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EXPOSING JOB LAW MYTHS
Thank you for a great article, “Workers Wronged,” November, page 36. I have represented plaintiffs in employment discrimination cases for 32 years. It has become more and more difficult to get a fair chance at trial due to the anti-employee bias of many federal judges, including the evermore difficult standards required to get past summary judgment. We take only the strongest cases (e.g., employees with long histories of excellent performance who are suddenly mistreated after a new supervisor arrives on the scene, with evidence that the new supervisor is harder on women or black employees). Nevertheless, we struggle to stay in business.

Scott Fortune
Jacksonville Beach, Florida

Social change through law is messy. But it also aggregates over time. Attitudes toward sexual harassment, for instance, have changed dramatically since Anita Hill. Thirty years of women standing up one by one is why public attitudes recently reached the critical mass that brought down Harvey Weinstein and opened the door to a flood of revelations.

The cases are contentious because the system requires that incendiary allegations be made. To make a case, an employee must accuse an employer of anti-social behavior (invidious discrimination or harassment), and to defend a case the employer must accuse the employee of misconduct or incompetence. Other advanced industrial nations simply require a showing of just cause for termination of employment and have a less onerous standard for recognizing constructive discharge. So many of the cases are, at their core, about basic fairness and equity. But employees must squeeze their claims into the discrimination mold to hope for a fair result, which is why many cases are not successful.

Michael Leech
Philadelphia

SOVEREIGN HAWAII
While it might sound nice in theory for Hawaii to become a sovereign country again (“To Form a Nation,” November, page 54), do the people of Hawaii really want to lose all of the rights they now enjoy as Americans?

One need look no further than another Pacific island whose people once enjoyed rights as Americans: the Philippines. Prior to 1946, Filipinos were U.S. nationals. (U.S. nationals are almost the same as U.S. citizens: They carry the same U.S. passports as citizens; can freely travel to, live in and work anywhere in the country; are completely immune from deportation or visa requirements; and can apply for full U.S. citizenship after living anywhere in the country for three months.)

By getting independence, Filipinos subjected themselves to the full wrath of U.S. immigration law (something that is becoming more and more onerous by the day). Today, it can take almost two decades for some Filipinos to immigrate to the U.S. There are massive lines to get visas at the U.S. Embassy in Manila, and it is increasingly difficult to get any work visas for Filipinos.

Do the Hawaiians really want to subject themselves to the same fate?

Josh Effron
Rolling Hills Estates, California

CORRECTIONS
Due to an editing error, “Zeroing In,” December, page 16, misquoted Kavitha Mediratta’s description of her work. It should have been described as examining the “racially biased effects of zero tolerance school disciplinary policies” on children’s education.

“From Campus to Courtroom,” December, page 54, should have identified Baylor University in Waco, Texas.


“Balancing Act,” November, page 24, should have stated that the opinion from the New York City Bar Association’s Professional Ethics Committee interprets New York state court rules that are based on elements of the ABA Model Rules of Professional Conduct. Due to an editing error, the article identifies “the New York City bar’s rule.” The Journal regrets the errors.
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President’s Message || By Hilarie Bass

The Truth Is Out There

ABA Legal Fact Check sorts fact from fiction on legal issues

In an age where we can “Google” almost any question, we are bombarded with so much misinformation that finding the truth can still be a difficult task.

To separate facts from distortions, fact-checking internet sites have grown in popularity in recent years, and several mainstream media outlets routinely verify claims made by newsmakers. But until now, no fact-checking site has focused on verifying claims made about the law and legal issues.

To fill that void, the American Bar Association has launched an initiative called ABA Legal Fact Check at abalegalfactcheck.com. The concept is simple: When it comes to the law, the ABA can and should be the definitive source of information.

After all, the ABA is already a trusted and nonpartisan source on all matters related to the law, with access to legal experts across every specialty.

By focusing on timely legal matters in the news, ABA Legal Fact Check uses established case and statutory law and other legal precedents to separate legal fact from fiction. Relevant experts with experience in applicable areas of the law review each installment of ABA Legal Fact Check for accuracy before the answers are distributed to the media and posted online for the public.

Since ABA Legal Fact Check went live in August, the site has provided clarification on multiple legal issues, ranging from the constitutional right to refuse to stand during the national anthem to the legal implications of forced evacuations during hurricanes. Controversial issues, such as the legality of presidential executive orders and the constitutional protections for hate speech, have also been addressed in a non-political fashion.

For example, ABA Legal Fact Check recently corrected the statement by Portland Mayor Ted Wheeler that: “Hate speech is not protected.” Legal Fact Check reported that “the U.S. Supreme Court has made it clear that governments may not restrict speech expressing ideas that offend, citing the most recent unanimous 8-0 ruling on June 19, 2017, in Matal v. Tam, known as the ‘Slants’ case.”

The reaction to ABA Legal Fact Check has been encouraging. Since its launch in September, the site has attracted significant web traffic, indicating widespread interest in its fact-based analyses.

Lawyers have written to express their support for the project. A Manhattan attorney praised it as “Great work!” An assistant attorney general wrote: “I applaud the new effort.” And a general counsel commended its broad mandate.

“Thank you so much for providing this essential resource to the American people,” she emailed us. ABA Legal Fact Check has also attracted widespread positive attention from the legal press, including stories in publications ranging from lawnewz and Above the Law to law.com and Bloomberg Big Law.

The feedback is great, but it is even more gratifying to know that after a few short months, ABA Legal Fact Check has become an important resource for the media and the public. For example, an Oregon publication picked up Legal Fact Check’s correction of Portland Mayor Wheeler’s statement on hate speech, as did the popular question-and-answer website Quora.

Public education always has been a major priority of the ABA. We want to encourage Americans’ understanding of our laws and of our Constitution, and ABA Legal Fact Check is an extension of that effort. Our ideas for ABA Legal Fact Check installments come from our readers and ABA members. If you have a legal “fact” you would like us to check, or you see a legal controversy you would like us to research, please contact us at legalfactcheck@americanbar.org.

The best way to fight misinformation in today’s highly politicized environment is to arm the public with the truth. That is the mission of ABA Legal Fact Check and we look forward to continuing to provide a resource the public can rely on.

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Judges Push for Diverse Voices in Court

Standing rules help women and young attorneys take the lead

ON THE DAY U.S. DISTRICT JUDGE ELIZABETH WOLFORD RECEIVED A COPY OF A NEW YORK STATE BAR ASSOCIATION report revealing that women participate in court at lower rates than men, the judge had a meeting to discuss a pending breach-of-contract case.

In addition to a male partner, each side had a female associate who, Wolford says, had clearly done the relevant research. With the report in mind, Wolford of the Western District of New York recommended the associates argue at the hearing—and they did.

“It was one of the best arguments I have had the privilege of presiding over,” Wolford recalls.

According to the July report, female attorneys account for just 25 percent of counsels appearing in commercial and criminal New York state and federal cases. In more complex matters, the percentage declines further. A 2015 ABA report found similar numbers in a study of the Northern District of Illinois.

In August, Wolford implemented a standing rule that encouraged young attorney participation. Such rules, which often offer oral argument as incentive, are one way the NYSBA report recommends the bench help address litigation’s gender disparities.

Wolford’s rule was inspired by similar guidelines set forth by Judge William Alsup of the U.S. District Court for the Northern District of California. He implemented his rule soon after taking the bench in 1999, but he also requires large firms to document how they will integrate junior attorneys into a case. Alsup says he does so for the good of the profession, as well as for up-and-coming lawyers.

“If we don’t train the next generation, then lawyering will suffer and the public will lose confidence” in the system, he says.

None of the rules mentions gender or race. But the measures can have the effect of increasing opportunities for women and minorities because they now make up a greater share of young attorneys. In 2016, according to ABA data, women composed more than half of matriculating students at all law schools, and minorities made up more than a third of such students. In 2009, 47 percent of all enrolled students were women and 23 percent were minorities.

Attorney Sharon Porcellio, who worked on the New York bar report, says she thinks the rules are an innovative way to address an age-old problem. “Those of us who have been practicing for a long time had hoped that the pipeline theory”—the idea that increasing numbers of women and minorities in law school would lead to equal representation in practice—“would work,” she says. “The pipeline theory has not proven to work.”

Attorneys say the nonmandatory rules can make it easier to convince clients, who may prefer the most senior team member’s participation, to allow junior lawyers the chance to argue. But they also point out that not every matter is appropriate for assignment down the ranks. In 2016, a federal judge criticized Facebook for failing to send a more senior lawyer to a hearing. At the next appearance, Paul Grewal—Facebook’s vice president and deputy general counsel and a former Northern District of California magistrate judge—was present.
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Besting the Bull

Attorney’s bullfighting dreams come true during golden years

LIKE MANY LAWYERS, James B. Pritikin will tell you that he faces a lot of bull in the courtroom. But he might be the only lawyer in the United States who also faces the real thing.

Bullfighting is a hobby for Pritikin, a divorce litigator who is a partner at Beermann Pritikin Mirabelli Swerdlove in Chicago. But he sees a similarity between the two pursuits: "In a bullring, you've got to watch where you walk," he says. "You deal with the same excrement in my field of practice. It's two lawyers arguing, which isn't much different from what I encounter in the ring."

Pritikin's fascination with bullfighting goes back a long way. He discovered the ritual as a student at the University of Illinois at Urbana-Champaign, when he watched televised bullfights from Mexico City. “I fell in love with the tradition and spectacle, and I said, ‘I can do this.’ But then came the Army, law school, marriage and law practice. Life passed me by.”

But sometimes dreams deferred become dreams fulfilled. As Pritikin was approaching his 66th birthday, he was bemoaning his lost opportunity to try bullfighting to his wife, Mary Szatkowski-Pritikin, when she surprised him with the gift of a two-week course at a bullfighting ranch in Salamanca, Spain.

“My first thought was: Am I too old for this? My second thought was: Why do I have to wait until June?”

That was 12 years ago. Now, at the age of 78, Pritikin still travels to Spain once or twice a year to hone his skills as a bullfighter and to experience what he describes as an "adrenaline rush that is more than anything I’ve experienced before." And at an age at which just about anyone else might think twice about getting into a ring with even the young 500-pound bulls that Pritikin fights—he looks the part of a matador: tall, slim, erect posture and brushed-back hair.

Pritikin’s wife has never seen him in the ring because, he says, “she doesn’t want to have an actual awareness of the danger I’m in.” And the danger is very real, even with smaller bulls still learning how to fight. In 2010, he was gored in the left leg, breaking his tibia and fibula and...
tearing his meniscus. His rehabilitation took close to a year, but he returned to bullfighting as soon as possible.

“I needed to get back in the ring,” he says. “As long as I’m comfortable and don’t embarrass myself, I’ll continue going into the ring.”

But Pritikin does avoid one aspect of bullfighting: killing the animal at the end of the match. “I’ve never thought of doing that,” he says.

Pritikin sees no reason to let his age get in the way of his bullfighting—or anything else, for that matter. He’s also a licensed boxing judge and referee, and he’s a board member for the Chicago chapter of the National Football League Alumni Association. And he serves as a hearing chair for the Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois. His client roster includes a number of sports figures, including former Chicago Bull Dwyane Wade.

The attorney savors his chance to fight bulls: “If I have one regret, it is that I didn’t follow my passion at a much earlier age,” Pritikin says. “I don’t regret the reasons I failed to do so, but I sometimes wonder how things would have been different. But then, I wouldn’t be America’s oldest bullfighter.” —James Podgers
Dance Moves
Harvard Law’s dean of students began as a ballerina before leaping into law

WHEN THE DANCE THEATRE OF HARLEM was founded in 1969, it did more than prioritize African-American ballet dancers—it inspired them. That’s the effect the company had on Marcia Lynn Sells, a young dance student in Cincinnati. After attending a performance, she recalls seeing classical dancers who looked like her and who made her believe that she could achieve her dream of becoming a professional ballerina. In 1976, Sells moved to New York City and joined the Dance Theatre of Harlem under the direction of its co-founder, Arthur Mitchell. Fast-forward four decades and Sells is now dean of students at Harvard Law School, and her legal career has been as impressive and inspiring as any grand jeté.

You danced professionally with the Dance Theatre of Harlem for four years but left it behind to go to college and law school. How did you make that transition and why?

