice Henry E. Needham, Jr.

Sheila C. Cheston
Hon. Judith C. Chirlin
Benjamin R. Civiletti
David W. Clark
Michael A. Clark
Robert A. Clifford
Mark D. Colley
Genevieve Coonan
Karol Corbin Walker
Jason Crowell
Marvin S.C. Dang
Barbara J. Dawson and
Hon. Samuel A. Thumma
Mark S. Davidson
Nancy Scott Degan
Julie A. Divola
Elaine G. Drummond
Dawn M. Du Verney
M. Douglas Dunn
Donald R. Dunner
Daralyn J. Durie
Barack S. Edchs
Stephen C. Edds
Walter F. Eggers, III
David Ellis
Pamela Lawrence Endreny
Jo Ann Engelhardt
Deborah Enix-Ross
Laura V. Farber
Jose C. Feliciano
Benjamin B. Ferencz
Donald M. Ferencz
William and Rita Hoch
James S. Holmes
Michael J. Horvitz
Hon. Barbara Howe
Theodore A. Howard
George C. Howell, III
R. Thomas Howell, Jr.
William C. Hubbard
Julianne Hughes-Jennett
Erika Hummer
Cynthia Monaco and
Daniel J. Jaffe
Sylvia F. James
William and Judith Jamieson
W. Anthony Jenkins
Julianne Jennett
Leslie S. Johnson
Justice Earl Johnson, Jr. (Ret.)
Harry S. Johnson
Jenny L. Johnson
Leslie S. Johnson
William and Mary Johnston
Gregory A. Jones
Robert E. Juceam
Robert M. Kaufman
Kathryn M. Keneally
Hon. Gladys Kessler
Loren Kieve
Julian Y. Kim and Julia Hong
Linda A. Klein and
Michael S. Neuren
Stephen P. Koch
Stephen M. Komie
Alan S. Kopit
Nancy J. Laben
Carolyn B. Lamm

James H. Landgraf
Mark E. Langevin
David J. Lansner
Kurt L. Lawson
Norman Lefstein
Hon. Jodi B. Levine
George T. “Buck” Lewis, III
Roberta O. Liebenberg
Richard M. Lipton
Deborah Maddux
Robert Maldonado
James R. Malone, Jr.
Wendy K. Mariner
Ronald L. Marmer
Lorelie Masters
Karen J. Mathis
Michele Coleman Mayes
Sandra R. McCandless
Jere D. Magaffey
Hon. Margaret McKeown
Scott and Ann Michel
Hon. Leslie B. Miller
Meg Milroy
Meade W. Mitchell
Guinevere M. Moore
John J. Moores and
Kathy Smith
Justice Henry E. Needham, Jr.
Annette Nellen
William P. Nelson
Mark A. Neubauer
William H. Neukomm
Stu B. Nibley
Frederick M. Nicholas
Randall and Lissa Noel
Susan Potter Norton
Joseph and Cinda O’Connor
Linda Oechsle
Pamela F. Olson
E. Fitzgerald (Jerry) Parnell, III
Scott F. Partridge
J. Anthony (Tony) and
Marylou Patterson
William G. Paul
Dr. Tania Pawade
Judy Perry Martinez
and Rene Martinez
Alan E. Peterson
Guy D. (Pete) Pfeiffer
William Phelan
Joseph M. Potenza

Thank you to the American Bar Endowment for their grant of nearly $3 Million in the 2016–2017 bar year.
ENSURING ACCESS TO JUSTICE

You make all that the ABA accomplishes possible. Thank you for standing with the ABA to have a meaningful and visible impact on creating a globally just society.

The Access Group, Inc.
American Association of Retired People
ABA Commission on Women in the Profession
ABA Section of Antitrust Law
ABA Section of Business Law
ABA Section of Criminal Justice
ABA Section of Health Law
ABA Section of Infrastructure and Regulated Industries
ABA Section of Litigation
ABA Section of Tort Trial & Insurance Practice
American Arbitration Association - ICDR Foundation
American Bar Endowment
American University Washington College of Law
Anne and Ronald Abramson Family Foundation
AT&T, Inc.
Baker Botts LLP
Baker Donelson Bearman Caldwell & Berkowitz, PC
Albert & Elaine Borchard Foundation, Inc.
Butler Snow Omara Stevens & Cannada Foundation
California Bar Foundation
Caplin & Drysdale, Chartered
Casey Family Programs
Cisco Systems, Inc
Clifford Law Offices
Community Foundation of the Virgin Islands
DLA Piper LLP
Drinker Biddle & Reath LLP
Fenwick & West LLP
Greenberg Traurig LLP
Freedom House
Holland & Knight LLP
Huntton & Williams
International Coalition of Sites of Conscience
International Development Law Organization
Jenner & Block LLP
John Hancock
Walter S. Johnson Foundation
Jones Day Foundation
Justice in Aging
Kirkland & Ellis Foundation
Law School Admission Council
Lieff Cabraser Heimann & Bernstein LLP
Lockheed Martin
Merck & Company - Polaris
Microsoft Corporation
Minority Corporate Counsel Association
Morgan, Lewis & Bockius LLP
Munger Tolles & Olson LLP
National Center for State Courts
North Carolina Bar Association
Northwestern University Pritzker School of Law
Oechsle Foundation
Orrick Herrington & Sutcliffe LLP
The Panzi Foundation
Pelican Center for Children and Families of Louisiana
Pilot Travel Centers LLC
Public Welfare Foundation
Pugh, Jones & Johnson PC
Quality Trust for Individuals
Raymond James/Morgan Keegan Company, Inc.
Redlich Horvitz Foundation
Search for Common Ground
Sheppard Mullin Richter & Hampton LLP
Sidley Austin LLP
Skadden Arps Slate Meagher & Flom LLP
State Bar of Texas
State Farm Insurance Companies
State of Connecticut Street Law, Inc.
Suffolk University Law School
Sullivan & Cromwell LLP
Swedish International Legal Assistance Consortium
The Tan Family Education Foundation
Thornburg Foundation
TIAA
U.S. Agency for International Development
U.S. Department of Health and Human Services
U.S. Department of Homeland Security
U.S. Department of Justice
U.S. Department of State
U.S. Department of Transportation
University of Southern California
University of Texas School of Law - Center for Women in Law
Vera Institute of Justice
Walmart, Inc.
Vera Institute of Justice
USAA

DEFEND. PROTECT. EMPOWER. GIVE.

You play a vital role at the ABA. Membership builds a foundation of sustainable charitable programs that benefit both attorneys and vulnerable populations served by the legal profession. Your membership has greater value when together, we support legal advancements positively shaping our communities.

Join the ABA FJE President’s Club
DONATE.AMERICTANBAR.ORG/FJE

AMBAR.ORG/FJE
WELCOME TO THE WEB 100

2017 ABA JOURNAL

BY ANDREW LEPKOWITZ, SARAH MUI AND STEPHEN RYNKIEWICZ
ell-informed lawyers cannot live on law blogs alone. So meet the ABA Journal’s Web 100.

When the Journal launched the first Blawg 100 in 2007, podcasts, Twitter and smartphones as we know them existed. But they were in a nascent stage. (By our second Blawg 100, we were highlighting podcasts and sharing bloggers’ Twitter handles.) But from now on, other digital media will share the spotlight with legal blogs—and we’re leaving the portal open to highlight new web platforms that are not yet imagined.

Our inaugural year of this feature honors 50 blogs (and adds five more to our Blawg 100 Hall of Fame), as well as 25 law podcasts and 25 tweeters for lawyers to follow. We once again conducted a survey on the state of the legal blogosphere and report the results online.

How did we arrive at this list of 100? During the summer, readers wrote to us to share what they considered the most compelling corners of the web. And this year—in a change from the last decade—judges from outside our staff made contributions and helped us pick the best of the best. (See pages 37, 41 and 43.)

We invite you to read, listen, follow and retweet.

Brett Burney does a great job writing posts and creating well-produced videos.
—Robert Ambrogi

THE ALGORITHMIC SOCIETY
NEW Ken Grady, a professor at LegalRnD—the Center for Legal Services Innovation at the Michigan State University College of Law, questions whether the legal profession’s leaders are too focused on perfecting old skills to see the big picture and make big changes. “An absolute must-read,” says Casey Flaherty of 3 Geeks and a Law Blog. Grady is “our brightest mind and often our sharpest tongue.”

APPS IN LAW
NEW “Brett Burney does a great job with this blog, not just writing posts but creating well-produced videos highlighting the features of each app he reviews,” says Robert Ambrogi of the LawSites blog.

ARBITRATION NATION
HALL OF FAME
Stinson Leonard Street lawyer Liz Kramer’s blog marked its sixth “blogiversary” during what she called the Summer of Arbitration because of the avalanche of arbitration cases and regulation. But Kramer goes beyond recounting rulings to look for arbitration trends and lessons for her “warm community of fellow arbitration geeks.”

ARTIFICIAL LAWYER
NEW Consultant Richard Tromans focuses on news of what he calls “new wave” legal technology—who is funding it and who is adopting it. “Thoughtful, timely coverage of developments related to artificial intelligence in law,” Ambrogi says.

BEFORE THE BAR
Law students, read this blog. Posts—written by practicing lawyers, law students or ABA Law Student Division staff—cover trends in legal writing, the U.S. Supreme Court, professionalism in practice, information about upcoming panels and writing competitions for law students, how to navigate law school, and how to move on after failing the bar exam.
BESPECIFIC
“For years, this has consistently been one of the best sources of news on the world of legal information, legal research” and knowledge management, Ambrogio says of Sabrina I. Pacifici’s 15-year-old blog. Posts from BeSpacific summarize and link to news stories, academic papers, and websites that highlight the latest web databases and news of interest to researchers.

BIG LAW BUSINESS
“Is one of my daily must-reads” for its “in-depth and consistent coverage of the business of law,” Ambrogio says. Posts and roundups at Bloomberg Law’s blog cover topics that include which BigLaw firms are getting hired, what partners are getting hired away, and academic papers presenting theories on the corporate legal market here and abroad.

BRIAN LEITER’S LAW SCHOOL REPORTS
The blog helmed by this University of Chicago Law School professor (with occasional guest posts) is more than a decade old and still very much on top of law school news. Posts regularly—and bluntly—comment on questionable decisions by law deans, major law school faculty changes, the status of law school hiring, the value of a legal education, and much more.

CANNA LAW BLOG
This Harris Bricken blog focuses on the myriad legal issues facing the cannabis industry in states where its sale is legal. Posts cover the industry’s lack of access to financial services, tax issues encountered by those operating cannabis businesses, and zoning issues

BRAIN LEITER'S LAW SCHOOL REPORTS
The blog helmed by this University of Chicago Law School professor (with occasional guest posts) is more than a decade old and still very much on top of law school news. Posts regularly—and bluntly—comment on questionable decisions by law deans, major law school faculty

Big Law Business
“Is one of my daily must-reads” for its “in-depth and consistent coverage of the business of law,” Ambrogio says. Posts and roundups at Bloomberg Law’s blog cover topics that include which BigLaw firms are getting hired, what partners are getting hired away, and academic papers presenting theories on the corporate legal market here and abroad.

EDUCATION LAW PROF BLOG
Timely analysis of constitutional law cases at the federal appellate level and above are the bread and butter of this blog by law professors Steven Schwinn and Ruthann Robson. In what promises to be a blockbuster year at the U.S. Supreme Court, you should check in with this blog regularly.

THE DIALOGUE BLOG
NEW This blog is a group effort by expert contributors curated by Australia-based consultant George Beaton, co-author of Remaking Law Firms: Why & How. Posts cover the challenges facing large law firms and how to address them.

EMPIRICAL SCOTUS
This blog is a group effort by expert contributors curated by Australia-based consultant George Beaton, co-author of Remaking Law Firms: Why & How. Posts cover the challenges facing large law firms and how to address them.

EDUCATION LAW PROF BLOG
Timely analysis of constitutional law cases at the federal appellate level and above are the bread and butter of this blog by law professors Steven Schwinn and Ruthann Robson. In what promises to be a blockbuster year at the U.S. Supreme Court, you should check in with this blog regularly.

THE DIALOGUE BLOG
NEW This blog is a group effort by expert contributors curated by Australia-based consultant George Beaton, co-author of Remaking Law Firms: Why & How. Posts cover the challenges facing large law firms and how to address them.

EMPLOYMENT & LABOR INSIDER
“I am a compensation consultant, and I find this blog helpful to keep up to date with employment law,” says Joe Rice, who works at Cbiz management consulting in St. Louis. Amy Puzder, a human resources adviser at ThinkHR in Pleasanton, California, says blogger Robin Shea “explains things in a way that are relatable to HR people and, more importantly to my work, in a way that I can easily translate to my clients.”

EVIDENCE PROOF BLOG
Colin Miller’s blog focuses on the applications of state and federal rules of evidence in criminal trials. Joan Gallo of Hopkins & Carley in San Jose, California, says the blog is well-written and clear. “As a civil lawyer, it gives me a better understanding of criminal procedure. ... It is always interesting and relevant. It has fostered my interest in reform of the criminal justice system.”

EXCESS OF DEMOCRACY
This blog by Derek Muller, a professor at Pepperdine University School of Law, is an eclectic mix of...
analysis of major election law cases and number crunching related to the state of bar exam scores. We've admittedly paid a bit more attention to the bar exam content as California recently mulled lowering its cut score, and Muller pondered what this meant for legal education in the state.

FINANCIAL PANTHER
NEW This blog is less about the law than one lawyer's quest. Kevin, the "Financial Panther," says he managed to pay off about $87,000 in law school loans in less than three years, which allowed him to break his BigLaw chains and take a government job at a $50,000 pay cut. But he maintains "side hustles" to supplement his income on his terms, and he documents these efforts on his blog.