There was a moment when the film The Wiz was filming, and a number of Dance Theatre of Harlem dancers were performing in it, and the company went on hiatus. During that time, I had applied to Barnard College and had deferred. I come from a family of educators—everyone has a college degree. My mother said, “Maybe you should just call Barnard and say you’ll be around for a bit, and then if the company starts again, you can work your schedule around it.” I started at Barnard and fell in love with the school. When the company started back up again, I decided not to go back. After graduation, I went straight to law school. No one in my family was in the theater—my parents’ friends were all teachers, lawyers, doctors and educators, so it wasn’t a foreign thing for me to think about.

Tell me about your path to becoming a prosecutor.

There was a clinic started in my third year in law school called the Child Advocacy Clinic, and I thought, “This is what I want to do.” I was thinking I’d work in legal aid, but I had a friend who said, “You should be a prosecutor because you have the performative nature of the job and you are comfortable in your skin.” I had already been on stage much of my life! I joined the Brooklyn District Attorney’s Office in 1984, and I tried rape and child abuse cases. I loved the work, and I loved the job. When I say loved, it is from the standpoint of being able to make a difference in people’s lives. We worked in victims’ rights, and we helped advance changes in how rape was understood and prosecuted, like rape shield laws and having trauma-informed lawyers working with women and children. I worked with the lawyers who helped get the laws changed to outlaw marital rape.

You eventually joined Columbia University Law School as the dean of students, where you met David Stern, then the commissioner of the NBA, and landed the job of vice president of organizational development and human resources at the NBA. How did that happen?

David Stern was the graduation speaker, and I met him and he was teasing me about how long his speech would be. I said, “You know, you’re not the show—parents want to see their kids walk across the stage, and I am not paying overtime at Carnegie Hall.” He was impressed by that and asked the dean if I’d be interested in a job at the NBA. I thought, “How many times am I going to get offered a job in an area I never would have thought about?” When I talked to my dad, he said, “Are you kidding me? You can’t not take this!”

What did you do for the NBA?

It was similar to being dean of students: looking at people and their lives and career choices. It was an amazing, amazing time. The WNBA was starting, and I ended up being its head of human resources. The WNBA is owned as a partnership with the owners of the NBA teams, so we had to construct human resources for an entire league instead of having every team running as its own business. We also started the NBA store. I didn’t know anything about retail and what kind of HR structures you needed for that, and for a short time we created NBA City at Universal Studios Orlando. I was there when Golden State Warriors player Latrell Sprewell choked his coach. I still remember thinking, “If any other employee came up and choked their boss in the office, what would you do? Is that a human resources matter?”

Did the fact that you had been a young athlete help you relate to the basketball players?

Oh, completely. What was amazing was being part of shaping orientation for incoming players. When you see young men, particularly those whose families didn’t have the resources like the family I came from, get drafted,
it was eye-opening to see what they were able to do for their families because of the financial payout for these top athletes.

You eventually left the NBA to join Thomson Reuters, and then you returned to academic administration at Columbia until 2015, when Harvard called. Why did you decide to accept the job in Boston?

I could have said no, because I love New York. But I was feeling like: I am not really that old, so why not try a big jump?

Did it turn out to be that different from what you’d done in the past at Columbia?

My first year was one of the craziest of any job I’ve ever had. We went from a Title IX report, to industrial black tape placed over the photos of the faces of African-American professors in Wasserstein Hall, to students advocating for changes and even a terrible outbreak of mumps. I had to quickly jump in. The students didn’t really know me that well. I was advocating for them, and we had to work together and with other administrative offices on some changes to orientation. Not that they’re magical, but we made some changes to acclimate students to law school and what it means to have the kind of discussions that lawyers have on issues, recognizing that at times you can’t be dispassionate, but you have to be respectful and generous. That’s what engagement is about: It’s about growing and learning. Those are the things that I get to work on.

You have a teenage daughter. Is she interested in ballet?

She did take dance lessons, but I knew she wasn’t going to be a ballet girl when she said, “Do you mind if I start going to Saturday Little League instead of ballet?”

Do you still feel connected to the Dance Theatre of Harlem?

Completely. I feel it so much. When Mr. Mitchell was looking for a place to put his archives, I was working at Columbia, and I worked to help him understand (1) why it was necessary to find a place for his archives and (2) why Columbia was that place.

And he agreed, right?

Yes, and on Jan. 12, I’ll be at the opening of a major exhibit at the new Wallach gallery in Lenfest Center for the Arts that Columbia has built, and it’s going to feature Arthur Mitchell. It’s called, “Arthur Mitchell: Harlem’s Ballet Trailblazer.” It will be a combination of the work of the Dance Theatre of Harlem in words and pictures, movies of him doing different ballets, traveling with the New York City Ballet and photographs of Mitchell, Igor Stravinsky and George Balanchine creating Agon, a ballet in four parts with the feature pas de deux section that changed ballet with Arthur Mitchell and Diana Adams. It is deeply gratifying to have helped Mr. Mitchell achieve his goal to have his story not disappear and be part of the larger history of dance and ballet in the U.S. He helped so many dancers of color see their dreams come true, and future generations need to know it is still possible.

—Jenny B. Davis

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Surpassing Expectations, Defying Labels

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 Melissa Felder Zappala

Though people who know me today might assume it was a foregone conclusion that I would be a lawyer—both my father and grandfather were lawyers—this was far from the case. When I was 1, my parents learned I was deaf. A doctor warned them that I would likely never learn to speak, and that I would not read past a fourth-grade level.

This prognosis—now obviously incorrect—caused me to attribute much of my success to a work ethic that drove me, from a young age, to defy those early expectations. From nursery school to high school, I constantly worked with auditory therapists to improve my speech and hearing. In every class, I sat in the front row and used an amplification system—known as an FM system—to make sure I could understand my teachers. My college and law school provided me with a court reporter who transcribed lectures for me in real time.

Fast-forward a decade or two, and I am now a litigation partner at Boies Schiller Flexner.

Some of the challenges I have faced in my life and career as a deaf attorney may not seem universally relatable; however, at my core, I am just a working mother trying to find success both at home and at my job in an extremely demanding field. I truly believe the keys to finding that balance are universal to any lawyer or business professional.

First, my simplest point: This profession requires hard work and perseverance—most of which is far from glamorous. In litigation especially, the work can be tedious and the hours long. I attribute my success to the fact that I have always been a hard worker, dedicated to the quality of my work—even the tedious parts—and willing to go the extra mile for a case. Ultimately, the exciting moments of practicing law can’t be found without rolling up your sleeves and putting in the hard work.

Second, I learned that if there are specific responsibilities you crave or matters you want to work on, ask for them. Make your ambitions known to people who can help create opportunities for you, and be your own advocate. I am lucky enough to work at a firm that is incredibly supportive of my career and the specific interests I have voiced. Not only does Boies Schiller provide the technology that allows me to succeed in my practice, like captioning on calls, but I was also encouraged to take on new responsibilities as a young lawyer, including those that my childhood doctor wouldn’t have predicted me doing, such as oral arguments or taking depositions.

Third, I can’t overstate the importance of truly listening—in a deposition, in court or in a conversation with a colleague. It seems simple, but as lawyers we sometimes mistakenly feel too busy to hit pause and actively listen. In a deposition, for example, it can be easy to tick through a list of prepared questions without really concentrating on the content of the answer you were given. Since I need to both listen and lip-read at the same time, I am uniquely focused on deponents’ answers. Listening carefully allows me to pick up on details that others might miss and follow up as needed.

Fourth, make the time to nurture personal relationships. I have yet to meet anyone capable of succeeding in both spaces entirely on their own. I am fortunate to have an incredibly supportive wife who—despite also working full time—is the primary caregiver to our 2½-year-old daughter and soon-to-be-born son. Having her support has been the most important component, enabling me to navigate the challenges of being a working parent while pursuing my career goals. As we work together to find a balance that fits our family, I’ve found that setting priorities and boundaries is key. For example, I make it a priority to be home with my family before our daughter goes to bed. For all of us, this time is so important—even if it means I log back on to work later at night or wake up earlier to get things done.

It takes a lot of hard work to succeed in our profession—and especially as women with families—but it’s important to remember that you’re never doing it alone. Put in the hard work, ask for what you want, and don’t be afraid to ask for support.

Melissa Felder Zappala is a partner in the Washington, D.C., office of Boies Schiller Flexner, where she specializes in complex commercial litigation. She is on the National Law Journal’s 2015 DC Rising Stars list of 40 lawyers under age 40 and on Super Lawyers’ 2014 and 2015 Rising Stars lists.
43% of lawyers at large and midsize law firms are millennials, making them the largest generational group, according to data collected by ALM Intelligence. Millennial lawyers (ages 18 to 36) in BigLaw firms now outnumber those from Generation X and the baby boom generation, mostly in the associate ranks. The cities with the highest concentration of millennial lawyers are San Jose, California, New York City and Boston.

Source: law.com (Nov. 6).

Did You Know?
Researchers at the Boston University School of Public Health found that states with relaxed criteria for concealed carry of guns have a higher rate of handgun deaths than states with stricter requirements. Results from the 25-year study found that lenient “shall issue” laws were associated with a 6.5 percent higher total homicide rate than more stringent “may issue” laws, as well as an 8.6 percent higher firearm homicide rate and a 10.6 percent higher handgun homicide rate. Researchers say their findings demonstrate that the national trend toward relaxed concealed carry laws and reciprocity between states is a public safety risk.

Source: bu.edu (Oct. 20).

Whiteout
President Donald Trump is reversing the slow uptick toward a more diverse judiciary by nominating white men to federal courts at a rate not seen in nearly 30 years. So far, 91 percent of the president’s nominees are white, and 81 percent are male with few African-Americans or Hispanics in the mix, according to an Associated Press analysis. The last president to nominate such a homogenous group was George H.W. Bush. The White House has been upfront about its goal to fill the bench with conservatives, indicating that judicial philosophy trumps concerns about racial or gender diversity.

Source: ap.com (Nov. 13).

Police Beat
Officers wearing body cameras reported using force about as often as police colleagues who didn’t have them, according to a report by the District of Columbia police department’s in-house research team. The study also found that citizen complaints were pretty even against both groups. Despite these results, proponents say video footage can offer a clearer record of controversial incidents and improve public trust.

Source: washingtonpost.com (Oct. 20).

Opening Statements

Say What?
The Louisiana Supreme Court ruled that a suspect’s statement during a police interrogation—“I know that I didn’t do it so why don’t you just give me a lawyer dog”—could be interpreted as a request for a canine attorney, as opposed to an exercise of his Sixth Amendment right to counsel. The high court held that Warren Demesme’s “ambiguous and equivocal reference to a ‘lawyer dog’ does not constitute an invocation of counsel” that requires police to end their interrogation.

Source: washingtonpost.com (Nov. 2).
On her TV show last summer, comedian Samantha Bee told the story of a teenage girl, Cassandra Levesque, who learned about child marriage laws at a Girl Scouts conference. Cassandra was upset after discovering that most states allow girls as young as 13—and boys as young as 14—to be married with the simple consent of a judge.

Cassandra promptly started work on a Scout project to craft legislation in her home state, New Hampshire, that would raise the minimum age to 18. State Rep. David Bates, a Republican, did not appreciate her help. “We’re asking the legislature ... to repeal a law that has been on the books for over a century, that has been working without any difficulty, on the basis of the request from a minor who’s doing a Girl Scout project,” the granite-haired legislator said. Bee screwed up her face in mock horror. “Yeah, what does she know? She’s just a minor. She shouldn’t get to make a decision about something as important as marriage!”
Child marriage, of course, is no joke. Worldwide, the nonprofit Tahirih Justice Center estimates that more than 14 million girls in their early teens will marry in the next decade—the vast majority against their will. One would think that such a situation would be outlawed in the United States. Not so. Tahirih looked at the results of a 2011 survey of about 25,000 U.S. women. It discovered that about 9 percent of all married women were younger than 18. Projecting nationally, the research estimated that 9.4 million had married at 16 or younger.

“We were shocked,” says Jeanne Smoot, senior counsel for policy and strategy at Tahirih. “Virginia was the bottom of the barrel. There was no lower age limit, and some girls had married with startling age differences. Another shocking realization was how at odds these minimal-age marriage laws were with laws aimed to protect children, such as statutory rape.”

Between 2000 and 2015, according to Tahirih’s latest tally, more than 200,000 people younger than 18 were married in the United States. The number of states that allow child marriage, meanwhile, has dropped by a tad—thanks to intense lobbying efforts by Tahirih, as well as groups such as Unchained at Last, a nonprofit that helps women and girls escape arranged and forced marriages and works to end child marriage. Virginia is now one of three states (Texas and New York are the others) that forbid under-18 marriages—with the exception being minors fully emancipated by a court. (A minor is emancipated when a judge, at the request of the youth or parents, finds the minor mature and capable of self-sufficiency; standards vary widely.)

A half-dozen other states are slated to consider legislation soon, according to Smoot, although it is often a complex uphill struggle.

UNDER THE RADAR

Outright hostility to minimum-age marriage laws might be rare; more often the roadblock is ignorance. “It’s an education issue,” says Vanessa Atterbeary, a Maryland legislator who sponsored a bill in her home state. “Few people understand how many children get married and how widespread the abuse is.” She got involved when friends of a young teen expressed concern and kept calling her office to report the teen’s marriage to a man in his 50s. “They wanted to know: ‘Isn’t there a law?’” she says.

In Maryland, there almost is. An under-18 ban passed in the House by a 91-46 vote but stumbled in the Senate, whose members wanted to bar girls 15 and younger from marrying. Time ran out on a 2017 compromise, but Atterbeary believes it will win approval this year.

“People have preconceptions; they think: ‘Who really gets married that young?’” says Beth Halpern, a partner at Hogan Lovells in Washington, D.C., a firm that has played a key pro bono role with Tahirih. “Many ask what’s the harm? Their grandparents got married young, and 50 years later they’re doing just fine. But this is not Romeo and Juliet.”

Even romance might not insulate the partners from consequences. Less dewy-eyed motives—face-saving or parental pressure or the avoidance of statutory rape charges—carry serious risks.

The statistics are alarming. Teen mothers are 50 percent more likely to drop out of high school and 31 percent more likely to live in poverty later on, according to a 2016 Tahirih report. They have substantially higher rates of psychiatric disorders; they are much more likely to have a stroke, heart disease and diabetes. In terms of intimate partner violence, young women ages 16 to 19 face victimization almost triple the national average.

Girls under 18 also might find life difficult if they choose to flee a marriage. Most domestic violence shelters don’t accept minors. Those that do can notify parents. Although automatically emancipated by marriage, a minor’s right to sign a legal contract can be restricted, creating all sorts of difficulties.

Donna Pollard, an opponent of child marriage from Kentucky, met her future husband at 14 when her mother sent her to a behavioral health facility where the man, 29, worked. They married two years later. “It should not have been a wedding,” she testified at a teleconference sponsored by Tahirih in August. “It was statutory rape.”

The high school near her new home rejected her because she was deemed likely to get pregnant. Pollard lost custody of her infant girl because she lacked legal representation. Fleeing the marriage, she couldn’t get into an apartment complex because she was too young to sign a lease. Now in her early 30s with the years of abuse in the rearview mirror, Pollard said simply: “He preyed on my vulnerability.”

A HODGEPodge OF LAWS

The challenge of changing minimum-age marriage laws is made more daunting by the complexity of the many different laws. More than half of all states do not specify a minimum “floor” age below which children cannot marry, according to Tahirih.

Some states allow parental consent as an exception to an under-18 marriage. Others, the majority, permit a judge to emancipate a young person. A number of states permit a pregnant teenager to marry with or without consent. The support for child marriage and objections to change are almost as varied and not always predictable.

The National Right to Life movement opposes restrictions on the grounds that they might make pregnant teens more likely to have an abortion. The American Civil Liberties Union—in a recent California action—opposed blanket restrictions because they intrude on “the fundamental rights of marriage.” The Children’s Law Center of California argued that raising the marriage age would strip minors of their chance to escape foster care through emancipation. In New Jersey, outgoing Gov. Chris Christie issued a conditional veto to a near-unanimous bill that would have raised the minimum age to 18, proposing a 16-year-old floor and citing...
The Docket

his state’s religious traditions. Christie’s proposal would have required a judge’s consent for 16- and 17-year-olds to marry.

“His veto indicates a troubling lack of understanding of how forced marriages often play out,” Smoot says. “Judges in New Jersey and others have approved the marriages of girls at young ages and with large age differences that should have been clear red flags that the girl was at risk.” Those girls, she says, should have been protected and “not shuffled down the aisle.”

Smoot’s language hints at another challenge for those who seek change—namely the conflation of “child marriage” with “forced marriage.” She says they aren’t synonymous, and they are two separate if overlapping issues. The overlap, of course, is that many girls and young women who marry are, in effect, coerced into marriage by parents or much older men. The outcome might not vary much if the girl were technically forced.

“Regardless of whether the union was the child’s or the parent’s idea, marriage before 18 has catastrophic, lifelong effects on a girl, undermining her health, education and economic opportunities while increasing her risk of experiencing violence,” wrote Fraidy Reiss, founder of Unchained at Last, in an op-ed for the Washington Post.

Tahirih has 10 states in its cross-hairs, hoping to end child marriage in upcoming legislative sessions. Another priority is improving the education of judges, who might not always be qualified to determine whether a young woman has been forced or coerced. Judges don’t see “threats that a girl might be facing outside the courtroom,” Smoot says.

Tahirih also picked up a major ally in 2014, when the ABA House of Delegates issued a detailed resolution that condemned forced marriage. More allies exist in the hundreds of law firms that, like Hogan Lovells, have contributed thousands of pro bono hours in research and legal advice.

“Without their help, none of this would be possible,” Smoot says.

Racing for Profits

Legal quirk allows struggling greyhound tracks to boost income with other types of gambling

By Arin Greenwood

Greyhound racing, which has been in decline for decades, is now illegal in 40 states, plus the U.S. territory of Guam. There are 18 dog racing tracks that still operate in the country, with 12 of them in Florida. But it’s not because folks in the Sunshine State are particularly fond of the sport.

Attendance at Florida dog races is down. The advocacy group Grey2K USA Worldwide notes that paid attendance from 2007 to 2016 declined by 85 percent, while wagering was down by 50 percent, according to figures from state regulators. Betting, likewise, was down by more than one-third from 2004 to 2010, while tax revenue collected between 2001 and 2012 decreased by 79 percent.

Some greyhound track owners say they are losing money year after year—while also facing mounting pressure to shut down from advocates and an animal-loving public concerned about allegations of cruelty toward an estimated 8,000 racing dogs in Florida. Among the allegations are frequent serious injuries and deaths, as well as dogs being confined to small cages for much of the day.

But a legal quirk keeps Florida dogs running: The law allows greyhound track owners to provide more remunerative activities such as poker or slots—as along as they also keep running the dogs. Animal advocates and some track owners are looking to have this law scrapped—while an odd mix of allies on the other side fights to keep the dog races going.

“The problem with this is greyhounds are the ones who are really suffering,” says Christine Dorchak, president and general counsel at Grey2K.

BIRTH OF A SPORT

After about a decade of illicit operation, Florida became the first state to legalize greyhound racing in 1931. Legal, licensed dog racing was launched as a Great Depression-era scheme to raise money for the state coffers; a tax was taken out of all bets. Although by some accounts, because most people didn’t have extra money during this period, the state brought in less money than it had hoped for—at least at the beginning.

That first year, according to the first annual report of the State Racing Commission of Florida, 870,392 people attended the six dog tracks then in operation—a remarkable number, given that Florida’s population at the time was about 1.5 million. Bettors put down $7.92 million that year, which
brought in $333,429 for the state.

At its height three decades ago, greyhound racing had gotten far more lucrative. In fiscal year 1988, the total handle—the aggregate amount of bets taken—for dog racing in Florida was $1.02 billion, according to the state’s yearly report. It brought in $80.59 million in taxes for the state.

By contrast, in fiscal year 2016—the last for which numbers are available—wagering on greyhound races amounted to $239.92 million. The state got $2.85 million in taxes and fees. Meanwhile, the track owners were losing a collective $35 million in fiscal year 2012, according to a study by the Florida legislature.

With interest in dog racing declining, track owners looked for new sources of profit. In 1997, the Florida legislature passed a so-called coupling law that allowed them—as well as horse racing tracks and jai alai courts—to open the more lucrative card rooms or slots so long as they maintained their previous activities. In the case of greyhounds, they were required to hold 90 percent of the dog races they previously held.

“It’s a lot of races, and it’s a lot of dogs that are being bred merely to run around a track with no one watching,” says Dana Young, a Republican member of the Florida Senate.

MAKING A SPLIT

In 2011, when Young was a new member of the Florida House of Representatives, she introduced a bill that would decouple greyhound racing from slots. She says she was inspired by a mix of animal welfare concerns and belief in the free market.

“These numbers make it abundantly clear the public interest iswaning,” she said at the time. “For us to create a false market for the dog breeding product at the expense of taxpayers simply makes no sense.”

That bill was supported by animal welfare advocates and some track owners. It was opposed by people who don’t want gambling to expand in the state, including owners of already-existing casinos seeking to stave off competition; Disney, which publicly opposes casino expansion on the grounds that gambling interferes with Florida’s reputation for family-friendliness; and, of course, the greyhound industry.

After it passed in the House and Senate, the bill died when the two houses “failed to resolve minor differences,” according to a Sun Sentinel commentary from 2016.

Young, along with some colleagues, has tried repeatedly in the years since to move legislation. The decoupling bills haven’t been successful yet, including a proposed measure last year.

Legislative attempts to require the reporting of greyhound injuries haven’t been successful, either. (However, in response to public pressure, one Florida county recently passed such a measure.) A bill that would have prohibited the use of steroids in greyhounds also failed in the 2017 legislative session.

But an administrative rule adopted in 2013 requires tracks to report all greyhound deaths. Because of the rule, we know that “415 dogs have died at Florida race-tracks since May 2013, the month and year when the tracks finally had to begin disclosing this information to the public,” Dorchak says.

This figure, which indicates about one death every three to four days, she says, helps bolster calls to move toward greyhound racing’s end either by outright ban or by allowing the industry to shrink of its own accord through decoupling.

INDUSTRY FIGHTS BACK

Jeff Kottkamp, a former Florida lieutenant governor who lobbies for the greyhound industry, is vigorously fighting against ending the racing. He has succeeded so far. He says the animal welfare concerns are overblown, and that the coupling is necessary to protect greyhound owners and those whose jobs depend on the dogs still running.

“That’s putting our folks out of business, and we can’t just let that happen,” Kottkamp says.

But with no legislative changes, at least one greyhound racetrack could disappear this year.

Last summer, state regulators approved an application for the Magic City Casino in Miami to get rid of its racetrack and put a jai alai court in its place while keeping its slots. Attorney John Lockwood tied the casino’s application to a 1980 state law that allowed some gambling facilities to make this switch. Although this was the first time regulators have allowed a so-called pari-mutuel facility to switch from greyhound or horse racing to jai alai, according to an article from the Miami Herald.

Lockwood says jai alai won’t be more profitable than greyhound racing. The court takes up less space, which will let the casino use the freed-up property for what he calls “its highest and best use,” perhaps an entertainment center.

Kottkamp, representing the greyhound industry, has filed an appeal. Lockwood hopes it will not be successful. On top of his client’s economic concerns, as a dog lover he says he is also moved by the animals.

“They’re telling us we have to run dogs around a race-track. Why are they making us do this? It’s horrible,” Lockwood says.

In October, Republican Sen. Tom Lee filed a constitutional amendment to ban dog racing altogether in Florida. The proposed amendment will have to be approved by Florida’s Constitution Revision Commission before voters see it on the ballot this year.

Sen. Young also plans to try again with new bills to protect greyhounds in the next legislative session, which begins this month. “It just takes time and steadfastness,” she says. “I’m cautiously optimistic.”

Dorchak of Grey2K sounds less reserved in her optimism. “Even as we work to pass laws to improve conditions for the gentle greyhounds exploited by this cruel, unpopular and outdated industry, the day grows closer and closer for dog racing to be outlawed nationwide as well as worldwide,” she says. “The question now is not if greyhound racing will end, but how soon?”
Urge to Purge

Court considers whether Ohio’s methods of cleaning up voter registration rolls go too far  By Mark Walsh

Larry Harmon, a software engineer and U.S. Navy veteran from Kent, Ohio, typically has voted in presidential and gubernatorial elections. But starting with the 2010 midterms and continuing into the next two federal elections, he skipped going to the polls.

“In 2012, I was disillusioned with the candidates and the political process, so I decided to abstain from voting, which was my own way of having my voice heard,” Harmon said in court papers. “There’s no option on a ballot for ‘none of the above,’ so I stayed home and expressed my political preference that way.”