FOIA ADVISOR
NEW "While there are a few blogs that cover [Freedom of Information Act] news, this is consistently one of the best," Ambrogi says. The bloggers summarize and link to the latest FOIA-related court opinions, reports from the Department of Justice's Office of Information Policy and FOIA-related op-eds. They also solicit questions from readers about FOIA to answer in their posts.

FOURTH AMENDMENT.COM
For more than a decade, criminal defense attorney John Wesley Hall Jr. has posted multiple brief daily summaries of search-and-seizure cases in state and federal courts. His site has pages devoted to links to Fourth Amendment rulings from each state, and a page listing links to Fourth Amendment rulings by the U.S. Supreme Court dating back to Boyd v. United States (1886).

GAVEL TO GAVEL
HALL OF FAME
This blog covers legislation in all 50 states affecting the courts. “Gavel to Gavel is the leading source of reliable news about under-the-radar developments in judicial administration throughout the country,” says Eugene Volokh of the Volokh Conspiracy blog.

GLASS CEILING DISCRIMINATION BLOG
NEW This employment law blog by Eric Bachman of Zuckerman Law focuses on promotion discrimination against women and racial minorities in corporate America. Posts cover awards in such cases from juries and arbitrators, note shocking court rulings in such cases, and highlight the latest statistics that demonstrate the prevalence of this form of discrimination.

Jeremy Richter is "a damn good writer on a variety of legal and not-so-legal topics.” —John Tabler

Jeremy W. Richter
NEW Jeremy Richter is "an insurance defense attorney, aka a jerk who prevents me from getting my payday on a regular basis," says John Tabler, a lawyer at Lau & Associates in Reading, Pennsylvania. "He’s also a damn good writer on a variety of legal and not-so-legal topics. His posts range from commercial trucking issues to the history of anti-miscegenation law in Alabama. The common thread? It's always—always—an interesting read."

JUST SECURITY
NEW This blog, based at the Center for Human Rights and Global Justice at the New York University School of Law, covers news related to U.S. national security law and policy. Then it analyzes that news and contrasts U.S. policy with international law. In the Trump era, the president’s national security-related tweets and news reports on the same topics are noted in the blog’s Early Edition posts every weekday.

THE LAST GEN X AMERICAN
Matt Leichter's blog originally launched in 2010 as the Law School Tuition Bubble. But he rebranded it in July 2015 after shifting its primary focus from law school tuition to student debt and legal education in general. Leichter is all about the data—what it shows about job outcomes for law grads, exploring the “law-school tipping point” with regard to LSAT scores, and questioning the quality of available data. He also stores original research that he posts about at this blog.

LAWFARE
HALL OF FAME National security issues have come to the fore in Donald Trump's presidency, and Lawfare is the blog to turn to for a take on...
the full legal implications behind the latest shocking headlines. Beyond that, posts cover foreign policy, cybersecurity law and policy, and the legal questions and challenges arising from turmoil in the Middle East.

**LAWGEEX**
-FULL-This posts at the law blog of Tel Aviv, Israel-based LawGeex cover what tech tools lawyers should be using and news in the legal tech industry generally. The blog also has started posting a series of monthly interviews with inside counsel about how they use legal technology to enhance productivity. Richard Granat, founder and CEO of DirectLaw Inc., likes the blog’s coverage of new developments in artificial intelligence and law.

**LAWNEWZ**
-FULL-This blog—founded by Dan Abrams, an ABC News legal analyst—covers high-profile criminal trials, celebrity-related legal news and legal issues emerging from President Donald Trump’s administration. Posts are sorted into categories that include “celebrity,” “important,” “crazy” and more, so readers can peruse the news they’re in the mood for. Live feeds for ongoing high-profile trials also are available.

**LAW SCHOOL CAFE**
The pace of posting is a little slow on this blog. But the work of co-moderators Deborah J. Merritt, a professor at Ohio State University’s law school, and Kyle McEntee, executive director of Law School Transparency, keep a tight focus on the systemic challenges facing law schools and recent law graduates. They grind the data to get a grip on the extent of the problems being faced and provide pointed commentary.

**LEGAL INSIGHT**
-FULL-This blog is not a frequent poster, but when he does post, it is always worth reading,” Ambrogi says. “He is one of the leading commentators on where the profession is and where it is heading.” Furlong also has a recent, self-published book about why clients, rather than law firms, have legal professional training courses.

**LEGAL PRACTICE**
-FULL-Bill Henderson is “a deep, dedicated thinker who is always worth reading,” ---Casey Flaherty

**LEGAL EVOLUTION**
-FULL-Bill Henderson, a professor at the Indiana University Maurer School of Law, shuttered his longtime blog the Legal Whiteboard this year to start up Legal Evolution, in which he tracks innovations in the industry and legal education and covers lagging legal productivity. Henderson is “a deep, dedicated thinker who is always worth reading,” Flaherty says.

**THE LEGAL GEEKS**
-As superhero and sci-fi movies and TV are surging in popularity, this blog explores the plotlines of Hollywood projects and comic books for potential legal issues. Blogger and podcaster Joshua Gilliland’s geek cred is only rising: He co-hosted panels this year at San Diego Comic-Con (for the third time) and San Francisco Comic Con. Gilliland’s favorite practice areas seem to be the Star Wars and Star Trek franchises and Marvel comics.

**LEGAL MOSAIC**
The days of law firms’ dominance of the law industry are over. Today’s reality is a mosaic: Firms, corporate law departments and other legal service providers are in place to meet legal consumers’ needs. This is what legal consultant Mark Cohen writes about. Cohen has “an unrelenting commitment to exploring the implications of what the customers and market are saying,” Flaherty says.

**LEGAL PRODUCTIVITY**
-Rocket Matter’s blog features posts on how lawyers can get organized, leverage technology and market their firms—as well as a podcast every Tuesday. Readers who wrote to us also note the blog’s occasional Legal Freedom Fighter Series and Shelter Animal of the Week.

**LETTERS BLOGATORY**
-Year after year, readers praise this blog, which focuses on international judicial assistance. “This blog is a painless way to keep up with international family law developments as they arise,” says Miami lawyer Carolyn West. The blog is “extremely helpful for my work in foreign litigation,” says Laurel Fresquez, a 2L at Harvard Law School who was a law clerk at the Department of Justice’s Office of Foreign Litigation this summer. “Ted Folkman is well-informed and has great legal theories that spark(ed) debate in my office.”

**LIFE AT THE HARRIS COUNTY CRIMINAL JUSTICE CENTER**
-Murray Newman has been blogging in this space for more than nine years. But this year he was in the eye of the storm—Hurricane Harvey. Life at the Harris County Criminal Justice Center in Houston became more challenging. Some posts are mostly of interest to locals, but others are relatable day-in-the-life stories from criminal defense practice.

**NY BAR PICTURE BOOK**
-At her blog, Wela Quan posts cartoons that...
reflect on her former life as a corporate lawyer in New York City. Her other claim to fame is her self-published *New York Bar Picture Book*, which is a visual study outline for the New York state bar exam.

**OPEN LAW LAB**
Margaret Hagan, a lecturer at the Hasso Plattner Institute of Design at Stanford University, started this blog as a Stanford Law School student. She blogs about the use of legal design as a means of access to justice—and often uses illustrations to convey her ideas to readers. Her posts also cover the products and projects of legal design thinkers. Her blog’s Legal Design Toolbox also features guidance on how to develop ideas into new products and services.

**RACE AND THE LAW PROF BLOG**
Professors write about topics that include race-based inequities in the workplace, racial profiling, and how to teach *Dred Scott v. Sanford* to students at a time when white supremacy is emerging from the shadows.

**RICHARD ZORZA’S ACCESS TO JUSTICE BLOG**
Ambrogi says no blogger covers access-to-justice issues like Washington, D.C., lawyer Richard Zorza. Richard Posner made the plight of pro se litigants a cause celebre when he abruptly retired from the 7th U.S. Circuit Court of Appeals at Chicago in September. It “could open a whole front in access to justice,” Zorza writes on the blog. Watch his blog to see what happens.

**ROSS LEGAL TECH CORNER**
NEW Ross Intelligence “is perhaps the most famous name in legal tech and helps to put the spotlight on other technologies and founders as we seek to change the misconceptions and bias around legal tech,” says Jonathan Marciano, communications director of LawGeex. “The blog provides interesting interviews with legal tech pioneers.”

**SCREW YOU GUYS, I’M GOING HOME**
Donna Ballman’s blog gives straight talk and comprehensive information to those unsure of the state of the law surrounding their employment dilemmas. This year she had some helpful posts that answered hurricane-related questions: Do you qualify for disaster employment assistance if you lost your job because of a hurricane? Does the Occupational Safety and Health Act protect workers from dangerous post-hurricane work conditions? Do I get paid if a hurricane shuts down my office?

**SOCIALLY AWARE**
This Morrison & Foerster blog does “a good, consistent job of following developments related to social media in law,” Ambrogi says. Most posts cover social media users’ run-ins with regulators and the court system, social media evidence in the courtroom, and copyright issues related to content posted on social media. But posts also touch on new technologies such as blockchain and highlight data protection issues.

**UNDERSTANDING THE ADA**
William Goren “provides great insight on the ADA and provides analysis from the standpoint of the plaintiff and the defendant,” says J. Courtney Cunningham, a Miami lawyer. “He provides practical tips on how a case or opinion can be used to help your client.” Debra Amens, a lawyer from Battle Mountain, Nevada, says Goren “takes different aspects of the ADA and provides recent case perspectives and insight on how the cases move the law—and how to use the cases in argument.”

**THE ADA UNDERSTANDING**
**TECH CORNER HALL OF FAME**
Lawyer and knowledge management consultant Ron Friedmann’s blog is “an essential mix of expertise, hope and practicality,” Flaherty says. Posts identify and discuss significant legal tech products, and Friedmann sometimes interviews the people behind these products. He also spots trends in legal news, and this year he live-blogged the International Legal Technology Association’s annual conference.

**THEMCA.COM**
NEW The acronym TMCA in this Dorsey & Whitney blog stands for trademarks, copyrights and advertising, and posts cover entertaining legal developments in those areas of law. Readers wrote to us about this blog’s commitment to fun, some citing one post about a fair use law—“It’s brilliantly clever writing and informative subject matter.”

**VERDICT**
“As much a magazine as a blog, Verdic..."
What Makes a Good Law Firm Website?

We had originally planned to list law firm websites among this year’s Web 100. But we didn’t get enough viable candidates this first time around.

But what should law firms consider if they’re contemplating a site revamp? Two people who were going to judge that category, Monica Bay, a fellow at CodeX—the Stanford Center for Legal Informatics at Stanford Law School, and Sam Glover, founder and editor-in-chief at Lawyerist, had constructive feedback.

Bay and Glover agree each firm has to decide the right course of action regarding website design based on its services and the type of client it wants to attract. The website “is an opportunity to tell people what you can do for them,” Bay says.

She says many law firm websites “aren’t focusing on potential clients.” Instead, they are vehicles to showcase images of sleek conference rooms and highlight industry accolades.

To avoid this trap, a successful website should start “with a well-defined goal” that highlights a “call to action,” Glover writes in the Lawyerist publication 10 Things the Best Website Designs Have in Common. Lawyerist has run a law firm websites contest since 2010.

In other words, “don’t make your visitor think,” Glover says. This starts with building a website that appeals to search engine algorithms, which favor mobile-friendly sites. Google’s search algorithm, for example, prioritizes sites with a responsive design—those that can fit any mobile screen.

A website not favored by Google can struggle. Data from Advanced Web Ranking shows that 21 percent of mobile users will click through the first result of a search, while 4 percent will click through the fifth result.

Beyond being client-focused, Glover says a website has to have a personality. Still, a creative design without purpose does not “tick all the boxes,” Glover says. Pulling back to his report’s first point, he says a firm’s website must have a goal for its creativity and “a strategy with that goal in mind.”

This strategy should get into the weeds. “Just like drafting a brief, you’d try to advocate with your font choices and headings,” he says.

For example, a personal injury attorney might want to use a red color scheme with blocky fonts because these design choices reinforce a client’s anger and frustration.

Conversely, a divorce attorney should consider rounded, serif fonts with a higher “x-height” (the height of the main body of a lowercase letter), warm colors and pictures of people smiling because it is friendlier and helps alleviate a potential client’s heightened stress.

Regardless of the design and layout a firm chooses today, “it has to be evolving,” Glover says. He recommends, at a minimum, an audit every six to 12 months. During that audit, firms should track click-thru and conversion rates to see whether their design and messaging create the intended effect. Glover says the stereotypical personal injury firm sites that play videos automatically, feature pop-up chat boxes and have other clutter make him cringe.

However, he muses, if that design is getting the desired result, “then go with it.”

—JASON TASHEA

VISIT ABAJOURNAL.COM FOR RESULTS OF OUR LAW BLOGGER SURVEY, OUR WEB 100 TWITTER LIST AND OUR BLAWG HALL OF FAME.
CRIMINAL
Crime stories from the banal to the bizarre are presented by public radio producer Phoebe Judge of Durham, North Carolina. “This podcast is riveting,” says lawyer Brad Rosen, a writer-analyst at Wolters Kluwer Legal & Regulatory. “Phoebe Judge is awesome.”

THE DIGITAL EDGE
Sharon D. Nelson and Jim Calloway keep listeners up to date on tech innovation, with an ear for the solutions lawyers need. Episodes this year also examined the buyer’s market in legal services and the low bono concept for access to justice.

EVOLVE LAW
Mary Juetten of Traklight and Jules Miller, co-founder of Hire an Esquire, conduct brief but cogent interviews with technology innovators in the Evolve Law member network. “This podcast provides great insights into emerging legal tech companies,” Rosen says. “Juetten and Miller deliver the goods.”

THE GEN WHY LAWYER
“Nicole Abboud hosts an engaging, practical and always-entertaining podcast that delivers quality content relevant to young lawyers,” says Franklin Graves of Naxos Music Group in Nashville, Tennessee. “The podcast serves as a source of weekly inspiration and thought-provoking discussion that truly helps develop my skills and growth as a Gen Y/millennial lawyer.”

THE HAPPY LAWYER PROJECT
Okeoma Moronu Schreiner, a Dallas in-house lawyer with BigLaw credentials, is a relatable guide for young lawyers. Interviews cover law practice, career development and work-life balance.

HSU UNTIED
San Francisco legal recruiter Richard Hsu has shifted his interview series from its original focus on lawyers and their hobbies. Reflecting his background as a Caltech engineer and a BigLaw partner, Hsu now indulges his curiosity with a quirky selection of authors, entrepreneurs and celebrities—including Steve Wozniak, Apple’s co-founder, and Carol Spinney, Big Bird and Oscar the Grouch’s puppet master.

HUSTLE & FLOW
Heather Joy Hubbard, a former BigLaw partner and practice group leader, addresses the hustle of business and career development and the flow of cultivating inner peace. “As a midyear associate, Heather has a lot of raw and real advice from her experience and helping others,” says Annie Howard of Hancock, Daniel, Johnson & Nagle in Johnson City, Tennessee.

THE LAWFARE PODCAST
These are boom times for Benjamin Wittes and Lawfare. The Department of Justice’s Russia probe has given Wittes and Susan Hennessey, The Lawfare Podcast co-hosts, a wider audience for their interviews with national security insiders. This summer, Wittes made news when he shared the details of conversations he’d had with former FBI Director James Comey with the New York Times. “Ben Wittes is heavy-duty and deep,” Rosen says. “Let the cannonballs fly.”

LAWYERIST PODCAST
Sam Glover and Aaron Street of Lawyerist get down to the nuts and bolts of law practice, drawing from guest interviews and their experience with Minneapolis solos and startups. “This is the best podcast out there for anyone who cares about the future of the legal profession,” says Jordan L. Couch of Palace Law in University Place, Washington. “They cover a lot of topics with nominally interesting people and provide a voice for the often-overlooked solo and small-firm lawyers.”

LAWYER2LAWYER
Robert Ambrogi and J. Craig Williams have been podcasting since 2005, almost as long as the word podcast has been in circulation. Episodes pair up lawyers with opposing perspectives on legal issues in the news.

THE LEGAL GEEK PODCASTS
Jessica Mederson and Joshua Gilliland watch the latest superhero sequel and wonder how the courts would sort out the carnage. Heavy doses of comic books and sci-fi make this chatty podcast a guilty pleasure for fans of the Justice League and other defenders of justice.

LEGAL TOOLKIT
Jared Correia and Heidi Alexander look solo and small-firm practice management issues that startups. “This is the best podcast out there for anyone who cares about the future of the legal profession,” says Jordan L. Couch of Palace Law in University Place, Washington. “They cover a lot of topics with nominally interesting people and provide a voice for the often-overlooked solo and small-firm lawyers.”

MAXIMUM LAWYER
Marketing-savvy St. Louis lawyers Jim Hacking and Tyson Mutrux and their guests explore the details of lead generation and the broader practice management issues that solos and small firms face.
NEW SOLO
Legal technology coach Adriana Linares aids lawyers building their practice or making small-firm transitions.

REASONABLE DOUBT
Adam Carolla, a comedian and former contestant on The Celebrity Apprentice, engages criminal defense attorney Mark Geragos in pop culture bro banter.

RESILIENT LAWYER
Autumn Witt Boyd of the Legal Road Map podcast recommends podcaster Jeena Cho. “Law is a high-stress field, no doubt,” Boyd says. “Many lawyers need to hear what she and her guests have to share. She interviews lawyers at all stages of their careers, including many at the highest levels of BigLaw, CEOs and corporate counsel, to find what’s worked for them to be more resilient.”

SWORD AND SCALE
Among the wave of true crime podcasts, Sword and Scale is notable for covering a wide range of sordid and bizarre events and documenting how they wind their way through the justice system.

THINKING LIKE A LAWYER
Above the Law surveys legal news with skepticism and a few F-bombs. “Elie Mystal and Joe Patrice are often both insightful and hilarious,” Rosen says.

THIS WEEK IN LAW
Denise Howell, a lawyer from Newport Beach, California, launched this technology podcast in 2006. Intellectual property litigator J. Michael Keyes and University of Notre Dame Law School student Matt Curtis now join Howell in a video conference that covers drones, virtual reality, privacy and Kim Kardashian West.

UN-BILLABLE HOUR
Employment lawyer Christopher Anderson schedules time to make lawyers more successful. The no-nonsense style of a former ADA serves Anderson well as he guides business and technology experts in breaking down topics such as blockchain, bookkeeping, litigation financing and process management. His team consulting background helps focus discussion on what’s best for lawyers and their clients.

UNDISCLOSED
Maria Rainsdon of Grand Junction, Colorado, became hooked on the case of Adnan Syed from the Serial true crime podcast. “Then came Undisclosed, which actually investigated, looked into any and all facts they could find, and produced a high-quality podcast that shined a light into so many places Serial walked past.”

AMERICAN BAR ASSOCIATION (@ABAesq). Follow this feed to keep up with the ABA and other legal news.

ANDREW ARRUDA (@AndrewArruda), co-founder and CEO of Ross Intelligence. “A leader in the field of big data, breaking down big notions for attorney consumption,” says Jared Correia of Red Cave Law Firm Consulting.

SARAH BURSTEIN (@design_law), associate professor at the University of Oklahoma College of Law. “Makes design fun and interesting. No small task,” says Tim Baran of Good2bSocial.

DAVID COLARUSSO (@Colarusso), data scientist at the Committee for Public Counsel Services in Boston. “Great source for tech news with a nod toward data science,” says Sarah Glassmeyer of the ABA Center for Innovation.

BRIAN CUBAN (@bcuban), attorney, speaker and author of The Addicted Lawyer. “Addiction and mental health issues are a crisis for lawyers. This account discusses the issues frankly and serves as a good learning opportunity for what to look out for.” —Glassmeyer

STEPHEN LOUIS A. DILLARD (@JudgeDillard), chief judge
of the Court of Appeals of Georgia. “Entertaining and engaging.” —Baran

CAROLYN ELEFANT (@carolynelefant), lawyer, blogger, author and founder of PowerUp Legal. “A longtime booster of solo attorneys, Elefant continues to run her own practice while offering sage advice to colleagues.” —Correia

THE FLORIDA BAR (@theflabar). “The least stuffy bar association Twitter account you’ll come across—it’s informative and fun!” —Correia

CHRIS GEIDNER (@chrisgeidner), legal editor and Supreme Court correspondent at BuzzFeed News. “Legal news with a touch of the irreverent BuzzFeed twist.” —Glassmeyer

ROSS GUBERMAN (@legalwritingpro), president of Legal Writing Pro. "Legal writing is boring, but this gives you tips in easy-to-digest tweets, so you don’t feel like you’re being lectured at. Like hiding vegetables under a pile of cheese sauce.” —Glassmeyer

RACHEL GURVICH (@RachelGurvich), clinical assistant professor at the University of North Carolina School of Law. This co-founder of #PracticeTuesday “provides great, practical advice for law students and beyond.” —Glassmeyer

SHERRILYN IFILL (@SifiLLDF), president and director-counsel of the NAACP Legal Defense and Educational Fund. “Truth-telling leader of a civil rights organization.” —Baran

MITH JACKSON (@mitchjackson), aka the Streaming Lawyer, speaker and tech entrepreneur. "Always on the forefront of modern technology, Mitch Jackson is not afraid to try anything new or to dream the experience.” —Correia

SARAH JEONG (@sarahjeong), senior writer at the Verge. “Good source of tech news for nontechies.” —Glassmeyer

ELIZABETH JOH (@elizabeth_joh), professor at the University of California at Davis School of Law. “Insightful, especially around politics.” —Baran

JOSH KING (@joshuamking), chief legal officer at Avvo. “A champion of free speech, King frequently addresses issues of social import for attorneys.” —Correia

DAN LEAR (@rightbrainlaw), director of industry relations at Avvo. “Great energy and an evangelist for innovation in the profession. Engaged without oversharing.” —Baran

KEITH LEE (@associatesmind), lawyer and author. “With an army of small-firm and solo supporters, Keith Lee expands his kingdom via Twitter.” —Correia

WHITNEY MERRILL (@wbn312), counsel for privacy, e-commerce and consumer protection at Electronic Arts. Information security “is now more important than ever. This feed is a great source” for information security and privacy news—especially as they relate to lawyers. —Glassmeyer

ELIE MYSTAL (@ElieNYC), executive editor of Above the Law. “Never afraid to speak his mind, Mystal uses his pulpit at Above the Law to say what other lawyers are afraid to.” —Correia

JASON STEED (@5thCircAppeals), of #AppellateTwitter, appellate lawyer and former English professor. “Good mix of legal news and original commentary.” —Glassmeyer

GABRIEL TENINBAUM (@GTeninbaum), legal writing professor at Suffolk University Law School and director of its Institute on Law Practice Technology & Innovation. “Perhaps the most tech-savvy law professor in the country,” he is “focused on training law students to deliver practical solutions in legal and legal tech.” —Correia

KEVIN UNDERHILL (@loweringthebar), lawyer and legal humor blogger. “Legal humor without laughing at people, which I think is important.” —Glassmeyer

ALEX VITALE (@avitalo), author and sociology professor at Brooklyn College. “In the Wild West of legal innovation and tech, we sometimes seem to forget about criminal law. But this is a great compilation of criminal law news and investigation.” —Glassmeyer
ABA MEMBER DISCOUNTS TO SMILE ABOUT
RICOH LEGAL SOLUTIONS MEAN BIG SAVINGS FOR ABA MEMBERS

Law offices must be as efficient as possible to keep clients happy without cutting back on service. If you are overwhelmed with manual workflows, your productivity, accuracy and organization will suffer. Learn how to gain efficiencies in your law office and provide the service your clients demand. Plus, enjoy special discounts on office equipment.

LEARN MORE AT AMBAR.ORG/RICOHLEGAL

GIFT YOURSELF WITH DENTAL AND VISION COVERAGE IN 2018

Here’s something to smile about! The ABA Insurance program offers comprehensive dental and vision coverage at competitive rates for you and your family. Administered by USI Affinity

LEARN MORE AT ABAINSURANCE.COM

DELL DELIVERS SAVINGS

From laptops to servers, and desktops to monitors and displays, Dell delivers affordable technology for any law firm. And ABA members save up to 40% on the everyday price!

LEARN MORE AT AMBAR.ORG/DELLSAVE

GUARANTEED INCOME FOR LIFE!

Receive guaranteed payouts that deliver predictable income for as long as you need. Take advantage of special payout rates available to ABA members!

LEARN MORE AT AMBAR.ORG/INCOME
When Lisa Graybill organized a rally for criminal justice reform at the Louisiana Capitol in April, she was expecting maybe 300 people. Twice that many showed up.

"I haven't seen anything like that, and I've been doing civil rights advocacy for almost 20 years now," says Graybill, who helped organize the day as part of a coalition called Louisianans for Prison Alternatives, a project of the Southern Poverty Law Center. "We ran out of T-shirts. ... We weren't entirely prepared for the volume or the energy."

A lot of that support, Graybill believes, came from people who have personal experience with Louisiana's prison policies. As of 2015, Louisiana—a state that went to the Republicans in the last five presidential elections—had the dubious distinction of incarcerating more people than not only any other state (according to the Bureau of Justice Statistics) but also any nation (according to the UK's Institute for Criminal Policy Research). More than other Americans, Louisianans are personally affected by imprisonment, or they know someone who is.

"The upside, if you can call it that, to being the world's leading incarceration state is that you've got a whole lot of pissed-off people," says Will Harrell, former Southern regional director of the American Civil Liberties Union's National Campaign for Smart Justice. "It's hard to find someone in Louisiana not either directly or closely indirectly impacted by the carceral policies of that state."

Putting that many people in prison is also expensive. In 2015, Louisiana had a $1.6 billion budget gap—so much that the state government wasn't sure it could afford its 2016 presidential primary election. The same year, the corrections budget was $622 million, nearly $200M more than similarly populated Alabama and South Carolina. And all that spending wasn't lowering crime; FBI statistics...
“WE WEREN’T ENTIRELY PREPARED FOR THE VOLUME OR THE ENERGY.”

—LISA GRAYBILL
say Louisiana had the nation’s highest murder rate in 2015. So when Democrat John Bel Edwards won the governor’s office, he promised he’d make criminal justice reform a centerpiece of his term—and won support from the majority-Republican state legislature. In June, Edwards signed a package of 10 bills that is expected to reduce the prison population by 10 percent, and the parole and probation population by 12 percent over 10 years. The state estimates the bills will save $252 million, about 70 percent of which will be plowed back into programs designed to prevent crime. In this way, the state hopes to promote public safety, save money and give former offenders a chance to be full members of society.

Around that same time, the federal government signaled a reversal of Obama-era criminal justice reform; President Donald J. Trump told an assembly of police officers: “Please, don’t be too nice” when transporting suspects; and Attorney General Jeff Sessions increased prosecutors’ use of mandatory minimums (See “Jeff’s Law,” October, page 56). Meanwhile, states have gone, often with great enthusiasm, in the opposite direction. Adam Gelb, director of the Pew Charitable Trusts’ Public Safety Performance Project, says 36 states have enacted some kind of criminal justice reform—eight of them more than once—over the past 10 years.

And although those reforms can be a struggle to get through legislatures, they tend to win approval—even in “red” states such as Louisiana—because they have bipartisan support. They bring together legislators with diverse backgrounds and interests, including controlling crime, reducing corrections costs, embracing religious ideas about redemption, reducing the size of government, grappling with the effect of imprisonment on families and minority communities, and questioning the morality of locking up so many people.