Harmon is now at the center of a major U.S. Supreme Court case regarding the methods authorized by federal law for the states to clean up their voter registration rolls.

In Ohio, after a voter fails to participate in an election during a two-year period, which could mean missing just one election, the state sends an address verification notice. If the voter fails to respond, the state eventually removes the voter.

In November 2015, after skipping those prior elections, Harmon arrived at his polling place to vote in an Ohio state election. “I was told that my name was not in the poll book, meaning I was not registered to vote and therefore could not vote in the election,” Harmon said in a court declaration.

“I was very upset,” he added. “My registration was canceled even though I had not moved, and the state had accurate records at their disposal that would have shown the reality: That I still resided at my address.”

Although Ohio had sent Harmon a notice in 2011, he said he never received it. “Because I had voted in prior elections, I believed I was registered to vote in the 2015 election,” Harmon said. “I do not remember ever receiving a notice in the mail asking me to confirm my address or warning me that my voter registration would be canceled if I did not vote.”

ONE LAW, TWIN GOALS

The question posed in Husted v. A. Philip Randolph Institute, which is scheduled for argument Jan. 10, is whether Ohio’s process is consistent with the National Voter Registration Act of 1993.

That federal law, also known as the “motor voter law,” made it easier for voters to register at motor vehicle offices and by mail. But the law also contains detailed provisions that encourage the states to maintain “accurate and current” registration rolls and remove the names of ineligible voters—such as those who have died, those who’ve moved or those convicted of a crime.

The NVRA also specifies that the states’ voter-roll maintenance programs “shall not result in the removal of the name of any person ... by reason of the person’s failure to vote.”

Congress amended the law in 2002 to make clear that the states could remove a voter who failed to respond to a notice about potential removal and subsequently did not vote in two or more consecutive general elections for federal office.

The Ohio secretary of state’s policy on cleaning up the voter rolls is at issue in this case. The secretary’s office directs county boards of elections to send notices to voters who fail to vote for a two-year period and to remove any such person who does not respond to the notice and doesn’t vote in the subsequent four years.

What this means, according to challengers, is that Ohio’s policy is the harshest in the nation in terms of purging its voter rolls.

“Ohio is the only state that does it based on not voting in a two-year period,” says Dale E. Ho, director of the American Civil Liberties Union’s Voting Rights Project, which along with the public policy group Demos, is representing Harmon and two Ohio nonprofit organizations. “It doesn’t make a lot of sense to assume that most registered voters move every two years.”

Ohio Attorney General Mike DeWine, a Republican, said in a court brief that the twin goals of the NVRA and its amendments were to...
AGGRESSIVE REMOVAL

Harmon and the two nonprofits—the Northeast Ohio Coalition for the Homeless and the Ohio chapter of the A. Philip Randolph Institute, a Washington, D.C.-based organization of African-American trade unionists—sued the state over its procedures in 2016.

A federal district court ruled for the state, but a panel of the 6th U.S. Circuit Court of Appeals at Cincinnati voted 2-1 to reverse. Ohio’s process “constitutes perhaps the plainest possible example of a process” that results in “removal of a voter from the rolls by reason of his or her failure to vote” and thus violates the NVRA’s failure-to-vote clause, the majority held.

On remand, the district court ordered relief for the November 2016 election that required the state to count more than 7,500 provisional ballots from voters who had been removed from the rolls.

That figure, lawyers for Harmon have pointed out, does not include purged voters who had sought to vote by mail, those who learned they had been purged and did not show up, or those who came to the polls but did not cast a provisional ballot.

(Harmon said he was not offered one.) More than 5 million votes were cast in Ohio in the 2016 election. Myrna Pérez of the Brennan Center for Justice at the New York University School of Law says most states use independent information that a voter has moved in order to trigger sending a notice under the NVRA. This includes consulting with other agencies in their own states, sharing information with other states, other election-related mailings, and the U.S. Postal Service’s national change-of-address system. Ohio’s method “is not a smart way to get your rolls clean,” says Pérez, whose center joined with the League of Women Voters in filing an amicus brief on Harmon’s side. “As a policy matter, we don’t want election administrators making sloppy inferences that have real risk of voters being disenfranchised.”

The issue is especially important now, according to Pérez. “We are in a climate in which there is some element that wants really aggressive voter removal,” she says.

Harmon and some of his allies point to evidence that Ohio’s process has disproportionately purged racial minorities from the rolls. A 2016 analysis by the Reuters news agency found that in Ohio’s most populous counties, “neighborhoods that have a high proportion of poor, African-American residents are hit hardest” by the state’s purge process.

SHIFTING POSITION

Robert Alt, president and CEO of the Buckeye Institute, a free market-based policy group that filed an amicus brief on the state’s side, says voters, regardless of race or political affiliation, should welcome keeping the voter rolls clean. “An oft-forgotten problem in voting is that vote dilution occurs if individuals vote where they aren’t supposed to,” Alt says.

Another ally on Ohio’s side in the high court is President Donald Trump’s administration.

“The NVRA’s history and purpose reinforce the conclusion that states may send [address verification] notices based on nonvoting,” according to an amicus brief filed in August and signed by then-Acting U.S. Solicitor General Jeffrey B. Wall.

That is a reversal from the way the Department of Justice under President Barack Obama and previous administrations had consistently interpreted the NVRA. An amicus brief on Harmon’s side was filed by former U.S. Attorney General Eric H. Holder Jr., as well as 16 former DOJ civil rights attorneys who were in Democratic and Republican administrations. It says that from 1994 until the Trump administration’s brief in this case, the DOJ “repeatedly interpreted the NVRA to prohibit using the failure to vote as the basis for initiating a purge procedure.”

Samuel R. Bagenstos, a professor at the University of Michigan Law School who is one of the former DOJ civil rights officials, wrote in the brief: “Unusually, the [Trump administration’s] solicitor general’s brief was not signed by a single career attorney in the Civil Rights Division, the component of the department that is responsible for enforcing the NVRA provisions at issue here.”

 increase voter registration and to reduce the number of ineligible registered voters.

While the “failure-to-vote” clause of the federal law bars programs that result in removal of a voter for nonvoting, other language in the law—referred to as the “confirmation procedure”—affirmatively requires states to use nonvoting in removal, according to the state’s brief.

“The [Supreme] Court can reconcile these provisions by holding that the failure to respond to a notice under the confirmation procedure breaks the prohibited link between nonvoting and removal under the failure-to-vote clause,” DeWine said in his brief.

Ohio state officials declined an interview request.
Distilling Fear
Lawyering can be scary, but that shouldn’t stop us from being powerful advocates

By Heidi K. Brown

In the 1992 hit movie *A League of Their Own*, Tom Hanks’ character—a baseball coach to a women’s team—admonishes a sobbing right fielder and barks: “There’s no crying in baseball!” As a quiet law student fresh out of college, intimidated by the Socratic method of classroom teaching and other performance-oriented events such as oral arguments and negotiation simulations, I often heard similar mantras: “There’s no fear in lawyering! Just do it!”

Well-meaning mentors in the early years of law practice furthered this ethos, prodding my fellow junior associates and me into stressful deposition scenarios or first-time courtroom experiences with “Fake it till you make it! Show no fear!” For years—nearly two decades—I did just that, pushing myself into trial advocacy seminars, jumping feet-first into antagonistic interactions with gruff law firm partners, aggressive opposing counsel and curt judges, thinking there was something wrong with me because I was afraid. I worried I was not cut out for the law, or at least the litigation path I had chosen, even though I loved and thrived in my daily tasks of researching and writing, thinking and analyzing, strategizing and problem-solving.

The belief that my fear was a weakness took a profound emotional, mental and physical toll. I spent a good chunk of my 20s and 30s anxious and depressed, though I earned great money, paid off my student loan debt, took tropical vacations and drove a cool sports car. I kept doing it, faking it, pushing through, bungee jumping into the fray and pretending I wasn’t afraid. Inside, I was terrified—all the time. Afraid of making a mistake, misreading a contract, overlooking a case in my research, proposing the wrong strategy, faltering in a combative deposition, missing the timing of a courtroom objection, not knowing the immediate answer to a judge’s question.

My relationships and physical and mental health suffered. I thought I was the only lawyer who was petrified on a daily basis, and felt I couldn’t admit it to anyone. In fact, when I did confide inklings of trepidation about a case I was working on, relatives and colleagues quipped, “But this is the career you chose! Just grow a thicker skin.” Legal research and writing became my safe haven, and I threw myself into immersive tasks like brief writing. But migraines and stomachaches abounded.

**TACKLING PUBLIC SPEAKING**

When I transitioned from law practice to law teaching and noticed that my strongest legal writing students often were my quietest students and the most fearful of mandatory performance-oriented events, it hit me. As legal educators and practice leaders, we need to do a better job of talking about the reality of fear in lawyering. Instead of telling law students and junior associates to “fake it till they make it,” and “just do what scares you,” we need to say—out loud—that yes, lawyering can be scary, and some interactive scenarios might be more intimidating for some of us than others.

But that does not mean we are not cut out for law practice or don’t deserve to be here. Quite the contrary. By first acknowledging our fear in lawyering and then understanding its roots and drivers, we can develop and adopt practical strategies to distill fear and transform it into powerful advocacy for others.

In thinking about what exactly to do about fear, the usual mantras come to mind: fight it, conquer it, battle it, overcome it—verbs that imply that fear is a blobby foe that can be knocked out, skirted, stepped over. But in reality, the worrisome aspects of doing our jobs as lawyers cannot be carted away in a Bankers Box. Law school is inherently fraught with apprehension about grades, the curve, making law review, bar passage, landing a job. Law practice likewise ignites panic over deadlines, win-lose dynamics, partnership tracks. Instead, we must learn how to distill fear. The verb *distill* is defined as to “extract the essential meaning or most important aspects of” something, or to “purify (a liquid) by vaporizing it, then condensing it by cooling the vapor, and collecting the resulting liquid.” If we get to know the vaporous entity of fear that permeates lawyering and talk about it out loud, we can discern its essence and transform our emotional, mental and physical relationship with fear into powerful advocacy.
Let’s take public speaking anxiety as an example. When we think of the stereotypical American lawyer, we envision the eloquent courtroom orator, the advocate with the gift of gab, the garrulous conference room gladiator. But in reality, many law students and junior lawyers—perhaps naturally quiet, introverted, shy or even socially anxious individuals—experience trepidation toward law-related public speaking scenarios.

Extroverted or otherwise outwardly confident classmates or co-workers often quip to quiet contemporaries: “If you don’t like speaking, why’d you go to law school?” Being quiet during or initially hesitant toward spontaneous legal exchanges does not in any way mean a person is not cut out to be an impactful lawyer. But for some of us, in order to tap into our authentic advocacy voices, we first need to understand what is driving our fear.

To do that, we can’t keep pretending it doesn’t exist. After years of trying to push through my intense fear of public speaking, faking it till I made it in depositions, negotiations and courtroom appearances (and constantly feeling ill), it was not until I started teaching law that I finally sat down and got to know my fear.

Teaching an evidence course to 135 law students, I had to admit—out loud—I was afraid. I was scared of not knowing the answer to a tough question about a tricky criminal evidentiary rule (my years of practice had focused on the civil rules), of turning bright red (I’m an epic blusher), of seeming like a fraud to students paying $50,000 a year in tuition and expecting excellence.

TOSS THE NEGATIVE MANTRAS

Drawing upon the resources of many experts, I started analyzing the mental and physical realities of my fear: i.e., transcribing verbatim the negative messages I played on a soundtrack in my head at the onset of a fear-inducing event. Then I assessed what I was doing with my physical body that blocked energy, oxygen and blood flow, hindering my peak performance. I realized that the detrimental mantras I had adopted as gospel from others over nearly two decades of law practice served no purpose for me and simply fueled a shame-based fear of judgment.

I decided that my days of faking it, of dismissing the reality of fear, were over. I started verbalizing it: “Wow, tough evidentiary question. I need to think about that for a minute. I know I’m turning red right now, but the blush will go away in a moment, so ….” Vulnerability and honesty about my fear—in appropriate circumstances, of course—became powerful stanchions. Through alternating mental and physical reflection with mental and physical action, and always prioritizing truth over the mask of fake confidence, I slowly became less fearful and, in many instances, surprisingly fearless. This process works. Pretending didn’t.