“The reason that it is so bipartisan and cross branch is that it meets many objectives,” says Alison Lawrence, Criminal Justice Program director for the National Conference of State Legislatures. “I would say behind all of it, everybody cares about public safety, and that’s the underlying factor.”

FOLLOW THE LONE STAR
Louisiana is part of a nationwide movement toward justice reinvestment—policies aimed at simultaneously reducing crime and reining in corrections spending, while still holding offenders accountable. Gelb calls those goals “our holy trinity.”

“The real goal is to improve the performance of the corrections system or to achieve a better public safety return on corrections spending,” he says.

According to the Urban Institute, which studies the outcomes of justice reinvestment, achieving a better return can be met in several ways. Reducing sentences, in a thoughtful and politically palatable way, is one component. But so are reducing the number of people held in lieu of bail and the time they’re held, expanding eligibility for parole and other ways to be released from prison, and providing alternatives to prison for probation and parole violations.

By reducing the number of prisoners, states save money—often hundreds of millions of dollars. Then, states “reinvest” some of that money in programs they believe will reduce crime, and therefore the need for prisons. That includes prison-based re-entry or job training programs, more probation and parole officers, and grants to community groups that help with re-entry-related problems like mental health and substance abuse. States may also lift the legal restrictions they place on former offenders, such as eligibility for professional licenses.

States are receptive, Gelb says, in part because they’ve seen the success of earlier adopters—especially Texas, which is the widely acknowledged godfather of justice reinvestment. In 2007, the Texas Department of Public Safety, which handles corrections, anticipated that it would need 14,000 to 17,000 more prison beds over the next five years. So it asked the legislature for $2 billion. Legislators blanched at that cost and instead tried to make the new prison beds unnecessary by spending $241 million on behavioral health and alternative sanctions programs.

Ten years—and several more bills—later, Texas has actually closed...
several prisons. State authorities estimate that Texas has reduced its incarceration rate by 20 percent and its crime rate by 30 percent, all while avoiding $4 billion in costs. It’s also become a model for other states, particularly its Southern neighbors.

Harrell, now director of the justice reform consultancy the Justice Collaborative, says they’re particularly impressed because Texas has a long-standing reputation for toughness on crime.

“When I walk into the state of Alabama legislature, or Mississippi, they could care less what’s happening in California or New York—or any blue state, for that matter. But I can make reference to Texas,” he says. “The sentiment is that ‘Well, if it’s OK in Texas, it can be OK here.’ ”

Although Texas is an outlier in some ways, other states have seen similar results. Pew’s research says South Carolina’s 2010 reforms dropped the state’s prison population by 14 percent as of 2016, allowing it to close six prisons and avoid building new ones. The prison closures and related efforts saved the state $491 million in that period. Meanwhile, its crime rate dropped 16 percent, which reformers believe is at least partly from reforms like rehabilitation programs and increased ability to work after a conviction.

The following year, 2011, North Carolina adopted reforms that dropped returns to prison by 14 percent over two years and probation revocations by 50 percent over four years, all while crime dropped 11 percent in two years. (Crime also dropped nationally in that period, Pew notes.) Georgia, which has enacted multiple rounds of reforms, changed its juvenile system in 2013 to reduce its emphasis on out-of-home placements. That nearly halved the number of kids committed to the state Department of Juvenile Justice.

That record is one reason states are receptive, Gelb says. Another is that there’s research showing that alternatives to incarceration can work—by, for example, limiting the legal consequences of conviction that can make it harder to find a job and drive defendants back to crime. That information wasn’t available in the 1980s and ’90s, when some of the toughest sentencing laws were passed.

There’s also more widespread conservative support for criminal justice reform than there was in those decades, Gelb says. Groups such as Right on Crime—and a major funder, prominent Republican donors the Koch brothers—have for several years been making the conservative case for justice reform, which they say promotes employment and intact families while saving public money. These days, conservatives are less likely to be attacked for supporting reform.

And then there’s money, which “you’d have to be naive to dismiss entirely,” Gelb says. “But our perception really is that budget issues get people to the table, but they’re not the meal.”

PUBLIC SAFETY

Budget concerns were part of the motivation in Louisiana, according to people involved in passing the justice reinvestment package there. Gene Mills, president of the Louisiana Family Forum and an advocate for justice reinvestment, says he personally feels he must follow the biblical command to visit prisoners—but he thought recidivism, and the associated public safety and financial costs, was a more effective argument.

“I focused on recidivism simply by virtue of the fact that it was a healthy place to start the conversation,” he
A FORMER INMATE-TURNED-ACTIVIST TELLS HER STORY AND GETS DRAWN INTO POLICYMAKING

Syrita Steib-Martin

says, “And it was one which most of us could agree upon.”

Elain Ellerbe, Louisiana state director for Right on Crime, adds that the business community was interested partly because there’s a shortage of skilled workers. Job training programs—which are aimed at reducing recidivism—could help.

Unlike Texas, which started its reforms in 2007, Louisiana could draw on Pew; since 2010 it has been funded by the DOJ’s Bureau of Justice Assistance to help states with justice reinvestment. Pew staff spent months in the state, conducting research and helping decision-makers interpret the data. Those people were chiefly from the Louisiana Justice Reinvestment Task Force, a creation of the legislature that included members from throughout the justice system, as well as legislators, a faith group and a community development group.

After about nine months of study and eight public meetings gathering community input, the task force made its recommendations to the legislature. It suggested expanding eligibility for alternatives to incarceration and opportunities to be released from prison, changing certain kinds of sentences, reducing parole and probation sentences, eliminating or changing certain collateral consequences of felony conviction, and funding programs in job skills training and behavioral health.

That was where the real show began, say Louisianans involved in the effort. The project had support from the governor and legislators from both parties, as well as public support. But it also met with considerable skepticism from a powerful force in Louisiana politics: the district attorneys and the sheriffs. Bruce Reilly of Voice of the Experienced, a New Orleans organization that advocates for (and is run by) formerly incarcerated people, says it became clear that “this was going to be the district attorneys’ package.”

“We were going to get probably as much as we could wrangle out of the DAs’ association,” says Reilly, a former jailhouse lawyer and Tulane Law School graduate. “There’s many a politician that will tell you straight out: ‘I’ll see what my DA and my sheriff think.’”

And for those groups, it was a deal-breaker to include people convicted of violent crimes, says Mills. One of those groups, the Louisiana District Attorneys’ Association, declined interview requests from the ABA Journal. Instead, executive director E. Pete Adams sent a prepared statement saying the LDAA never supported changes to penalties
When Syrita Steib-Martin was released from prison, she knew she wanted to go back to school. The daughter of a workers’ compensation judge, Steib-Martin grew up expecting to get an education. But she was a wild teenager who, at 19, helped rob a car dealership and set it on fire. She paid for those actions with 10 years of her life.

In prison, Steib-Martin started taking community college classes, earning a 3.8 grade-point average. But the application to the University of New Orleans asked whether she’d ever been convicted of a crime. She told the truth, and the university rejected her.

Two years later, Steib-Martin was married, pregnant and ready for a career that could help provide for her son, who turned 6 in September. So she reapplied—and this time, she didn’t disclose her conviction. She was admitted with a scholarship and eventually earned a degree in clinical laboratory science.

“The only thing I changed was that I unchecked the box,” she says.

Today, Steib-Martin balances her job as a hospital laboratory supervisor with motherhood and her nonprofit, Operation Restoration, which seeks to lift barriers to education for formerly incarcerated women. In February, she was advocating for that goal when she told her story to a town hall meeting organized by the Louisiana Justice Reinvestment Task Force.

The task force was listening—but so were state prisoners has taught her that low-risk versus high-risk is a more useful distinction than violent versus nonviolent. Reilly adds that the risk versus high-risk is a more useful system in Louisiana.”

In the end, that opposition led to the removal of most provisions relating to violent crimes. This disappointed many supporters. Ellerbe says her experience working with prisoners has taught her that low-risk versus high-risk is a more useful distinction than violent versus nonviolent. Reilly adds that the “violent criminal” label helped create Louisiana’s problems.

“It’s the people with the long sentences who were convicted of violent crimes that pose the huge blockade to any kind of sane budget and sane amount of people in one community to be locked up,” he says.

Another recommendation missing from the package is a major one: a proposed revamp of Louisiana’s felony classification system. Many states classify crimes at uniform levels that carry uniform penalties. Louisiana does not, which makes its sentencing inconsistent, sometimes wildly. As the task force report pointed out, Louisianaans can be imprisoned 20 times longer for possessing a stolen smartphone than for stealing it in the first place.

“The task force had proposed a class system, and the legislature introduced a bill to create it, but the district attorneys objected. Adams says in his prepared statement that it was designed to reduce sentences wholesale and “a solution in search of a problem.” So the legislature voted to create a task force to study the issue—in which Adams said his group would participate—and make recommendations during its 2018 legislative session.

Those unresolved issues are why advocates think the 2017 bill package is just the beginning of justice reform in Louisiana.

“It’s going to take a while to undo the damage that has been done,” says Graybill of the SPLC. “But the package of reforms that passed this spring is a good, strong first step.”

Harrell says everyone involved knew it would take multiple years; Edwards said as much when he signed the package. And for precisely that reason, Harrell doesn’t anticipate as much pushback as he sees in other states.

“The leaders who pushed forward this agenda and others who came...
Along have expressed across the board their commitment to continuing this,” he says. “The momentum is tremendous in the state of Louisiana.”

**TALE OF THE TAIGA**

Louisianians interested in previewing that pushback might look 4,300 miles northwest. Like Louisiana, Alaska was facing major budget problems when it enacted justice reforms in the summer of 2016. Like Louisiana, it had the help of a study commission—the Alaska Criminal Justice Commission, which has examined the issue since 2014. And as in the Bayou State, Alaska’s reform bill, Senate Bill 91, was passed by a majority-conservative legislature with bipartisan support.

But Alaska’s reforms have seen a public backlash. Barbara Dunham, staff attorney for the Alaska Criminal Justice Commission, says the group hears a lot of testimony from members of the public who believe its reforms are responsible for increased crime. (Neither the FBI nor the Alaska Department of Public Safety had 2016 Alaska crime rates available when this article was being written, although the FBI says violent crime is rising nationwide.)

“When I tell people what I do, they don’t know what SB 91 is,” says Dunham. “But once people find out about it, they get very vocal.”

The actual reforms in Alaska are similar to Louisiana’s. Alaska established a new evidence-based pretrial services program in which it assesses defendants’ risk level. To keep someone in jail, a court must find that it is necessary to ensure public safety or their appearance at trial. The classifications or penalties for certain minor crimes were lowered, and police officers were authorized, at their discretion, to write tickets for class C felonies. A new “suspended entry of judgment” mechanism was created, permitting pretrial diversion programs.

Alaska also expanded parole eligibility and required the state Department of Corrections to make re-entry plans for prisoners. It expanded alternatives to jail for probation violators. In addition, the state rolled back some of the collateral consequences of conviction—such as ineligibility for food stamps—and expanded access to behavioral health services. And because it was expecting more people to be released from prison, it expanded victims’ rights to be notified about releases.

“This is a major overhaul of Alaska’s criminal justice system,” says Susanne DiPietro, executive director of the Alaska Judicial Council, which houses the commission. For experienced professionals in law enforcement, corrections and the courts, it’s “kind of a sea change.”

But some parts of the reforms are threatened. Dunham and DiPietro say Alaskans are feeling nervous about crime, and SB 91 is getting some of the blame. Part of that nervousness was caused by events not related to the bill.

In 2016, Anchorage had a serial killer who shot five people, apparently at random, in public places that included a playground. Anchorage police now believe the perpetrator was James Dale Ritchie, who they connected to the murders after he died in a shootout with police. Ritchie had no recent criminal record, although he had served time for burglary in 2005.

In other cases, critics can draw a clearer line to the reforms. Just days after SB 91 was signed, the then-president of the Anchorage police union told television station KTVA that he was already releasing drivers accused of DUI on their own recognizance, which he criticized as unsafe. When crime statistics showed that shoplifting and car theft had risen in Anchorage in 2016, some blamed SB 91 for removing prison as an option for first theft offenses.

Dunham says some of the backlash may be a reaction to Alaska’s other problems, including deep budget cuts—which limit law enforcement’s ability to respond to minor crimes—and the national opioid epidemic.

Nonetheless, the public outcry was strong enough to prompt the commission to revisit its work. In January, it came out with proposed revisions, some of which became Alaska’s SB 54. Among other things, the bill would make people who commit the lowest level of felony, class C, once again subject to jail for first offenses.

Because almost 40 percent of Alaska’s prisoners in 2015 were convicted of class C felonies, the bill could have a substantial effect on the prison population. That would make it harder for SB 91 to achieve its projected 13 percent reduction in the prison population and $380 million in savings. The bill is pending in the Alaska House of Representatives.

Meanwhile, the commission is busy trying to study the effects of SB 91, which is part of its mandate from the legislature. With an effective date of July 2016 or January 2017 for most of the provisions, it was too early last summer to review much data. DiPietro says they’re hoping to study recidivism over three years, which requires following offenders over time; that data won’t be available until 2019 at the earliest.

“At this point, it’s ‘Are we experiencing any significant shifts in public safety? Can we do things more efficiently without affecting the crime rate?’ ” Dunham says. “Public safety is the ultimate goal.”

Harrell thinks Louisiana may do better, in part because its governor has embraced, rather than merely tolerated, criminal justice reforms. And he advises supporters of justice reform to play the long game.

“I have watched for nearly four years now, each state literally looking across the borders and comparing themselves to the other. And nobody wants to be the worst of the worst anymore,” he says. “It’s almost a positive competition happening.”