Fear blocks learning and performance, and it can catalyze anxiety and depression in a profession already saturated with mental health challenges. If we can turn down the dial of stress and anxiety even one notch for even one struggling individual in our profession by opening up a dialogue about the reality of fear in lawyering, we must try. I’m a lawyer and a law professor, and I admit I’m often fearful about making the right decision, appearing unintelligent, or not knowing the wisest or correct answer. But I know that, if I give myself enough time to research, write it out, think, reflect and then act—while reinforcing techniques to channel thoughts, energy, oxygen and blood flow in a productive manner—I will do the best job I can.

Law practice mentors can remove a thick layer of stress from junior lawyers—good thinkers, writers and problemsolvers—by overtly acknowledging that some lawyering tasks may be more daunting for some individuals than others. We then can provide not only substantive and tactical guidance but also mental, physical and emotional strategies for optimizing performance. Let’s start talking about fear in lawyering.

Heidi K. Brown, an associate professor of law and director of legal writing at Brooklyn Law School, was a litigator in the construction industry for two decades. She is the author of The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy, published by the ABA.
Assistant Alert
Supervision is key to effective employment of paralegals

By David L. Hudson Jr.

Attorney usage of paralegals and legal assistants is a respected reality in today's legal climate. The Bureau of Labor Statistics reports there will be a 15 percent increase in paralegal jobs from 2016 through 2026—a rate it lists as “much faster than average” compared to other professions.

Paralegals perform a litany of tasks—including drafting documents, preparing attorneys for trial and organizing client files. The U.S. Supreme Court also has weighed in, writing in Missouri v. Jenkins, a 1989 school desegregation case, that paralegals provide the “cost-effective delivery of legal services.”

However, attorneys must be aware of ethical issues that can arise from using paralegals and legal assistants. Perhaps the most direct rule on point is Rule 5.3: Responsibilities Regarding Nonlawyer Assistance in the ABA Model Rules of Professional Conduct. Among other requirements, the rule explains that lawyers must make reasonable efforts to ensure those working under them comply with “professional obligations.”

The rule also explains that a lawyer who has supervisory authority over nonlawyers is responsible for the ethical violations committed by such nonlawyers. Comment 2 to Rule 5.3 explains: “A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.”

JUGGLING ACT
Some ethics experts identify delegating too much work to paralegals as the No. 1 ethical concern for attorneys. The key is to maintain adequate supervision over nonlawyer employees.

“The biggest minefield I see is overworked or inattentive lawyers failing to provide adequate direction and supervision, leaving the paralegal to figure things out on [their] own,” says Salt Lake City lawyer Keith A. Call, who has written about ethical issues involving paralegals in the Utah Bar Journal.

The process of delegating things that are hard for attorneys to figure out themselves is especially dangerous, Call says. “Under Rule 5.3, a lawyer can be personally responsible for the unethical conduct of his or her paralegal. And all too often, overworked or careless lawyers can be tempted to dump too much responsibility on the paralegal and fail to follow up with adequate supervision,” he says.

A related concern is that attorneys might give too much work to paralegals or not realize the paralegals are actually practicing law. Case reporters are filled with complaints in which attorneys faced discipline—sometimes very serious discipline—for allowing their paralegals to engage in the unauthorized practice of law.

“While I think there is a problem with attorneys delegating to and not adequately supervising paralegals, I think the bigger concern is paralegals conducting themselves in ways that could be considered the practice of law and attorneys not reining that in,” says Kellyn O. McGee, a professor at Savannah Law School.

“Paralegals have great knowledge in the areas of law that they work in,” she says, adding that it’s easy for them to give advice or otherwise cross the line and either not realize that they shouldn’t be doing it or attorneys might believe it’s harmless.”

A specific variant of this problem in some firms is paralegals signing up clients. “Some law firms allow paralegals to sign up new clients,” says ethics expert Peter A. Joy, a law professor at Washington University in St. Louis. “This can be a big problem because paralegals cannot exercise the independent legal judgment necessary to sign up a client, and sometimes paralegals may be crossing the line by soliciting clients.”

Joy points out another area of concern—lawyers allowing paralegals to sign legal documents.

“One area that some lawyers ignore both with paralegals and with other support staff is permitting someone other than a lawyer to sign a pleading or any other court filing,” he
says. “Both the ethics rules and court rules require a lawyer to sign anything filed in court.”

ISSUES OF CONFLICT
Paralegals sometimes switch law firms, just like attorneys do. Law firms must have proper screening mechanisms in place to guarantee that paralegals have no conflicts of interest. A classic textbook case is *In re Complex Asbestos Litigation* (1991), in which the California 1st District Court of Appeal ruled that a law firm was disqualified from asbestos litigation because the firm hired a paralegal who had worked on the same case with the law firm on the other side. The firm failed to properly screen the paralegal, leading to the disqualification of the law firm from nine related asbestos lawsuits.

“Firms should conduct conflicts checks when hiring paralegals and should properly screen paralegals when they need to, and that screening might also include prompt notice to the opposing side,” McGee says. “Failure to properly screen could result in the firm’s disqualification.”

Attorneys also should be mindful of another of the hallmark principles of professional responsibility—confidentiality—and how that intersects with the use of paralegals. Lawyers are taught ad nauseam about Rule 1.6 and the duty of confidentiality, but those lessons have to be effectively communicated to legal support staff.

Paralegals must take great care to make sure that confidential client data is not transmitted to the other side or to third parties. “Paralegals often handle volumes of client information in the form of paper and electronic documents,” Call says. “It is particularly easy to make a mistake in handling electronic information. For example, use of a file-sharing platform without passwords or encryption can lead to disastrous results. Or, if a paralegal is not careful, privileged information can be transmitted in metadata even though it has been redacted from the primary document.”

Confidentiality extends to conversations about cases. Call cautions that lawyers should “train paralegals to avoid talking about confidential matters with family members and friends.” Paralegals might not have the same level of training on confidentiality as attorneys, who have the concept “drilled into them in law school, bar exams and CLE programs,” he says.

ADVERTISING AND SOLICITATION
Attorneys also need to be wary of allowing paralegals to post advertisements or other information about their law practice without supervising these statements.

Last spring, the South Carolina Supreme Court in *In re Emery* disciplined a lawyer for several ethical violations, including a failure to post accurate information on the attorney’s website. The lawyer had hired a paralegal to post the material on the website, but some of it was inaccurate. For example, the paralegal created Facebook posts that congratulated clients after their real estate closings but did not obtain clients’ permission to use their names. The paralegal also posted about the quality of legal services, such as using the word *best* to describe the attorney without providing substantiation.

The South Carolina court found the attorney violated state ethical rules based on ABA Model Rule 5.3 and also Rule 7.1—which prohibits false and misleading statements regarding the lawyer’s services. This is one of many cautionary tales. For attorneys at all practice levels, paralegals may provide incredible value. But lawyers must take their duty of supervision for legal employees seriously to ensure ethical compliance.

“Limiting the use of paralegals and other nonlawyer professionals may make it increasingly difficult for many lawyers, particularly small firms and solo practitioners, to practice to the top of their licenses,” says Ellen Murphy, a professor at the Wake Forest University School of Law who specializes in professional responsibility issues. “The real minefield lies on either side of the thin line between increasing productivity using paralegals and remaining ethical using paralegals.”
Writing vs. Good Writing

Make the languorous doldrums of reading disappear

By Bryan A. Garner

When Thomas Mann said that a writer is someone for whom writing is more difficult than it is for other people, what do you suppose he meant? That’s our subject this month.

“All styles are good,” Voltaire said, “except that which bores.” The good writer, in other words, frets a little about piquing the reader’s interest sentence by sentence, paragraph by paragraph—never descending into unremittingly dull stretches. The French even have a word for those dull stretches: *longueurs.*

The good writer, I say, because pedestrian, workaday writers couldn’t care less. They assume, falsely, that they have a captive audience when in fact there’s no such thing. All readers, even paid readers, rebel with little provocation: As soon as it gets dull, they allow their minds to wander or simply stop reading. They quit.

In law, of course, this happens all the time. Most expository prose in law is pretty darned dreary. Lawyers come to think of on-the-job reading as a tedious, soporific part of the job. When we occasionally encounter something well-written, our attention immediately perks up: The languorous doldrums of reading suddenly disappear for the time it takes to read good writing.

We instantly realize, if only subliminally, that there’s an immense difference between writing and good writing. When that realization rises to the level of consciousness, it becomes, in the words of the late Justice Antonin Scalia, an “astounding revelation.” He said he saw his University of Virginia students undergo this epiphany when he was in charge of a legal writing course. Each term, he impressed upon his students that it takes time and sweat to undergo this epiphany when he was in charge of a legal writing course. Each term, he impressed upon his students that it takes time and sweat to have a captive audience when in fact there’s no such thing. All readers, even paid readers, rebel with little provocation: As soon as it gets dull, they allow their minds to wander or simply stop reading. They quit.

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**HOW TO BECOME UNENCUMBERED**

Consider an example:

**Writing:** Plaintiff merely takes two paragraphs out of context from the Swartz publication #2348, which is the manual dealing with career opportunities.

**Good writing:** Dampf merely plucks two isolated paragraphs from Swartz’s career-opportunities manual. What are the differences? (1) The character in this story has a drab legal label in the first version but is actually named in the second. Nothing helps a story connect with readers more than using the parties’ names. (2) The first version prominently mentions #2348, which is boring and unnecessary; the second just says what it is—and does so economically in four words instead of 11. (3) The phrasal verb in the first version is nondescript (takes out of context); in the second, the verb is a vivid metaphor (plucks). (4) The first version is encumbered with a long subordinate clause that de-emphasizes crucial information; the second version, direct and straight-shooting, puts all the information in one tight independent clause.

Also, the first version takes 21 words, the second just 11. Multiply both versions by 667, and you have a full-length appellate brief written in the one style or the other. That’s an oversimplification, you say? Perhaps a little, but the point holds: Reading 14,000 words in the original style is sheer tedium; reading 7,300 words in the second style is rather enjoyable.

The distinction between writing and good writing holds in every realm of expository prose—and either type becomes a matter of habit. Even something as mundane as a letter between relatives, about a debt that one has incurred to the other, can be elevated to artistry in the hands of a good writer. Take, for example, this classic letter written by the critic Alexander Woollcott (1887–1943) to his niece Joan Woollcott Jennings in 1940:

**Dear Mrs. J.:**

I hope that you like your marriage and that I, when our paths cross, shall like your husband.

Let us dispose, for the time being, of your debt to me, which, properly enough, is more on your mind than on mine. I should like to have you pay it back under one of two circumstances: (a) that you do it when, if ever, money is flowing freely in your direction and you can make the repayment without a wrench, or (b) that I myself am in difficulties, in which case I should let out a squawk. If, as seems not unlikely, I should be gathered unto my fathers before either of these contingencies arises, I hope you will regard it as a bequest to you. And if there is any order in your life I wish you would file this letter away as evidence of these testamentary intentions. To this contingent request there is attached not a condition but a suggestion. If I should hurry to my grave before you settle our account, I think you might keep it in mind that I would like to have you make your repayment take the form of putting some other youngster through college someday.

**A.W.**
SCRAP THE SAP

Why is that letter good? What makes any letter good, for that matter? In Woollcott’s letter, we see a combination of excellent ideas and excellent phrasing. Noble sentiments, never sappy, permeate the letter. And the technique of phrasing is mostly a matter of refined word choice, polished syntax and variety. Woollcott used appealing, slightly offbeat wordings in almost every sentence: dispose (with its double lay sense and legal sense), wrench, squawk, gathered unto my fathers, if there is any order in your life and hurry to my grave. As for syntax, he begins with a compound sentence of coordinate clauses followed by a series of sentences using both main clauses and subordinate clauses—all well-arranged. The one exception to that pattern in the second paragraph is the sentence that begins with an arresting inversion: To this contingent request ….

The writing is a series of pleasant surprises, both in language and in content. The style and the content reinforce each other. Whenever you’re enjoying a piece of writing, start noticing how often the reason lies in pleasant surprises.

Of course, there are as many tones in writing as there are in utterance. Most legal writers should aspire to sound like the voice of reason—and even that can (and should) be achieved with a piquant vocabulary and a varied syntax.