---

**“WHEN I TELL PEOPLE WHAT I DO, THEY DON’T KNOW WHAT SB 91 IS. BUT ONCE PEOPLE FIND OUT ABOUT IT, THEY GET VERY VOCAL.”**

—BARBARA DUNHAM
Get ready to meet the freshest name in Hawai‘i law.

Visit freshlawhawaii.com to learn more.
The last several years have seen a groundswell of legal complaints against colleges and universities—by both students who say they were victims of sexual assault on campus and students who say they were wrongfully sanctioned for alleged misconduct. Many have been high-profile cases; and all are high-stakes, with implications for ruining a college career—and worse—on both sides.

In September, the Department of Education overturned the Obama administration’s guidelines on how campus sexual assault allegations should be handled and investigated, giving schools greater control over matters like what standard of proof is used by decision-makers. The reversal has polarized the legal community, with victims’ rights advocates concerned the move will dismantle years of progress and others sure the decision will offer needed due process protections.

One thing is certain: The problem of campus sexual assault has been under scrutiny for a long time, with very little consensus on the best way for schools to discipline, and protect, all parties.
In March 2014, a freshman at the University of Oregon went to an off-campus party where she was allegedly assaulted by three members of the school's basketball team.

The student, who said she had been drinking, told authorities she had been sexually assaulted at the party and then, later, at another apartment. The men—Brandon Austin, Dominic Artis and Damyean Dotson (who now plays for the New York Knicks)—said the sex was consensual.

The Lane County district attorney declined to prosecute the men, stating that the case was unprovable. The situation garnered a great deal of publicity, leading to protests on campus that spring.

Although the school initially suspended the three Oregon Ducks players, it later revised the suspension by allowing them to attend school and practice. Two of the men played in the team's NCAA tournament games that same month, according to the Oregonian. But that May, the school suspended all three of the accused students for four to 10 years.

As in many situations where students make accusations of sexual assault, the school's response to the allegations angered all sides. The female student sued, claiming the school mishandled her complaint. Among other allegations, she argued that the school waited too long—more than two months—to fully suspend the players.

Her lawsuit, like that of many other students who allege sex assault by peers, included claims that the school violated Title IX of the Education Amendments of 1972—which prohibits schools that receive federal funds from discriminating based on gender. In 2015, the university settled with the student for $800,000.

The three accused men are also pursuing claims against the school. They also argue that their Title IX rights were violated, and argue that pressure from protesters spurred the school to discipline them based on their gender.

U.S. District Judge Michael McShane dismissed the men's lawsuit in June. McShane wrote that they were suspended for violating the school's conduct code, which requires students to obtain "explicit consent" before sexual penetration.

The three are taking their cases to the 9th U.S. Circuit Court of Appeals at San Francisco.

CAUGHT IN THE CROSSHAIRS

The University of Oregon isn't alone in facing lawsuits after a sex assault accusation.

Schools throughout the country have recently agreed to settlements with students who say they were assaulted, as well as those who have been accused.

Florida State University agreed in January 2016 to pay former student Erica Kinsman $950,000 to resolve a Title IX lawsuit. Kinsman alleged that she was raped in 2012 by Jameis Winston, and that school officials responded to the allegation with deliberate indifference. Winston, who won the Heisman Trophy in 2013, denied the allegations and said the encounter was consensual.

The University of Tennessee at Knoxville agreed in July 2016 to pay $2.48 million to settle allegations by eight women who said the school's disciplinary program was biased in favor of athletes accused of sexual assault. And the University of Connecticut agreed in 2014 to pay $1.28 million to five students who alleged the school had mishandled separate complaints of sex assault and harassment.

Perhaps most notoriously, Baylor College in Waco, Texas, is facing federal lawsuits over allegations of multiple assaults by members of the football team. One of the complaints alleged that between 2011 and 2014, at least 52 rapes were committed by at least 31 school football players.

A school administrative review at Baylor cleared player Sam Ukwuachu of sexual misconduct in 2015. Several months later, a jury found him guilty of sexual assault, but that decision was overturned by an appellate court in March 2017. The appeals court ruled that text messages between the complainant and a friend of hers on the night of the incident were wrongly excluded from evidence. Ukwuachu had argued that those texts showed the accuser consented to have sex with him. In September, the Texas Court of Criminal Appeals agreed to review the state's appeal of the lower court reversal.

The Baptist school, which has already settled three lawsuits brought by victims, has recently implemented a number of changes to its procedures. Among other initiatives, the school now offers a tool that allows students to make
online reports about sexual violence—including anonymous reports. Baylor also now requires annual Title IX training for faculty, staff and first-year students.

But sex assault victims aren’t the only ones suing schools. At least 150 students accused of sexual misconduct have filed their own lawsuits, according to Title IX for All, which advocates for the rights of men and boys in education.

On top of the lawsuits, the federal government has opened 445 civil rights investigations of colleges for how they handled reports of sexual assault and resolved 92 cases, according to the Chronicle of Higher Education. At least 18 of those resolutions were “administrative closures,” in which the details aren’t publicly available. A number of others were withdrawn by students. But in many cases, the schools agreed to implement new policies and procedures for handling sex assault complaints. The extent to which the DOE will continue to pursue such investigations under the current administration is uncertain.

TITLE IX AND BEYOND

Eighteen years ago, the Supreme Court ruled in the case of Davis v. Monroe that schools can be liable for Title IX violations when students harass other students, if the schools are deliberately indifferent to the harassment.

But observers trace much of the current legal activity surrounding campus sex assault to a more recent date—April 4, 2011, when the Obama administration issued what’s now known as the “Dear Colleague” letter.

That game-changing directive, unveiled by former Vice President Joe Biden and former Secretary of Education Arne Duncan, said that Title IX required schools to investigate sex assault allegations and adjudicate the allegations under a “preponderance of the evidence” standard—the same as for civil lawsuits.

The guidance also discouraged allowing students to question each other during the campus proceedings.

Before that letter came out, 70 percent of schools already used a preponderance-of-the-evidence standard, while others—including Cornell, Harvard, Princeton, Stanford, the University of Virginia and Yale—used a higher standard of either clear and convincing evidence or beyond a reasonable doubt, according to Inside Higher Ed.

In September, Education Secretary Betsy DeVos announced a reversal, issuing new interim guidance on how to investigate and adjudicate campus sexual misconduct. In addition, the department opened a notice-and-comment procedure to determine the rules schools should follow when dealing with allegations of sexual assault.

In a speech delivered at George Mason University’s Antonin Scalia Law School, she said the Obama administration’s guidance “wasn’t working.” “The system established by the prior administration has failed too many students,” DeVos said. “Survivors, victims of a lack of due process, and campus administrators have all told me that the current approach does a disservice to everyone involved.”

The 2011 Dear Colleague letter “put colleges squarely in the middle of the debate between the rights of the accused and the rights of people who’ve been victimized,” says Peter Lake, a Stetson University law professor and an expert in Title IX compliance.

Schools that don’t follow the guidelines potentially faced the loss of federal funding. But schools that don’t protect the rights of accused students also confront the prospect of lawsuits. Complicating matters is the murky nature of some sex assault allegations. These incidents often occur when both parties have been drinking, clouding judgment and memory. Often the only witnesses are the two people involved, and they may have very different perceptions of the events.

Given all this, the Trump administration’s new position has alarmed victims’ rights advocates, who fully supported the prior administration’s stance that offered greater protection for women during investigations. They say that many schools didn’t treat sex assault allegations seriously enough in the past, often resulting in victims dropping out of school—while the alleged assailant remained on campus.

“In a lot of these cases, they never have the strength and courage to go back to school,” says Boulder, Colorado, lawyer John Clune, who represents victims in Title IX lawsuits throughout the country, including the student who sued the University of Oregon. Clune estimates that as many as half of the students he’s represented left school after being assaulted.

“They were talented students—great students in high school—and are now working at Target,” he says.

Steve Healy, CEO of Burlington, Vermont-based school security consultancy Margolis Healy & Associates, adds that many accusers have been frustrated by schools’ responses to sex assault allegations. “Victims have been coming forward for years, saying they didn’t feel they were getting the support and the transparency they needed and wanted when they brought these cases to an institution,” says Healy, who previously served as director of public safety at Princeton University. “Victims are fed up that they’re not believed, that they’re blamed for whatever incident happened, and that authorities aren’t taking their complaint seriously.”

But lawyers who represent accused students say the Dear Colleague letter unfairly tilted the field against them. Defense lawyers argue that the school officials who investigate these cases often are biased in favor of accusers, and that the level of proof is frequently inadequate.

“There are massive problems with the way that schools adjudicate these cases,” says Justin Dillon, a Washington, D.C., lawyer who has two cases pending against schools and one against the DOE’s Office for Civil Rights.

In one of those cases, a former University of Virginia law student was accused of having sex with a classmate who was too drunk to consent. He told school officials that the woman didn’t appear intoxicated on the
night of the encounter. An adjudicator said the case was “very close” and “very difficult,” but that the evidence tipped “slightly” in favor of finding the man responsible for the charges, according to the male student’s complaint against the OCR.

The adjudicator suggested that a higher standard of proof would have tipped the scales in the accused’s favor, according to the complaint.

Dillon says the lawsuit seeks “to create a systemic fix” to perceived flaws in schools’ current systems. Like many other advocates for accused students, he contends that many school investigators are inclined to take the accusers’ side.

“Most of the people who run this process believe that you should always believe the accuser,” he says. “They set up a system that makes that incredibly easy to do.”

The American College of Trial Lawyers is among the groups that have criticized the Obama administration’s stance. “In a well-intentioned effort to address the significant problem of campus sexual assault, OCR has established investigative and disciplinary procedures that, in application, are in many cases fundamentally unfair to students accused of sexual misconduct,” the organization said in a white paper published earlier this year.

Pamela Robillard Mackey, a lawyer in Denver, chaired the American College of Trial Lawyers task force that issued the report. She says the letter essentially forced many colleges to take the paradigm they had developed for policing honor code violations, whether for plagiarism or making too much noise in the dorms, and apply it to sex assault—“something far more serious, with lifelong consequences for both the accused and accuser.”

“They weren’t particularly well-equipped to do it,” Mackey adds. “Universities were very much trying to comply with the Dear Colleague letter and also honor the women who were claiming to be sexually assaulted,” Mackey says. But, in the course of trying to do so, schools “weren’t as mindful to what was happening to the accused.”

In May 2016, a group of 21 prominent law professors issued an open letter criticizing the administration’s directives to schools. “Unfortunately, OCR’s relentless pressure on institutions to respond aggressively to sexual assault allegations has undermined the neutrality of many campus investigators and adjudicators by forcing them to consider the broader financial impact of their actions,” the law professors wrote.

The professors added that some schools question accused students before informing them of their alleged violations, and that many school officials deny students access to witnesses or evidence that could clear them. The upshot, according to the academics, is that innocent students are deprived of a college education and relegated “to a lifetime of diminished income and social stigmatization as sexual offenders.”

“It’s awful to be victimized, but also awful to be wrongly accused and have to live with suspension or termination for the rest of your
life,” says Harvard Law School professor Elizabeth Bartholet, one of the signatories.

She points out that Harvard Law requires the higher standard of clear and convincing evidence in other disciplinary situations, including cases where students allegedly committed crimes like nonsexual assault.

“The clear and convincing standard seems appropriate with a sanction as serious as being thrown out of college on the basis of a sexual assault charge, which can clearly be a career-ending incident,” she says.

BURDEN OF PROOF

Some individual states are pushing back against a perception that colleges aren’t treating accused students fairly. In 2013, North Carolina became the first state in the country to pass a law specifying that students at public colleges are entitled to hire lawyers to represent them at campus judiciary proceedings.

A few observers question whether colleges should be adjudicating criminal matters at all. Others counter that universities have always had the ability to enforce codes of conduct as they see fit, and that they regularly adjudicate violations such as plagiarism and cheating.

But advocates for victims, like Laura Dunn, founder of the D.C. nonprofit SurvJustice, note that schools are entitled to enforce their honor codes—which impose different requirements than the criminal justice system and carry different consequences.

“They have no obligation to keep anyone on campus,” says Dunn, a member of the ABA’s Commission on Domestic & Sexual Violence.

She also notes that some students who have been thrown out of one school following sexual misconduct allegations have gone on to enter other schools.

Durham, North Carolina, attorney Kerry Sutton, who represented the captain on the Duke lacrosse team—exonerated of sexual assault in 2007—counters that school adjudications can have dramatic, life-altering consequences.

“It crushes the kids. It crushes the families. The parents are in tears on the phone because the arc of their son’s future has changed,” says Sutton, who now represents accused students full time.

She adds that many of these cases involve people who know each other, and that virtually all involve heavy drinking. People who are drunk may not be capable of consenting to sex—though whether that’s the case often depends on matters including how incapacitated they are.

Often, subsequent interactions further confuse the issue. For example, accused students and their alleged victims sometimes trade text messages or communicate on social media after an incident. Those exchanges can shed new light on the allegations—but the digital media trail can also be subject to interpretation.

Stetson University’s Lake points out that some predators have “gotten better at covering their tracks” by attempting to immediately create evidence that would clear them of wrongdoing. For instance, he says, some will “immediately descend on a victim with text messages and Snapchats to create a digital record that makes it look like a misunderstanding.”

In rejecting the Obama-era guidance, DeVos specifically noted the concerns about the preponderance-of-the-evidence standard raised by the American College of Trial Lawyers. She also cited a June proposal by a task force of the American Bar Association’s Criminal Justice Section, which does not reflect official ABA policy and has been rejected by other sections and divisions within the association.

The CJS recommendations call for a panel of at least three people—separate from whoever investigated the allegations—to decide whether any policies were violated. The recommendations say an accused student should be found responsible only if the panel unanimously agrees.

“We understood that the system was regarded as being so broken that it was highly likely the new administration was going to come in and take some steps in this area,” says Andrew Boutros, a Seyfarth Shaw partner who chaired the ABA’s task force. “Our recommendation was that schools should move away from the single investigatory model, where the investigator is also the decision-maker.”

The task force also recommended that students not question each other directly but have the opportunity to submit questions to a decision-maker, who would then decide whether to ask them.

“The task force’s recommendations provide less opportunity for confrontation than is provided by the Sixth Amendment; however, they do provide for the opportunity for both parties to ask questions through the hearing chair,” the report states.

“In addition, they do not allow either side to present their personal statement about what occurred unless they are willing to be questioned by both the school and indirectly by the other party.”

In its report, the CJS task force notes that the recommendations “have not been endorsed by any other section of the ABA.” And in fact, for the past two years, the ABA Commission on Domestic & Sexual Violence has been quietly working on a U.S. Department of Justice-funded grant to develop standards for handling campus sexual assault cases.

“It’s a problem that this task force report is being widely viewed, reported and used as ABA policy when it is not,” says Mark Schickman, who is of counsel at Freeland, Cooper & Foreman in San Francisco and chairs the commission. “It is a single section task force report, which is being broadly misused.”

Schickman says that despite the controversy over the DOE’s new guidelines, the commission is not weighing in with recommendations until its research is complete; a report will be released next year. The findings will be used to train judges, prosecutors and mental health providers, in addition to suggesting best practices for dealing with “the whole process,” he
says. One of the primary concerns: ensuring that sex assaults are not treated as strictly a criminal justice issue.

“To require a heightened burden of proof before you can impose remedial and restorative actions is not appropriate,” Schickman says, likening campus sexual assault to actions an employer might take in a workplace with similar allegations. “For the past several years, the 2011 and 2014 guidelines were recognized as appropriate guidance in the field, and this [task force] report is being used to undercut that.”

TROUBLING ENCOUNTERS

This much is clear: Many students who have made accusations, as well as those who have been accused, feel like they didn’t receive justice.

Raechel Liska, a graduate of the University of Wisconsin at Whitewater, where she was in the ROTC program, says she was sexually assaulted by another ROTC student in October 2014. She also believes she was drugged while at the bar.

When she woke up the next morning, she felt like something was “seriously wrong” and went to the hospital.

The male student reportedly said they had a consensual sexual encounter.

Liska made a report to school officials, but says the administration mishandled the complaint. She says she met alone with the dean of students and believed the dean was taking her allegations seriously.

The dean found the complaint unsubstantiated—a decision communicated to Liska via email.

“I actually, physically, dropped to the floor,” Liska says. “I was under the impression she was listening to me when I was talking to her. I put a lot of faith in the university justice system.”

Liska believes the dean reached her conclusion after an incomplete investigation that relied on statements by the male student and his friends.

“The big thing that she focused on was body language,” she says. “I don’t understand how someone who wasn’t there can say my body language gave consent.”

Liska, who had a 4.0 grade point average, says she no longer wanted to attend ROTC classes where she would have to be in close contact with her alleged assailant. She says the school offered that she could drive to the Madison campus to take those classes, but doing so would have required making a two-hour round trip four times a week.

Liska, who is now represented by SurvJustice, filed a Title IX complaint. She also is pursuing a complaint with the military against her alleged assailant.

Affirmative Consent

In April, the New York Supreme Court Appellate Division ordered the State University of New York at Potsdam to reinstate Benjamin Haug, a former student expelled for allegedly violating the school’s code of conduct by having sex with another student without first obtaining her explicit consent.

That matter stemmed from an encounter during the first week of
Haug's freshman year. On Sept. 7, 2014, Haug had sex in a dorm room with a female student he had been friends with for several years. The woman later reported to campus police that she had been sexually assaulted—though she also said she hadn't declined to have sex. At SUNY, as at a growing number of schools nationwide, students are required to obtain "affirmative consent" before engaging in sexual activity.

Haug was summoned to a disciplinary hearing, presided over by a three-person board. The accuser didn't appear at the hearing. Instead, the school's student conduct director read from her notes about the accuser's account of the incident. Haug, who came to the hearing with a friend, also testified about his version of events. He hadn't yet told his parents what was happening and didn't have an attorney.

"I really didn't think it was going to be a big deal at that point," Haug says of the hearing. "I didn't know that when I walked in there, it was going to be a slaughterhouse. It wasn't about finding out if I was innocent. It was about finding out how severe my punishment was going to be."

The hearing board decided that Haug should be suspended for one semester. He was also told to read two books—one relating to sexual conduct and consent and one relating to alcohol—and to write 10-page essays on each.

Haug, a percussionist, was attending SUNY on a music scholarship, which he says he would lose if suspended.

After learning of the decision, he appealed to a school review board, which increased the penalty to expulsion. Haug's family then retained a lawyer, who challenged SUNY's decision in court.

A divided New York appeals court ordered SUNY to reinstate Haug. The appellate court ruled 3-2 that the hearsay evidence "did not constitute substantial evidence to support the determination" made by SUNY.

The state is moving forward with an appeal.

Haug's lawyer, Lloyd Grandy of Ogdensburg, New York, says his client was railroaded.

"His version of the events was, at the very least, not given a lot of weight," Grandy says.

A former prosecutor, Grandy says he hadn't previously handled a lawsuit stemming from a school disciplinary matter. Doing so was eye-opening.

"I realized just how scary it really is when you get wrapped up in one of these things—especially on the side of the alleged offender," he says.

"If you exert some sort of power or authority over someone, you need to be careful about how you do that," he says. "If you're going to take away from someone thousands of dollars, if you're going to kick them out of your institution, if you're going to hold their educational careers hostage while some suspensionary or expulsionary period runs, then you can't tell me you're not doing something serious enough to warrant safeguards."

Haug never finished his college education. He now works as a welder in Buffalo.

COLUMBIA CONTROVERSY

On the federal level, in July 2016 the 2nd Circuit at New York City reinstated a Columbia University student's suit accusing the school of violating his Title IX rights by acting with "sex bias" in investigating and suspending him.

The student in that case said he was suspended for two years after a consensual sexual encounter with another student, identified in court papers only as Jane Doe.

In his version of the incident, as set out in the complaint, he and Doe spoke in a campus lounge in the early morning hours of May 12, 2013, went out for a walk, and then eventually went back to her suite, where they had sex in the bathroom.

That September, four months after the incident, he was informed that he had been accused of engaging in nonconsensual sexual intercourse, according to the complaint. That same month, he was told that Columbia had issued an order forbidding him from having contact with the female student, and also prohibiting him from accessing any residence halls.

He alleged that he met with the school's Title IX investigator and told her about witnesses who were in the lounge, but that she didn't contact those people. The following February, Columbia determined he violated the school's policies by coercing Doe. He was suspended until the fall of 2015.

He appealed, as did his accuser—who argued that the sanction was too severe. But the dean of Columbia College, James Valentini, denied both appeals. He said the Title IX officer had discretion about which witnesses to interview, and that no witness was present for the encounter itself.

The school defended its policies in court, arguing they "are carefully drawn to account for the interests of all students—including the complaining student and the respondent—and to advance the educational mission of the university."

A trial judge dismissed the lawsuit, but the 2nd Circuit reinstated it last year. The matter was withdrawn in January after the parties reached a confidential settlement.

The accused's lawyer, Andrew Miltenberg of New York City, is among those who say schools aren't in a good position to adjudicate crimes like sex assault. "I don't think they're currently equipped, either with the personnel or from an institutional knowledge standpoint, to handle these things," says Miltenberg, who has represented more than 100 accused students.

If schools continue to judge these types of cases, Miltenberg says, there should be changes, including a more measured response by schools and more rights for accused students. "There needs to be a fuller opportunity for people to defend themselves."

Lawyer and journalist Wendy N. Davis lives in New York City.
New Books from ABA Publishing

Forum on Construction Law

Center for Professional Responsibility

ABA Cybersecurity Legal Task Force

Solo, Small Firm and General Practice Division

Annual Franchise and Distribution Law Developments 2017

Forum on Franchising

Section of Family Law

Section of Public Contract Law

Section of Real Property, Trust and Estate Law

Order Today | ShopABA.org | (800) 285-2221

@ABAPublishing | @ShopABA | ABAPublishing
Patricia Brown Holmes was on top of the world. It was 1999, and she was living a dream that most attorneys never come close to experiencing. Less than two years prior, Holmes, at the age of 36, had become the youngest African-American woman to serve as an associate judge on the Circuit Court of Cook County. “Being a judge is considered the top of the profession,” she says. “I wanted to be at the top of the profession. I wanted that ring.”

Then she was told she might have only six months to live. Diagnosed with lymphoma, her prognosis was grave. She could have drawn on her training as a lawyer to use what was left of her time to get her affairs in order. Instead, she drew on her other lawyerly skills and decided to fight.

“I tend to be tenacious and determined,” Holmes explains when recalling her death-defying recovery. “I’m the person you want to have around in an emergency because I’m not paralyzed. I tend to assess the circumstances quickly and accurately and then take appropriate action. But I’m constantly reassessing, listening and looking for new clues that may require a change in direction. I think those skills helped me survive cancer. I didn’t accept the prognosis. I assessed the situation and found ways to fight.”

Holmes credits her Type A personality and an experimental white blood-cell enhancer with saving her life. Since that challenge, she has served as president of the Chicago Bar Association and helped found the law firm of Riley Safer Holmes & Cancila.

Then, in July 2016, Holmes was appointed special prosecutor to investigate whether Chicago police officers involved with the highly charged 2014 fatal shooting of Laquan McDonald lied about another officer’s misconduct. Colleagues say it’s no surprise that she got such an important and high-profile job. “She has unfailing judgment,” says Ronald Safer, who worked with Holmes at the U.S. attorney’s office and has been her law partner since 2005, first at Schiff Hardin and then at Riley Safer. Holmes is “brilliant,” adds Robert Riley, another partner, “but she also has tremendous common sense. ... says her team is moving the investigation forward “as expeditiously as possible, giving it the time, attention and care it deserves.”

“I can say I am approaching this case not as an issue of public policy but as a set of specific facts that need to be discovered, examined and carefully weighed,” she says.

This past summer, Holmes secured indictments for conspiracy, official misconduct and obstruction of justice against three police officers and suc-
how much she’s getting, Holmes declines to comment, except to say it is less than what she usually charges.

“There’s no upside for her,” explains Zaldwaynaka “Z” Scott, a Foley & Lardner partner who worked with Holmes at the U.S. attorney’s office in Chicago. “She’s working at the lowest rate. But this case needed someone who could look at the evidence and work to be fair and honest and not just driven by emotion.”

It’s not the first time Holmes has been charged with leading a sensitive investigation. In 2011, she was appointed trustee of Burr Oak Cemetery, a historic African-American graveyard in the Chicago suburb of Alsip that declared bankruptcy after a scandal involving a grave desecration and reselling scheme.

It was a grim Halloween story: In 2009, the cemetery, the last resting place of jazz great Dinah Washington and civil rights martyr Emmett Till, was found to be reselling burial plots and either interring caskets above those already buried or removing remains to put new bodies in the plots. Prosecutors described a grisly scene where 1,500 bones of 29 people were strewn on cemetery grounds. A cemetery manager and three employees were convicted in the scandal.

But it was more than a job for Holmes. Her father’s grave marker and remains were likely among those removed, Holmes told the Daily Southtown, a suburban Chicago newspaper, when reinterment ceremonies were held in May 2016. She told the newspaper she went to visit her father’s final resting place in Burr Oak, but was unable to find it.

“You figure, well, it has been a couple years—maybe things change. Maybe it looks different,” Holmes said then. She ultimately convinced herself that she had forgotten where her father, Andrew Brown, was buried. Then she heard about the grave-reselling scandal.

“I was like ‘Oh, my God, I didn’t just forget. I was right!”

As Burr Oak Cemetery’s trustee in the aftermath of the scandal, she was tasked with overseeing its restoration. She also chaired the Illinois governor’s Cemetery Oversight Task Force, which recommended regulatory changes to the industry.

Now, working on the McDonald matter, Holmes doesn’t mind juggling the role of special prosecutor with her law practice. “I’m passionate about my work in that way—my client’s problems are my problems,” she says. In the McDonald matter, “I represent all of the people of the state of Illinois as the special prosecutor—and, in a broader sense, our system of justice. So, yes, I have very long days—as many as necessary.”

EARLY TRAINING

That work ethic can be traced back to Holmes’ roots on Chicago’s South Side, where she grew up...
the oldest of five kids. “We had no nannies, so I was my mother’s helper. That’s probably what contributes to people telling me I’m bossy,” she quips. Holmes graduated first in her high school class and turned down Ivy League offers to attend the University of Illinois. “It was close to home and not as expensive. My mom didn’t have a college fund waiting for me,” she explains.

She began her studies in industrial engineering but soon discovered there were few women and no other black students in that department. “People didn’t want to sit next to me. I didn’t have a study group,” she recalls. She switched to an individual major with a mix of philosophy, sociology, psychology and social work. “I have a jack-of-all-trades background, which has helped me as a lawyer.”

On a dare, Holmes took the LSAT and wound up earning a full scholarship to the University of Illinois College of Law. Upon earning her JD in 1986, she expected to become an intellectual property lawyer. “I still had an engineering background and I have a scientific mind,” she explains. “But I couldn’t get anyone to hire me because in that field there weren’t folks who look like me. Back then, firms only hired anyone to hire me because in that field there weren’t black students in that department. “People didn’t want to sit next to me. I didn’t have a study group,” she recalls. She switched to an individual major with a mix of philosophy, sociology, psychology and social work. “I have a jack-of-all-trades background, which has helped me as a lawyer.”