But since I’ve invoked Woollcott, let’s look at another letter he penned with a very different tone. Here he’s in high dudgeon—or a self-mocking version of it. He’s writing to the lyricist Ira Gershwin (1896–1983), who has defended his use of disinterested to mean “bored” as opposed to “impartial”:

Ira Gershwin:

Listen, you contumacious rat, don’t throw your dreary tomes at me. I’ll give you an elegant dinner at a restaurant of your own choosing and sing to you between courses if you can produce one writer or speaker, with an ear for the English language that you genuinely respect, who uses disinterested in the sense you are now trying to bolster up. I did look it up in my own vast Oxford dictionary a few years ago only to be told that it had been obsolete since the 17th century. I haven’t looked up the indices in your letter because, after all, my own word in such matters is final. Indeed, current use of the word in the 17th-century sense is a ghetto barbarism I had previously

thought confined to the vocabularies of Ben Hecht and Jed Harris. Surely, my child, you must see that if disinterested is, in our time, intended to convey a special shade of the word “unselfish” it is a clumsy business to try to make it also serve another meaning. That would be like the nitwit who uses a razor to sharpen a pencil. The point of the pencil may emerge, but the razor is never good again for its particular purpose.

Hoping you fry in hell, I remain

Yours affectionately,

A.W.

If the style had been less extreme, the letter would not only become less funny but its self-mockery would become more questionable—and the letter might actually seem more hostile. One thing is certain: Woollcott was comfortable with the sound of his own voice. All good writers come to be that way. Even so, it takes time and sweat because they have high expectations of themselves.

Bryan A. Garner, the president of Dallas-based LawProse Inc., is the author, most recently, of Nino and Me: My Unusual Friendship with Justice Antonin Scalia.

“Let us dispose, for the time being, of your debt to me, which, properly enough, is more on your mind than on mine.” —Alexander Woollcott
Starting Small
It’s time to make an achievable lawyer well-being resolution

By Jeena Cho

On Well-Being

It’s the new year. Time for new or renewed resolutions. Perhaps, like many, you have high aspirations for increasing your well-being. Maybe you will start going to the gym regularly, eat more vegetables or get more sleep. Yet research indicates that 80 percent of New Year’s resolutions fail by February.

Lawyers tend to be overachievers; we value perfection and doing things well. Often it is this mindset that deters lawyers from achieving their goals. Rather than focusing on making small, incremental changes, we expect substantial, rapid results.

When I teach mindfulness and well-being courses to lawyers, I ask the attendees to set a goal that can be accomplished in just six minutes per day. The reason for this is twofold. One, lawyers often measure their time in six-minute increments, so it’s familiar. Second, it’s easily achievable.

Assume you haven’t jogged since high school. Rather than proclaim you will run one hour per day, start with committing to a six-minute walk during lunch every day. The key is to keep the goals easily achievable so that you can experience that sense of accomplishment.

Inevitably, as with creating any new habits, you’ll hit stumbling blocks. This is a critical moment.

Because of our perfectionist tendencies, lawyers will engage in negative self-talk. “I committed to running every day and I haven’t run for a week. I’m so lazy. I’m a failure.”

Don’t waste precious time and resources berating yourself. No matter how long you’ve broken your resolution, simply begin again. This idea of beginning again has been crucial in forming what has become my daily meditation practice over the last six years.

WHAT IS LAWYER WELL-BEING?

As discussed in the recommendations released in August by the National Task Force on Lawyer Well-Being, it isn’t merely about an absence of illness. Well-being is multifaceted.

The task force defined lawyer well-being as a “continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health and social connections with others.”

As lawyers we can spend an inordinate amount of time ruminating, anticipating and planning for the worst-case scenario. Mindfulness is useful for recognizing when our thoughts are helpful or destructive. This includes when we’re engaged in problem-solving or simply replaying thought loops.

We know from a February 2016 ABA study that the levels of depression, anxiety and stress among attorneys are significant, with 28 percent, 19 percent and 23 percent experiencing symptoms of depression, anxiety and stress, respectively.

The reason why lawyers must care for their own well-being is that it is the cornerstone of being a competent lawyer. Rule 1.1 of the ABA Model Rules of Professional Conduct states that lawyers owe a duty of competence to their clients. Competent representation is defined as requiring “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Rule 3-110(B) of the California Rules of Professional Conduct states that “competence in any legal service shall mean to apply the . . . mental, emotional and physical ability reasonably necessary for the performance of such service.”

One task force recommendation for maintaining lawyer well-being is mindfulness meditation. Research indicates that mindfulness can reduce ruminating, stress, depression and anxiety. At their core, all meditations share the feature of bringing one’s attention to the object of focus—commonly the breath, sounds, other physical sensations or repetition of a mantra.

I started practicing mindfulness meditation after I was diagnosed with social anxiety disorder. It makes sense since anxiety is the subjectively unpleasant feeling of dread over anticipated events. By committing to be in the present moment, I naturally spent less time anticipating, playing the “what if” game.

Meditation has been shown to reduce negative reactions to stress, to improve reactions to depression and to increase overall workplace satisfaction.

AN 8-WEEK MINDFULNESS PROGRAM

In 2016, I partnered with the National Association of Women Lawyers and the Seyfarth Shaw law firm to offer an online mindfulness training program. In total,
968 lawyers participated.
As part of the program, we collaborated with John Paul Minda, an associate professor of psychology at the University of Western Ontario, who conducted a study to measure the impact of the program. Forty-six lawyers joined in this phase, in which we wanted to measure the impact of mindfulness programs for lawyers.

The lawyers who participated in the study completed a self-report. It included: a perceived stress scale; positive and negative affect schedule; brief resilience scale; five-facet mindfulness questionnaire; depression, anxiety and stress scale; and job effectiveness questionnaire.

The results were:
• Perceived stress scale: 22.73 percent reduction.
• Positive affect subscale: 13.65 percent change.
• Negative affect subscale: 17.78 percent change.
• Brief resilience scale: 10.36 percent change.
• Five-facet mindfulness questionnaire: 15.61 percent change across the five subscales.
• Job effectiveness questionnaire: 6.15 percent increase.
• Depression scores: 28.84 percent decrease.
• Anxiety scores: 30.29 percent decrease.
• And stress scores: 32.45 percent decrease.

Minda used the same questionnaire to measure depression, anxiety and stress as in the 2016 ABA study.

It was interesting to note that the participants spent, on average, 57.98 minutes per week meditating—just eight minutes per day. Reducing stress and anxiety by 30 percent with just eight minutes of regular meditation practice is an investment of time worth making.

START OUT WITH JUST 6 MINUTES
If you’re interested in trying meditation, here’s a simple practice to get you started.

Find a time when you can practice on a regular basis. It’s helpful to anchor to an existing habit. For example, if you drink coffee every morning, meditate beforehand.

Set a timer for the desired length of time.

Sit comfortably on a chair, both feet firmly on the floor, and lift your torso up through the spine. Allow the shoulders to relax.

Close the eyes.
Begin by feeling the movement of the breath. You can focus on the movement in the chest as the lungs rise and fall, or perhaps you might notice the movement in the stomach as the diaphragm expands and contracts.

When the mind wanders (thinking, worrying, daydreaming), gently return the mind to the breath. This may happen repeatedly during the meditation. It’s normal.

Continue until the timer sounds.
Practice for six minutes a day for at least 21 days. Perhaps at some point you’d like to increase the duration, or it might still be the right amount of time for you. (You can hear an audio version of this guided meditation at jeenacho.com/wellbeing.)

Often, lawyers feel discouraged by thoughts about not meditating correctly or doing it poorly. This is part of the journey. See whether you can view those thoughts for what they are—your inner critic narrating your experience rather than facts. Give yourself the permission to show up as you are each day and enjoy the practice.

Prepare, Practice, Practice, Practice...
Cybersecurity and the Law

Our yearlong series explores cybersecurity and how lawyers can better safeguard their confidential information while staying vigilant against an evolving, multifaceted threat.

When it comes to cybersecurity, attorneys from solo shops to BigLaw are grappling with tough issues.

Facing litigation after a phishing attack, attorneys contemplate the imperative to encrypt attorney-client communications. When a government agency is breached, firms look to ameliorate the damage to their clients. After every large public data breach, policymakers weigh whether organizations should have to disclose future incidents.

As these important issues are digested and debated, adversaries are taking advantage of law firm vulnerabilities. The American Bar Association’s 2017 Legal Technology Survey Report found that 22 percent of respondents experienced a cyberattack or data breach at some point, an increase of 8 percentage points over the previous year. These attacks occur as the legal industry ranks near the top in cybersecurity, according to recent research from cybersecurity ranking company BitSight Technologies.

Despite its comparatively high ranking, there is still room for improvement—after all, the consequences of a breach can be severe. Data breaches, a modern certainty like death and taxes, damage an attorney’s ability to provide zealous representation. Hacks can also cost large sums of money, as well as the profession’s own credibility.

To help make sense out of the ever-changing cybersecurity landscape, the ABA Journal—joined by industry and legal experts and in collaboration with the ABA Cybersecurity Legal Task Force—will spend the next year exploring traditional and vanguard cybersecurity and digital privacy issues. The goal is not to scare the legal field with digital horror stories but to cultivate a useful dialogue around current threats and best practices to better protect law firms, their clients and the profession.

The series begins with how a firm can assess its digital vulnerabilities and potential adversaries and change its organizational culture to be “security first.” From there, the series will explore the ethics...
of cybersecurity, cyber insurance and what to do after a breach. Later in the year, it will look prospectively at potential government regulations, the role of artificial intelligence and the future of cyberwarfare.

Beyond specific topics, this series looks to promote concepts that create a healthy security culture. This series will not hawk tools and digital “solutions.” Rather, it will reinforce that process, procedure and people are the core components of online security.

Another theme will reiterate that cybersecurity threats and best practices are always evolving. The pieces in this series should be read as a snapshot in time and not as rules written in stone. For example, only last year, the National Institute of Standards and Technology rescinded its 14-year-old recommendations that “strong” passwords should contain numbers and special characters and be changed regularly. Research showed that these practices made accounts less safe. NIST now recommends longer pass-phrases and only changing a passphrase after a breach.

Adversaries seeking to breach law firms constantly change and improve their practices. To be proactive and secure in a dynamic world, lawyers must adopt a similar mindset.

Join us in the magazine and online throughout 2018 to stay abreast of evolving cybersecurity practices and growing threats. After all, your security is at stake.

—Jason Tashea

By John P. Carlin, Robert S. Litt, Hayley R. Curry and R. Taj Moore

CORPORATE LITIGATOR JANE DOE SAT DOWN at her desk Monday morning and logged on to her computer. She opened an email appearing to be from a client that read: “Hi. Could you please take a look at this document? It’s urgent.” Doe clicked on the attachment. Two weeks later, a hacker website published confidential documents that one of her most important clients had given the firm in connection with a lawsuit alleging environmental violations. Doe’s client called, furious, to inform her that she was discharged, and that the client was considering a lawsuit against her firm.
Every week brings news of major new cyberattacks—the stealing of personal information from Equifax and the federal Office of Personnel Management, the Petya and WannaCry ransomware worms, the Russian hacking of the Democratic National Committee’s emails, to name a few. Indeed, the cyberthreat from criminals, hacktivists and state actors is growing. The costs associated with these malicious activities are staggering: Last year, the Commission on the Theft of American Intellectual Property estimated that the annual cost of IP theft in three major categories may be as high as $600 billion and that the low-end total exceeds $225 billion, or 1.25 percent of the U.S. economy.

Law firms have not been immune. In fact, they have been a ripe target:

- Several major New York City law firms working on public mergers and acquisitions were hacked in 2014 and 2015 as part of a sophisticated insider-trading scheme.

- In 2012, hackers believed to be linked to the Chinese government obtained confidential documents related to solar panel designs by hacking into a prominent Washington, D.C., firm.

- A Panama-based law firm was the target of the largest data theft ever by volume: A hacktivist website obtained 11.5 million individual documents stolen from the firm (2.6 terabytes of data), which contained confidential financial information about the firm’s clients.

- Among the many entities victimized by the Petya ransomware attack this past year was a BigLaw firm that was forced to take some of its email servers offline for an extended period.
The nature of their work and the resulting sensitive data make law firms enticing targets. Law firms conduct due diligence and internal investigations, negotiate settlements, provide advice on regulatory issues, and handle important contractual negotiations and litigations. In the course of their representations, they often have access to a wide range of confidential client information, including trade secrets and other intellectual property, financial data, business strategies and national security information. All of this can be valuable to criminals seeking monetary gain, to businesses seeking a competitive edge or to foreign intelligence services.