So instead, Holmes became a prosecutor, handling misdemeanors, felonies and appeals in the Cook County State’s Attorney’s Office, eventually rising to a leadership position, chairing the firm's white-collar crime and government investigations group and serving on the executive committee.

Dashcam video shows Laquan McDonald walking in the street before Officer Jason Van Dyke shot him 16 times. Holmes announced indictments in June.

cases, including *U.S. v. Mohammad*, a case of first impression related to what was known as a “bankruptcy bust-out” scam. The case involved individuals from another country who were accused of engaging in bankruptcy fraud by ordering millions of dollars in merchandise through their businesses and then not paying their bill before reselling the merchandise for less than it was worth. The alleged perpetrators would then file for bankruptcy protection while sending their money overseas to family members.

After the U.S. attorney’s office, Holmes became Chicago’s chief assistant corporation counsel for municipal prosecutions, leading such cases for every city department. All along, Holmes says, she was building a judicial résumé, waiting for the right opportunity.

That came when a position for associate judge of the Circuit Court of Cook County opened up in 1997. Although she was just 36, friends encouraged her to apply, suggesting she wouldn’t make it the first time around but would get exposure for later. To her surprise, she got the job.

‘DRAGGED ... OFF THE BENCH’

After serving almost eight years in the juvenile court, Holmes applied for a magistrate judge position, which she didn’t get. That coincided with law firms making a push for internal diversity, and friends suggested that she try private practice.

Safer quips that he “dragged her off the bench” to join him at Schiff Hardin. It’s cliche, he concedes, “but she’s one of a kind.” Safer calls Holmes “one of the most genuine, caring, committed people you’d ever want to meet.”

Not surprisingly, Holmes had some anxiety about leaving the bench. After all, she’d gotten that ring she’d long wanted. “But I didn’t view it as going backwards. I viewed it as a new path that could help other people,” she recalls. In those days, firms couldn’t really diversify organically, and they needed people like her.

At Schiff Hardin, she says, “I was the first black, female equity partner—now there’s a slew. I could show young African-American lawyers what’s possible, that you can be on the bench. I worked to train, recruit and vet lawyers in order to expand diversity” in the profession. Holmes rapidly rose to a leadership position, chairing the firm’s white-collar crime and government investigations group and serving on the executive committee.

Eric Barnum met Holmes in 2006 when they worked together
on Schiff Hardin's diversity committee. "She has a unique ability to make a convincing argument in new, novel, never-before-tried kinds of ways," explains Barnum, now at Baker & Hostetler in Atlanta.

"She speaks for the majority and the minority in an inclusive way, giving equal weight and credit to different perspectives. That way she can get everyone to buy into a common goal."

Barnum recalls one instance when Holmes gave a PowerPoint presentation on diversity at a partners' retreat. "On one of the last slides, the fade-in text was the logo of a significant client. And then another faded in and another until the entire screen was filled. Then they filled a second screen. She said, 'These are clients for whom the person deciding where the work goes is a woman or a person of color or both. Not only are people of color decision-makers themselves but they want to see diversity on their law firm teams.' You could have heard a pin drop. These were significant clients that everyone in the room was familiar with. There were 105 equity partners who all had skin in the game. She was making the business case for diversity without saying it."

In her first years in private practice, Holmes amassed a solid track record as a defense attorney in complex commercial, regulatory and class action litigation as well as internal investigations involving fraud, corporate whistleblower allegations and contract disputes. In a case with multiple class actions against an airline, her team got all the cases dismissed at the complaint stage, a decision that's been upheld on appeal. Holmes also represented Mark Kipnis, former general counsel of the media conglomerate Hollinger International, the only defendant completely exonerated in a $60 million fraud case. "These matters have been significant and challenging because there is a lot at stake," Holmes says.

Highly confidential internal investigations like the McDonald and Burr Oak Cemetery situations have also become a Holmes specialty. She resolves thorny issues so that no one but her client even knows about them. "I get to learn information, resolve a problem and help a business get past something that could be disastrous—but thankfully isn't."

According to Safer, one reason Holmes is tapped to lead internal investigations and high-stakes litigation is her knack for seeing through "the morass of details in very complex problems to discern the right path," he says. Juries and judges relate to her, he adds, because "she's honest and genuine—there's not a pretentious or false bone in her body."

Although Holmes has "one of the sharpest legal minds," Barnum adds, "you won't know it when you first start working with her because she has the ability to make complex issues very simple." When one of Barnum's clients needed her services as a white-collar lawyer, Holmes put the client at ease in the first meeting. "She was able to break down legal issues and accurately predict how the case would play out. She was two to three moves ahead, so the client was never like 'Oh, my God, what's happening?' The client could calmly respond as we planned."

Clients also appreciate Holmes' manner, Barnum adds. "There are lots of former judges who want people to know they're former judges. They want to maintain a certain judicial ... untouchability. But she's not that way. She uses her judicial experience as an asset to help her clients, not as a barrier or a title that separates her from the common man."

**EVERYTHING COUNTS**

In 2016, Safer and Riley decided to hang up their own shingle, and they had radical ideas about what kind of firm they wanted to form. Rather than be wedded to the traditional billable hour, the firm gives clients a choice of being billed by the hour or paying fixed or stage-based fees; and they don't charge for the time it takes to learn the client's business. "We made a very deliberate effort to be as closely aligned with what's important to our clients as possible," Riley explains.

Riley Safer Holmes & Cancila is now home to 65 lawyers with offices in Chicago, New York City and San Francisco. Seven of the lawyers are former assistant U.S. attorneys, and three were general counsels to name-brand companies. The partners are also committed to diversity. Earlier this year, the firm acquired 11 new lawyers, all but two of whom are black.

Riley says that Holmes "has made sure that our firm has worked very hard to live up to our collective vision of what a 21st-century law firm can be."

For all her success in the legal profession, Holmes' cancer battle may be what drives her, according to Scott. And it has reminded her not to get too consumed by her work. "If you lived through what she lived through, being told you're not going to make it and then you do make it, you look at life differently. She makes every moment, every relationship, every experience count and have meaning."

To that end, Holmes remains close to her family of origin, engaging in a group text every morning with her siblings and mother. She enjoys traveling with her husband, a high school football coach and administrator. This year alone, she visited Barbados, Barcelona, Cancun, London, Martha's Vineyard, Paris and Puerto Rico. She is close with her 35-year-old stepson, a teacher; her 23-year-old daughter, a football coach and administrator; her 7-year-old daughter, a program coordinator for Chicago's Museum of Science and Industry; and her youngest son, who plays football at the University of Kentucky.

Safer says the "sense of responsibility and commitment" that is evident in Holmes' family life carries over into her professional life too. Calling her an "active mentor," he notes that Holmes is "constantly having lunch, dinner and meetings, kicking [mentees] in the butt, counseling them."

For her part, Holmes says she's humbled to learn that people respect her. "I view myself as a down-to-earth person, going about my daily business and enjoying life," she says. As for goals, Holmes would like to get better aligned with millennials. "They have really embraced the concept of living for and enjoying the moment—the YOLO motto means a lot to them. It's a good way to think. It provides the courage to experience and explore and not waste precious time on things that don't matter. Happiness is a real concept that we need to embrace because there is no recapturing it once you're in the box in the ground."

*Erin Gordon, a former lawyer, is a legal journalist based in San Francisco.*
Law in Translation
Chang Wang walks the line to teach constitutional law to students in Beijing

By Lee Rawles

Chang Wang was an art student at the University of Illinois at Urbana-Champaign when a PBS miniseries changed the trajectory of his life.

When Wang arrived in the United States in 2000 to study for a master’s degree in art history, he already had earned a bachelor’s degree in filmmaking from the Beijing Film Academy and a master’s in comparative literature and comparative cultural studies from Peking University.

He liked to visit the University of Illinois’ library to watch films and documentaries. It was there that he stumbled upon the 1987 documentary series *Eyes on the Prize*, a history of the civil rights movement in the 1950s and ’60s.

“I can’t remember how many times I cried,” Wang says. “It was a life-changing learning experience. I studied a lot of theory in art school, but nothing struck me to the heart like learning about the civil rights movement.”

For Wang, who was born in Beijing in 1972 with Chairman Mao Zedong ruling the People’s Republic of China, hearing about the power that people had to effect change was staggering. When he learned that in the United States a citizen could challenge the government in court and prevail, he was driven to find out more.

He went to the library to listen to recordings of oral arguments in U.S. Supreme Court cases. He read Clarence Darrow’s autobiography. He watched archival footage of the Army-McCarthy hearings and was struck by the exchange between the Army’s chief counsel, Joseph Welch, and the powerful Sen. Joseph McCarthy. Wang says he was thrilled by the audaciousness of Welch asking McCarthy: “Have you no sense of decency, sir? At long last, have you left no sense of decency?”

And so, after 10 full years of study devoted to the arts, Wang decided he was changing course. After he completed his degree at the U of I, he enrolled at the University of Minnesota Law School.

In the 11 years since Wang earned his law degree, he has become an advocate for democracy and the rule of law, a cross-cultural ambassador and a prolific writer. He lives in St. Paul with his wife and three dogs and is the chief research and academic officer at Thomson Reuters, where he has worked since graduating.

**LEADING BY EXAMPLE**

Wang has been an ABA member since 2011 and has participated in many ABA committees on topics such as immigration and naturalization, international law, and arts and cultural heritage law. He has adjunct faculty and guest lecturer status at several institutions and works to fire up students with the same love for constitutional law he discovered in himself.

In the spring, Wang usually travels back to Beijing to teach students at the China University of Political Science and Law about American constitutional law. This year, he brought with him a textbook he had written and edited with more than a dozen research assistants. That team translated into Mandarin the U.S. Constitution, the state constitutions of Minnesota and Massachusetts, the Magna Carta and the headnotes on 39 seminal Supreme Court cases. *Constitutional Law: Lectures, Cases, and Resources* includes 25 lectures written by Wang, is 1,200 pages long and comes in two volumes.

Thomson Reuters reports that it is the first English-to-Chinese textbook on U.S. constitutional law. “We have positive reactions from all the major law schools in Beijing and Shanghai, and at least 15 of them have adopted the textbook as the official textbook or reference book for their comparative law teaching,” Wang says. “As a textbook, we do not expect it to be a best-seller. The publisher printed 5,000 copies for the first run, and it’s doing pretty well. The publisher is very happy, given the fact that..."
I do not receive any royalties, for this is a collaborative research project by Thomson Reuters and China University of Political Science and Law.

The World Economic Forum reports that China is producing twice as many graduates from higher-education institutions as the United States, and that law is the fastest-growing area of study. Wang, who once served as vice-chair of the ABA Committee on International Legal Education and Specialist Certification, has found eager audiences when he teaches American law abroad.

“What’s happening in the United States is fascinating to foreign students,” Wang says. While he’d planned to cover familiar historical cases such as Marbury v. Madison and more recent cases such as Obergefell v. Hodges for his Beijing students this past spring, he found that his students were captivated by the travel ban litigation and emoluments clause lawsuits against President Donald Trump’s administration.

The travel ban cases in particular seemed to be unbelievable to people used to the Chinese legal system, which is still controlled by the Communist Party.

“In the United States, rule of law means that nobody is above the law. But in China it means ‘I will rule you by law,’” Wang says. In legal systems based on the Magna Carta, “even the king is subject to the rule of law. But that concept does not exist in the Chinese system.”

For Wang’s law students, the idea that a little-known judge in Hawai‘i had the power to stop the president’s administration from implementing a travel ban was stunning.

“The students were mesmerized and very surprised to see how constitutional law can be used in real life to protect institutions, to protect citizens’ rights and to protect constitutional democracy,” Wang says. “And, of course, when we get to the Bill of Rights, they’re also very surprised to see the Bill of Rights is alive. The Constitution of the United States is a living document. It keeps evolving; it’s not something we just regard as a canon and just put on the bookshelf.”

The political climate in China can make discussing civil rights and the American system of law a tricky venture. Government minders attend Wang’s lectures, in which he deliberately focuses on explaining how the law works in the United States without directly contrasting it to the Chinese system, where judges are appointed by the Communist Party and subject to its control.

“Wang knew some of the human rights attorneys who were swept up by the Chinese government in a July 2015 crackdown. He is careful about what he says and does in China.

“I do not hide my opinion. But I think I know where the line is, and I do not want to cross the line,” he says. “Of course, the human rights lawyers thought they knew where the line was, too. But the authorities keep moving the line.”

As an example of how this can impact his work, when Wang was doing the final edits on his book, he adjusted his dedication.

“It was ‘to Chinese civil rights lawyers’ on the manuscript but only ‘to Chinese lawyers’ on the dedication page of the printed book,” Wang says. “I believe this is one of the lines that cannot be crossed.”

DUELING IDENTITIES

Rick King, executive vice president of operations and chief information officer at Thomson Reuters, has long been a mentor and friend to Wang. When Wang won the Asian Pacific Outstanding Contribution Award from the Minnesota State Council on Asian-Pacific Minnesotans in 2015, he dedicated it to King, saying: “Without Rick’s trust and support, none of my career accomplishments would have been possible.”

The admiration is mutual. “Chang is such a great ambassador for Thomson Reuters,” King says. “I think that...”
his evangelism for spreading the rule of law around the world is incredible.”

King also praised Wang for another of his recent projects, putting together a series of CLE seminars for Thomson Reuters on civic engagement. Wang is on the civic engagement committee for Minnesota Gov. Mark Dayton’s Diversity and Inclusion Council and has worked within his community to provide more civics education. During the 2016 election season, he helped put together a seminar to explain how the American political system works to Chinese immigrants and students in the Minneapolis-St. Paul area.