Technology enhances the risk. Records that a law firm once kept on physical pieces of paper in file cabinets now reside on data servers or in the cloud. Lawyers increasingly communicate using mobile devices or email. Firms’ use of a growing number of devices that are connected to the internet—the “internet of things”—creates new vectors of vulnerability. While these developments may have made the logistics of legal practice easier, they have also introduced additional opportunities for illicit access.

**FIRMS OFTEN LAG BEHIND**

As in-house counsels heighten their focus on cybersecurity, they are increasingly trained to ensure that any outside law firm has practices at least as secure as the client. To date, the opposite is more often the case. Law firms may have weaker cyber defenses and less robust breach-response plans than clients, many of which have long operated in regulated industries that impose specific cybersecurity requirements. Partly for cultural reasons and partly for economic reasons, law firms have been slow to invest in and adopt strong cybersecurity measures. In particular, a small law firm may find it difficult and seemingly cost-prohibitive to keep abreast of the latest threats and defenses. And large firms that rely extensively on international electronic communications may be vulnerable—especially if they operate in countries like Russia and China, where hacking is commonplace. Indeed, while in government, we saw foreign adversaries deliberately target law firms and sought to warn firms of the dangers.

Finally, law firms may be
victimized by cyberattacks even if they are not specifically targeted, as happened with the Petya ransomware. Phishing and other attacks often operate indiscriminately, infecting anyone who happens to open a link containing malware. The 2016 Mirai botnet attack shows how the use of internet-enabled devices can increase risk. In that case, malware infected internet of things devices such as printers, webcams and copy machines and used them as the basis for a denial of service attack.

The consequences of a cyberattack for a law firm can be devastating. Most obvious are the immediate financial costs flowing from the attack. A firm may need to hire a forensic investigator to determine the scope of the breach and ensure it is remediated. Valuable time that could have been spent on client matters might be dedicated to a prolonged breach response. Attorneys and other staff may leave, requiring resources to be spent finding and training replacements. The damage to a law firm’s reputation and business can be equally serious: If clients do not have faith in a law firm’s ability to protect their confidences, they are likely to take their business elsewhere.

LAYERS OF REGULATIONS

Beyond the financial costs, law firms have both legal and ethical obligations to safeguard the confidential information of their clients, and the failure to comply with these obligations can have serious consequences. At the federal level, Congress and agencies have imposed a number of sector-specific data-security obligations. Regulations promulgated under the Gramm-Leach-Bliley Act, for example, require all banks to establish written information-security programs describing how they will protect clients’ nonpublic information. And the Health Insurance Portability and Accountability Act of 1996 requires covered entities to take steps to ensure the integrity and confidentiality of protected health information. Businesses subject to these data-protection obligations often require that they be observed by contractors such as their law firms. As a result, a law firm that obtains protected information from its client may be required to protect that information as well.

In addition to federal laws and regulations, many state laws require the protection of various kinds of information. Some states, including California, impose a general duty to implement “reasonable” security procedures and practices. Others, like Massachusetts, are more specific, requiring businesses to implement minimum safeguards, including malware and firewall protection, encryption on laptops and portable devices, and various user-authentication procedures to protect certain types of data. The ABA Cybersecurity Handbook, which was recently published, lists the relevant state and federal laws as of the date of publication, but lawyers should be sure to check for more recent legislation or regulation in this rapidly changing field.

International data-protection rules vary widely from country to country. At present, there are over 100 national data-protection regimes around the world. The European Union is preparing to implement its General Data Protection Regulation, which goes into effect in May. It provides a strong privacy framework for entities doing business in member states or processing personal information obtained from people within the EU. It is enforceable by potentially substantial fines. National laws not only vary widely in their scope and substance but also are changing rapidly, and lawyers must stay up to date.

Apart from legal rules, however, a lawyer’s ethical duty to protect information obtained from a client imposes obligations to act prudently and with discretion in the digital world as well as the physical one. Rule 1.6 of the ABA Model Rules of Professional Conduct requires a lawyer to make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,” and a comment to Rule 1.1 makes clear that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” This rule applies across a variety of contexts; for example, in May 2017 the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 477R, which modified an earlier opinion to make clear that it is not always permissible for a lawyer to conduct confidential client communications by unencrypted email and set out steps a lawyer should take.
to guard against unauthorized disclosure of information.

**ACTION PLAN**

So what should lawyers do to protect themselves against financial and reputational loss and to comply with legal and ethical requirements? Firms should focus on risk management and incident response planning, both of which serve to prevent breaches and minimize their potential consequences. As part of the risk management process, firms should take a number of steps:

1. **Education and training.** Many breaches begin with some sort of human error, such as an insecure password like “Password123,” a lost laptop or an unthinking response to a phishing email. Law firms should ensure that each employee—lawyer and nonlawyer alike—understands that he or she has an individual responsibility to protect confidential information and knows how to do so. This training should be provided as soon as an individual joins an institution and should be repeated throughout their employment.

2. **Inventory.** As part of the risk management process, law firms should identify what their most valuable data assets are, where they are located and who should have access to them. If a firm does not know what information it maintains, it cannot expect to properly protect it. In a world of finite resources, allocating security based on which data needs it the most is prudent.

3. **Access controls.** Too often, a firm’s users and systems are connected by default, with no consideration of the attendant risks or of employees’ actual access needs. But over-connectedness can enable a breach that might otherwise have been relatively confined to inflict far greater damage. A firm’s management should view access as a business decision and evaluate whether the efficiencies gained by connection outweigh the risks. Additional controls such as multifactor authentication, network segmentation and encryption should also be implemented.

4. **Monitoring.** Mitigating the potential consequences of a breach requires that it be detected quickly. Real-time monitoring is critical to swift detection and response. Firms should install a system that monitors the network and immediately identifies and corrects anomalies. Incidents may be detected in a variety of other ways as well. An employee may report a lost or stolen device or misdirected email. Law enforcement or clients may contact the firm directly. A story may run in the press. Each firm should therefore ensure it has a method by which all employees can report incidents, such as a dedicated and routinely monitored email account or help-desk phone number, and by which all such reports are followed up. Being alert to all potential breach indicators will limit the time an intruder can spend wreaking havoc on the firm’s systems.

5. **Contractors.** Law firms are increasingly making use of third-party vendors, such as cloud service providers. They must make certain that those third parties adequately protect data they obtain or have access to. If a third-party contractor is hacked and the law firm’s systems are connected by which all such reports are followed up. Being alert to all potential breach indicators will limit the time an intruder can spend wreaking havoc on the firm’s systems.

6. **Incident response.** Sometimes breaches are discovered by a separate ransomware attack. The infection spread to its offices around the globe, forcing employees to shut down their computers and refrain from sending digital communications. In online parlance, DLA was “pwned.” If personal and confidential data are the currency in today’s electronic world, then law firms are sitting on a gold mine.

As DLA’s experience indicates, even large firms with digital security staff and robust resources can fall prey to hackers. With any number of financial institutions, multinational corporations, health care companies and credit agencies as clients, large firms have a duty to safeguard their confidential information that, in the wrong hands, could be devastating to not only their clients but also their own reputations.

“IT’s an issue about the data, fundamentally,” says Jake Olcott, a vice president at BitSight Technologies, a cybersecurity rating company. More organizations that have this sensitive data internally are doing better to protect themselves, and so the bad guys who are interested in this data are having to turn to what they perceive are the weakest links in the supply chain. That’s why law firms are such targets.” Indeed, in the last five years, several
large firms have been targets for cybercriminals of all shapes and sizes:

In 2014 and 2015, authorities say, hackers involved in a massive insider-trading scheme breached several major Am Law firms, including Cravath, Swaine & Moore and Weil, Gotshal & Manges.

In 2012, Washington, D.C.-based Wiley Rein was doing work relating to solar panel design when it was hacked by actors believed to be connected to the Chinese government.

Perhaps most famous is what’s known as the Panama Papers. The German newspaper Süddeutsche Zeitung and the International Consortium of Investigative Journalists analyzed 11.5 million documents (2.6 terabytes of data) from Panama-based law firm Mossack Fonseca. The data, some of which was released in 2016, included confidential information of several prominent individuals, including current and former heads of state or government leaders from Argentina, Iceland, Saudi Arabia, Ukraine and the United Arab Emirates. The firm maintained that it had been hacked and denied that it was an inside job or their own fault for not updating software.

More recently, offshore law firm Appleby claimed that a cybercriminal had stolen 13.4 million documents, collectively known as the Paradise Papers, and turned them over to journalists.

Some of the firm’s named clients include Apple, Facebook, Twitter and U.S. Secretary of Commerce Wilbur Ross. According to Olcott, BitSight’s research indicates that the legal sector, “on average,” is “high performing” when it comes to cybersecurity.

As such, any improvement in performance could help deter cyberthieves. Kim Phan, of counsel at Ballard Spahr in Washington, D.C., points out that several years ago hackers aggressively targeted marketing firms. Once firms realized they were the target du jour for hackers, they invested in their digital security, and the hackers looked for another target. “I think we’re going to see some law firm breaches for a while,” she says, but the inundation of law firm hacks is “a fad right now.” Once the message is clear that law firms are serious about security, Phan believes, “then the hackers will move on.”

—Jason Tashea and Victor Li
firm's data disclosed, the law firm may well be held responsible. Firms should know the details of their vendor contracts, especially which party has responsibility for which aspects of security.

6. Incident response plan. But the strongest and most effective risk management cannot prevent all cyberattacks. Former FBI Director Robert Mueller made famous the aphorism that “there are only two types of companies: those that have been hacked and those that will be.” This, obviously, applies equally to law firms. Incident response plans are the cornerstone of any organization’s preparedness and response related to cyberthreats. They serve a variety of functions, including enhancing communication within the firm, identifying and eliminating the source of the incident, minimizing the damage where possible, and restoring normal operations as quickly as possible.

An IRP sets out the concrete steps a firm should take in responding to an incident, from assembling an incident response team and investigating a potential breach to informing firm management and assessing notification obligations. It should contain a list of key contacts and contact information, as well as checklists (to ensure no step is left out in the midst of a breach) and sample notice letters (to facilitate compliance with data-breach notification laws, many of which require notice to relevant individuals and state regulators mere days after a breach is discovered). The plan should be printed in hard copy, in the event a breach takes down the firm’s electronic systems, and it should be updated regularly based on the current threat environment (typically at least once per year).

7. Practice, practice, practice. Creating an IRP forces a firm to consider ahead of time the multitude of issues it will face during a breach. Because the plan is written before it is needed, it fosters better decisions and clearer communication than might occur during a crisis. It also enables the firm to practice its response. Best practices include conducting tabletop exercises based on the IRP to establish clear working relationships and decision-making paths, such as who will make the crucial decisions, who must be consulted, and who in the firm will handle crisis communications. Tabletops thus serve as training vehicles and allow the core members of the response team to practice working together.

Creating and practicing an IRP will do more than help protect a law firm from the loss of data or access to systems resulting from a data breach. It will also demonstrate to regulators and to the triers of fact, in the event of lawsuits, that the firm’s preparation before the incident was reasonable. Failure to have an IRP puts both a firm and its clients at risk.

8. Relationships with law enforcement. Finally, as part of their preparation for a cyberattack incident, law firms should invest in building relationships with law enforcement beforehand. These relationships can help a firm to obtain the most up-to-date threat information, keeping it current and in a position to maintain the strongest defenses possible. Moreover, knowing exactly who in the government to call, and having a trusted relationship with that individual, is important to ensuring a fast and well-coordinated response. Law firms, like companies, are often reluctant to involve the government in a breach; while law enforcement and regulators encourage entities to voluntarily report incidents, they are also eager to make examples of entities that, in their view, were not adequately prepared for an incident or did not adequately respond to one. Law firms face the unique issue of balancing the desire to inform clients and law enforcement of a breach with the obligations of the attorney-client privilege. The benefits of reporting an incident generally outweigh the potential harm, but the report should ideally be made to a trusted individual within the government. Firms should identify, in advance, who in law enforcement and regulatory agencies they will contact and what they will tell them, as advance planning and outreach may enhance the response and service they receive.

Cybersecurity is a process, not an event. A plan that is reasonable in 2018 may not be reasonable in 2020. Law firms must recognize, and keep abreast of, the threats they face, as well as their duty to protect their clients and themselves. A plan built on preparedness, risk management and resiliency will enable them to do just that. With current technology, there is no way to reduce the risk of a breach to zero, but with the proper plan and proper training, law firms can recover from an incident and get back to the business of serving clients.