The new CLE seminar series launched this past spring, and each program has looked at a different aspect of the Bill of Rights and issues of discrimination. “He’s just done a really great job,” King says. Wang’s most recent book, Parallel Universes: Essays and Conversations, was published by Thomson Reuters in October and contains some of his musings about his dueling identities: artist and lawyer, Chinese and American. “I consider myself most fortunate to be able to appreciate the beauty of the Chinese language and culture,” Wang says. “At the same time, I am able to function in the American system of justice and fundamental fairness. I feel obligated to serve as a bridge between these two cultures. I am a lineal descendant of Chinese arts and intellectual tradition. And at the same time, I am a zealous advocate for the democratic values, equal protection and due process of the American system. In fact, there are only two things that can bring me close to tears: Chinese literature and American law.”

Wang continues to keep his feet in these different worlds. He likes to say that he talks about art with lawyers and law with artists. He writes books on American law for Chinese people and on Chinese law for Americans. He still spends time in both countries, as he did this summer with his students in Beijing. But he made sure to return home to Minnesota on July 3. He wanted to be back in time for the Independence Day fireworks.

Wang dedicated his Asian Pacific Outstanding Contribution Award to his mentor, Rick King.
CLASSIFIED/PRODUCTS & PROFESSIONAL SERVICES

BOOKS

Relax between Briefs “THE SUPERLIST I spy alone.”
On Amazon & Bookstores ISBN:1480222380
Powerful and emotional reading

CAREER OPPORTUNITIES


Environmental Chemistry & Pesticide Science
Over 40 years of experience in environmental chemistry and environmental risk assessment. Ph.D. in physical organic chemistry. Formerly with the US EPA.
Stuart Cohen, Ph.D., CGWP ets@ets-md.com, 301-933-4700 www.environmentalandturf.com


MEDICAL EXPERT

ATTORNEY-ENDORSED MEDICAL EXPERTS
Find Experienced, Qualified, Credentialed Expert Witnesses for Free at: ExpertPages.com

JAILS/PRISONS MEDICAL DIRECTOR is available for free initial consultation — 917-974-8073

Medicolegal Consulting for Cranioencephal Trauma Cases
Jimmy D. Miller, MD, JD
Board Certified Neurosurgeon with 35 years of academic and private practice experience.
For more information, please email: spoqr1@gmail.com

Phobia? Debilitating memories? Haunted by a past event? Gone in 45 minutes?
In one phone call.
Details not essential to be effective.
Call Dr. David Keller 440-974-4911 24/7

INSURANCE EXPERT WITNESS
Nationwide
Robert E. Underdown
The Insurance Archaeologist
Agent Standards, Bad Faith Claims CLAIMS HANDLING, COVERAGE OPPORTUNITIES
Insurance Industry Standards Life Insurance Suitability Opinions
www.Insurance-Evnt.com
Call for complimentary consultation 480-216-1364

Objection!

Top Selling Lawyer Games For Over 20 Years!
CLE / MCLE Approved

Be An Evidence Expert
(Federal Courts, All 50 States, D.C. & Military)
$140 Per Game ($450 For Series)
www.objection.com

Reach More Than Half of All U.S. Attorneys With Your Ad in the ABAJOURNAL

DECEMBER 2017 ABA JOURNAL || 69
Shielding Seniors
New law championed by the ABA fights elder abuse and exploitation
By Rhonda McMillion

Members of Congress came together in bipartisan agreement this fall to pass a law strongly supported by the ABA that would enhance the federal government’s response to elder abuse and financial exploitation of seniors.

The Elder Abuse Prevention and Prosecution Act of 2017, signed by President Donald Trump in October, was passed by voice vote in the House and Senate, where dramatic statistics on elder fraud and abuse prompted overwhelming support for the legislation.

“Exploiting and defrauding seniors is cowardly, and these crimes should be addressed as the reprehensible acts they are,” said Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, in a statement.

He sponsored the legislation with Sen. Richard Blumenthal, D-Conn., and 14 other co-sponsors.

The legislation “sends a clear signal from Congress that combating elder abuse and exploitation should be a top priority for law enforcement,” Grassley added.

The legislation includes goals supported by the ABA and addressed through the work of the association’s Commission on Law and Aging. The legislation requires:

• Designation of at least one U.S. attorney in every federal judicial district to prosecute or assist with elder abuse cases.
• A comprehensive training program on the investigation and prosecution of elder abuse.
• Appointment of an elder justice coordinator within the Department of Justice and the Federal Trade Commission’s Bureau of Consumer Protection.
• Improved data collection and coordination.
• And enhanced criminal penalties for telemarketing and email marketing fraud directed at seniors.

The new legislation also will enhance victims assistance provided to survivors of elder abuse by the DOJ. And the Department of Health and Human Services will be required to assess the legal proceedings that result in court-appointed guardianships for elderly individuals.

Research shows the country’s fastest-growing demographic segment is people 85 and older, and the U.S. Census Bureau predicts that people 65 and older will make up about 20 percent of the population by 2030.

This new legislation is “designed to create a federal infrastructure and support for efforts to better understand, prevent and combat elder abuse—constituting a sound investment in the health, dignity and economic future of our nation,” Susman said.

“This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is editor of ABA Washington Letter, a Governmental Affairs Office publication.”
2018 REGULAR STATE DELEGATE ELECTION
Pursuant to §6.3(a) of the ABA’s Constitution, 17 states will elect State Delegates for three-year terms beginning at the adjournment of the 2018 Annual Meeting. The states conducting elections and election rules and procedures can be found at ambar.org/2018StateDelegate.

2018 BOARD OF GOVERNORS ELECTION
The Secretary hereby gives notice that at the 2018 Midyear Meeting, the Nominating Committee will announce nominations for district and at-large positions on the ABA Board of Governors for three-year terms beginning at the conclusion of the 2018 Annual Meeting. The deadline for receipt of nomination petitions is Jan. 5. A list of the district and at-large positions conducting elections, and the election rules and procedures, can be found at ambar.org/2018BoardofGovernors.

NOTICE BY THE SECRETARY
The Nominating Committee will meet in conjunction with the 2018 Midyear Meeting in Vancouver, Canada on Sunday, Feb. 4, beginning with the business session at 9 a.m. Immediately following the business session, the Nominating Committee will hear from candidates seeking nomination at the 2019 Midyear Meeting. This portion of the meeting is open to Association members.

NOTICE BY THE SECRETARY REGARDING BOARD OF GOVERNORS VACANCY
The resignation of A. Vincent Buzard of Pittsford, New York, a member of the Board of Governors from District 15, has created a vacancy for the 2015-2018 term. All nominees must be accredited to New York. Nominations may be made to the Office of the Secretary, c/o Leticia D. Spencer, American Bar Association, 321 N. Clark St., Chicago, IL 60654, or 312-988-5160, Leticia.Spencer@americanbar.org. All nominations must be received no later than Friday, Dec. 15, 5 p.m. CT. For details, go to ABAJournal.com/magazine, Your ABA, ABA Announcements.

Mary L. Smith, ABA Secretary

AMENDMENTS TO THE ABA CONSTITUTION AND BYLAWS
The Constitution and Bylaws may be amended only at the ABA Annual Meeting upon action of the House of Delegates. The next meeting is Aug. 6-7, 2018, in Chicago. The deadline for any ABA member to submit proposals is March 9. Proposals will be published in the July 2018 ABA Journal. For details, go to ambar.org/AmendmentsNotice.

Mary L. Smith, ABA Secretary

INDEX TO ADVERTISERS

<table>
<thead>
<tr>
<th>ADVERTISER</th>
<th>WEB ADDRESS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA ADVANTAGE</td>
<td>AMBAR.ORG/ADVANTAGE</td>
<td>44-45</td>
</tr>
<tr>
<td>ABA BLUEPRINT</td>
<td>ABABLUEPRINT.COM</td>
<td>29</td>
</tr>
<tr>
<td>ABA CENTER FOR PROFESSIONAL DEVELOPMENT</td>
<td>AMBAR.ORG/FREECLE</td>
<td>68</td>
</tr>
<tr>
<td>ABA FUND FOR JUSTICE &amp; EDUCATION</td>
<td>AMBAR.ORG/FJE</td>
<td>32-33</td>
</tr>
<tr>
<td>ABA MEETINGS &amp; TRAVEL DEPARTMENT</td>
<td>AMBAR.ORG/2018PARISSESSIONS</td>
<td>3</td>
</tr>
<tr>
<td>ABA PUBLISHING</td>
<td>SHOPABA.ORG</td>
<td>61</td>
</tr>
<tr>
<td>AMERICAN BAR ENDOWMENT</td>
<td>ABENDOWMENT.ORG</td>
<td>IBC</td>
</tr>
<tr>
<td>AMERICAN FRIENDS OF THE HEBREW UNIVERSITY</td>
<td>AFHU.ORG</td>
<td>13</td>
</tr>
<tr>
<td>ANSWER1</td>
<td>ANSWER1.COM/ABA</td>
<td>10</td>
</tr>
<tr>
<td>GOODSILL ANDERSON QUINN &amp; STIFEL LLP</td>
<td>FRESHLAWHAWAII.COM</td>
<td>53</td>
</tr>
<tr>
<td>LAWPAY</td>
<td>LAWPAY.COM/ABA</td>
<td>5</td>
</tr>
<tr>
<td>LAWYAW</td>
<td>LAWYAW.COM</td>
<td>6</td>
</tr>
<tr>
<td>LAWYERS OF DISTINCTION</td>
<td>LAWYERSOFDISTINCTION.COM</td>
<td>7</td>
</tr>
<tr>
<td>LEXISNEXIS</td>
<td>LEXISNEXIS.COM/PRACTICE-ADVISOR</td>
<td>IFC</td>
</tr>
<tr>
<td>NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS</td>
<td>NACDL.ORG/TRIALGUIDES</td>
<td>11</td>
</tr>
<tr>
<td>THOMSON REUTERS</td>
<td>TR.COM/GOFEARLESS</td>
<td>BC</td>
</tr>
</tbody>
</table>
Japan’s Wartime Leader Is Executed

Even after Germany’s surrender in May 1945, the most devastating war in human history continued to rage throughout the Asia-Pacific region. While military momentum clearly favored the Allies, it took the nuclear devastation of two Japanese cities to force Emperor Hirohito to declare the unconditional surrender of his empire that August.

As the Allies began a reconstruction of the world order, some form of justice was needed to address the staggering barbarity displayed by the two Axis giants against populations under their control.

At Nuremberg, the trial of major figures in the Nazi regime was designed to be an international public spectacle that chronicled the Holocaust and its systematic murder of European Jews, as well as Roma, gays and other populations deemed to be unsuitable to the German sense of state. But in the Asia-Pacific region, war crimes trials took place with a view to lesser attention.

In January 1946, four months after Japan’s formal surrender, Gen. Douglas MacArthur established the International Military Tribunal for the Far East. The expressed purpose was “to try and punish Far Eastern war criminals who, as individuals or as members of organizations, are charged with offenses which include crimes against peace.”

Long before World War II, Japanese determination to control the flow of natural resources fueled wars with China and Russia. As an Axis power, Japan widened its aggressions, invading China, Korea, large swaths of Southeast Asia, Indonesia, the Philippines and other Pacific islands.

Although Japan was greeted first as a liberator in some of these vestiges of colonial empire, its rule was marked by large-scale internment, mass murder, wholesale rape, forced labor by prisoners of war and civilians, summary executions, and the organized conscription of “comfort women” to serve as concubines for Japanese troops.

MacArthur, the supreme commander for the Allied powers, authorized military tribunals throughout Asia to try the preponderance of individual war criminals. And by 1951, more than 5,000 Japanese were convicted. But under policy set by President Harry S. Truman, the Tokyo military tribunal focused on crimes against peace by the upper echelons of the Japanese command. Under MacArthur’s orders, about 100 former Japanese officials were arrested, beginning days after the surrender.

Among the first was Hideki Tojo, the son of a military officer who rose to become the nation’s penultimate leader during much of the war. A harsh man of focused competence, Tojo reigned simultaneously as general of the Imperial Japanese Army and as prime minister of Japan. He was serving as both during the Dec. 7, 1941, attack on Pearl Harbor.

As soldiers approached his home to arrest him, Tojo attempted suicide, shooting himself in the chest. He survived to become one of 28 Japanese officials to stand trial before the Tokyo military tribunal. The group included several officials in Tojo’s cabinet and well-known military officers who planned and executed invasions in Manchuria and other neighboring nations.

Opening statements began in May 1946 based on the work of lawyers from 11 Allied nations. The trial continued for more than two years, and the tribunal completed reading its judgment in December 1948. Although many counts of the indictment were dropped because of technical complications, two counts of war crimes survived the trial. The harshest punishment was reserved for those convicted under those counts.

Of the 28, 18 defendants were sentenced to prison—16 for life. Two died during trial, and one was deemed to be mentally unfit to stand trial. Seven defendants, including Tojo, were convicted for their part in war crimes and sentenced to death.

On Dec. 23, 1948, the seven defendants were hanged. With the Allies fearful of public backlash as they reordered Japan’s governance, there was no photography and only a handful of international witnesses, by order of MacArthur.

Dec. 23, 1948

Gen. Hideki Tojo of the Imperial Japanese Army

AP PHOTOS
The American Bar Endowment (ABE) is the independent, not-for-profit public charity that sponsors high quality, affordable life and disability insurance exclusively for ABA members. These group insurance plans are designed to generate dividends, which our insureds can choose to donate to ABE. Their contributions help fund programs that advance the American justice system, as shown above.

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

GET PROTECTION. GIVE BACK.

VISIT ABENDOWMENT.ORG, OR CALL US TOLL-FREE AT 1-800-621-8981.

© 2017 ABE, All Rights Reserved.
Expand your wheelhouse, not your workday.

Master new practice areas and leverage your organization’s best thinking faster with legal know-how from Thomson Reuters. The fearless confidence that only comes from trusted answers.

tr.com/gofearless