John P. Carlin is a partner at Morrison & Foerster. Robert S. Litt, of counsel at Morrison & Foerster, is a former general counsel for the director of national intelligence. Hayley R. Curry and R. Taj Moore are associates at the firm.
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ACTION for ACCESS
Much like the contemporaneous civil rights and anti-war movements, the disability rights movement had its roots in on-campus activism during the 1960s.

By Stephanie Francis Ward

Because she had contracted polio as a toddler, Judith Heumann couldn’t attend her neighborhood school in Brooklyn. The principal thought her wheelchair would be a fire hazard.

That experience figured in with discussions she had at Camp Jened, a two-month summer program in Hunter, New York, for kids who have developmental disabilities. “It was discussed as young people that we wanted to have more. We’d talk about what we saw as the struggles of the day and how we wanted to help change that,” says Heumann, mentioning examples such as transportation, housing and education.

She organized similar discussions at a school she attended that was specifically for children who had disabilities. In 1970, she formed Disabled in Action, the first cross-disability organization. Inspiration came when she was denied a teaching certificate on the basis that she couldn’t walk. Heumann, a 1969 Long Island University graduate, sued the New York City Board of Education. Shortly afterward, the entity reversed its position.

She was likely the first teacher to use a wheelchair in New York City, and her story got national attention.

Throughout many years, disability rights activism has flourished through programs that advocate independence and provide young people opportunities to discuss with peers how laws could improve their lives. Some participants, including Heumann, went on to be leaders in the independent living movement, and their activism led to federal laws that prohibit disability discrimination in the public and private sectors.

TOUGHING IT OUT

President Franklin D. Roosevelt started one of the earliest programs in Warm Springs, Georgia, at a rehabilitation facility with mineral springs. Diagnosed with polio at age 39, Roosevelt started visiting the town’s Meriwether Inn in the 1920s after he heard that its water could help with his below-the-waist paralysis. Roosevelt bought the property in 1926; replaced the inn with accessible buildings; and created the Warm Springs Foundation, a nonprofit group that provides comprehensive rehabilitation services.

“African-Americans were not welcome, but for white
people who were middle class and had the good fortune to go there, this was a place where they could go and meet with the president; he was kind of a mentor,” says Catherine Kudlick, a history professor at San Francisco State University who also directs the Paul K. Longmore Institute on Disability.

During that era, people with disabilities were expected to tough them out, and they were frequently celebrated for doing so, Kudlick says.

This was especially true for polio survivors, and Roosevelt played a role in that outlook. The mindset also led to placing children who had polio at live-in facilities because doctors thought their families would coddle them too much at home. “In the polio rehabilitation hospitals, they bonded with each other and said: ‘This sucks; we’re going to push for rights later on,’ ” Kudlick says.

CAMPUS ACTIVISM

Around the time Heumann formed Disabled in Action, Ed Roberts recruited her and other disability activists across the country to come to the University of California at Berkeley. Roberts was a doctoral candidate in political science who had contracted polio and was paralyzed from the neck down.

Roberts was the former head of the California Department of Rehabilitation; and along with Heumann and Joan Leon, they co-founded the World Institute on Disability. Roberts, who died in 1995, was the first severely disabled student to attend Berkeley, according to his New York Times obituary, and no dorm could accommodate the 800-pound ventilator he used to sleep. Roberts lived in an empty wing of the university’s student health center, with the condition that it be treated like a dorm, not a medical facility. Many other students with disabilities moved in, too, and they called themselves the Rolling Quads.

Inspired by what the university’s free speech movement did for the civil rights and anti-Vietnam War movements, disability activists at Berkeley focused on independent living. Their platform included people with severe disabilities having attendant services rather than living in group facilities. And each individual—not the aide—decided for themselves what to eat, what to wear and when to go to bed.

“It was just a very exciting period of time. I compare it with being at a candy store, where you have all these different things that you could work on,” says Heumann, who got a master’s degree in public health in 1975 from Berkeley. She has since worked as the special adviser...
In her oral history for the University of Illinois, Kitty Cone, a student activist who had muscular dystrophy and attended the college in the 1960s, described Nugent as “an amazing person, in terms of his vision and his implementation of his vision, and for the time he was living in.”

However, Cone—who was a cheerleader, a student senator and an active member of the university’s NAACP chapter—said the college’s rehabilitation program sometimes wasn’t supportive of her activism or her desire to move out of the dorms, where women had more restrictions than men. She also had the impression that Nugent wanted students in the program to be “solid citizen types” and said he always challenged her activism.

Cone wanted to move to an apartment off campus because she thought she was getting weaker and wanted the chance to live by herself before it was too late. When she broached the subject with Nugent, she claimed, he suggested her activist activities might be making her tired and questioned her motive to move. “He said, ‘Well, are you sure you don’t want to just play house?’ ” Cone said.

“In those days, that meant something—[to] sleep with somebody. ... It was awfully invasive,” Cone said in her oral history. Cone, who became a disability activist, left college in 1967 and got a job with the National Mobilization Committee to End the War in Vietnam. She died in 2015.

Fred Fay, an activist who started the online disability forum Justice for All, graduated from the university in 1972 with a doctorate in educational and rehabilitation psychology. According to his University of Illinois oral history, Fay, who died in 2011, was paralyzed from the neck down at age 16 after a backyard accident in which he broke his neck. He enrolled at the college after he learned about its accessibility program while attending the Warm Springs Foundation’s rehabilitation program in Georgia in the early 1960s.

Smashing curbs with sledgehammers was before Fay’s time. However, working with other students, he created a map with the “most notorious curbs” on campus, he said in his oral history. The map was presented to a local business group, which replaced the curbs with curb cuts, and Fay saw that as the beginnings of his activism.

**FEDERAL INACTION**

After college, Fay was a founder of the Boston Center for Independent Living, and he was a research and training instructor at Tufts University, where his work focused on independent living. He also was active in making public buildings more accessible, which led to the Architectural Barriers Act of 1968. Like Cone and Heumann, he advocated for Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against disabled people in programs that receive federal financial assistance.

That legislation was first introduced in 1972. But President Richard Nixon used a pocket veto to kill the act in October of that year, claiming its authorization of federal funds would waste taxpayer dollars. Disability activists organized protests across the country, including one in New York City at the building that housed Nixon’s campaign headquarters.
“We shut down traffic on Madison Avenue and then took over Nixon’s campaign headquarters four days before the election,” says Heumann, who at the time was working on her master’s degree at Berkeley.

The bill was reintroduced, and Nixon signed it in September 1973. However, his administration and President Gerald Ford’s did not implement the 504 regulation. Opposition to it was growing from entities covered by the law—including hospitals, universities and municipalities.

More disappointment came when President Jimmy Carter took office in 1977. “Carter had been a disability rights advocate, but he gets into office and starts stalling, too,” says Kudlick of San Francisco State University.

The Carter administration’s Department of Health, Education and Welfare set up a task force to study the disability community, and it appeared that the regulation was weakening—particularly its integration pieces that provided mainstream opportunities in programs and education for people who have disabilities. The main reviewer of the task force was David Tatel, a former director of the department’s Office for Civil Rights, who lost his sight after law school because of retinitis pigmentosa. He now is a judge serving with the U.S. Court of Appeals for the District of Columbia Circuit.

Activists demanded that the 504 regulation remain unchanged and be implemented by April 4, 1977. But that didn’t happen. On April 5, they organized sit-ins at 10 major cities, targeting buildings that housed regional Department of Health, Education and Welfare offices. That included Washington, D.C., where a hunger strike took place, and San Francisco, where a federal building sit-in with more than 100 people lasted until the end of April. It ended shortly after Joseph Califano, secretary of the department, signed the 504 regulation.

“We have begun to ensure a future for ourselves and a future for the millions of young people with disabilities, who I think will find a new world as they begin to grow up. Who may not have to suffer the kinds of discrimination that we have suffered in our own lives. But that if they do suffer it, they’ll be strong and they’ll fight back,” said Roberts of the World Institute on Disability at an April 30 victory rally. “And that’s the greatest example: That we—who are considered the weakest, the most helpless people
in our society—are the strongest and will not tolerate segregation, will not tolerate a society which sees us as less than whole people. But that we will together, with our friends, will reshape the image that this society has of us.”

The demonstrations marked the first time that the disability rights movement received international attention, Heumann says.

“At the time, coverage of disability in the New York Times was on the socialite page, about who gave the most money. And there was the Jerry Lewis Telethon, talking about hopeless cripples,” says Heumann, who led the San Francisco protest alongside Cone, who organized it.

At the time, both women worked at the Center for Independent Living in Berkeley, the first organization of its kind. The center was incorporated in 1972 and grew from student activists’ work at the Berkeley school, as well as a need for support services once they graduated. It was staffed by people who have disabilities and provided services that included referrals for housing or personal aids, peer counseling, and advice on how to advocate for oneself. It also was a template for the hundreds of centers for independent living that exist today—centers funded by a mix of federal, state and local money, as well as private donations, according to Access Living, an advocacy group in Chicago.

CHANGING THE LAW

The Center for Independent Living also established the Disability Rights Education and Defense Fund, which played an active role in litigation that arose from Section 504 regulation.

The first 504 case heard by the U.S. Supreme Court was Southeastern Community College v. Davis. It was brought by Frances Davis, a licensed practical nurse who was hard of hearing; she had been denied entrance to a registered nursing program. The court found in 1979 that denying her admission to the program was not a 504 violation, on the basis that she was not qualified for the program. The finding was unanimous.

The case was argued by Marc Charmatz, an attorney with the National Association of the Deaf. He started working on the case at the appellate level and today points out that Davis did not testify at the trial court level, which was not helpful for her appeal.

“We knew from reading that case that the Supreme Court justices weren’t getting it,” says Arlene Mayerson, who has worked as directing...
attorney of DREDF since the early 1980s. “They said that perhaps in the future, there will be better technology so disabled people could have more roles. We wanted to explain to the court that people with disabilities are very capable, and it was society that got in their way.”

Five years after Davis, disability rights advocates had another shot before the Supreme Court. This time, in Consolidated Rail Corp. v. Darrone, it went much better for them. The Disability Rights Education and Defense Fund filed an amicus brief that supported the petitioner. It focused on educating the court about discriminatory employment practices and the validity of the Section 504 regulations. In the 1984 opinion, a unanimous court found that Section 504’s ban on employment discrimination should not be limited to programs that receive federal aid.

Also during the 1980s, disability activists worked to amend the Fair Housing Act’s enforcement mechanisms, and they were involved with the Civil Rights Restoration Act—a law that requires federal fund recipients to comply with nondiscrimination laws. President Ronald Reagan vetoed the legislation in 1988. However, the House and Senate later overrode his veto.

Rep. Tony Coelho, who voted to override Reagan’s veto, had been focused on amending different bills that included disability language.

“But I realized that it really didn’t do much good to do the amendments without our basic civil rights,” says Coelho, a Democrat from Merced, California, who has epilepsy.

In 1988, he introduced the first version of the Americans with Disabilities Act.

Coelho was friends with Roxanne Vierra, a member of the National Council on Disability who contacted him about a draft bill. When he introduced it, Coelho sent a “Dear Colleague” letter to the members, asking for co-sponsors.

“As a result, I got Democrats and Republicans. I knew if I didn’t get that, it would never pass,” says Coelho, who co-sponsored the bill with Sen. Lowell Weicker Jr., a Republican from Connecticut.

Opposition came from the business lobby—including industries such as real estate, medical care and transportation—which argued that the legislation would be too expensive. Among those who weighed in was actor Clint Eastwood—then the mayor of Carmel, California.

“I think he had a restaurant, and he talked about how the ADA would kill his business,” Coelho says. “We advocated that accommodations would not kill a business and put in language that compliance had to be economically feasible. That became a key term.”

Fay, the University of Illinois graduate, worked in support of the ADA legislation with Justin Dart Jr., a wealthy Republican who used a wheelchair after contracting polio as a child and was vice-chair of the National Council on Disability. By that time, Fay used a motorized bed for his mobility device, after an inoperable cyst on his spinal cord prevented him from breathing if he sat up, according to his oral history. The device was equipped with a work station, and Fay could access his phone and computer from the bed.

A House vote on the ADA legislation was repeatedly delayed. Jim Wright, a Democrat from Texas who was the speaker of the House from 1987 to 1989, had it referred multiple times to committees, Coelho says, and twice to a subcommittee.

In March 1990, more than 60 people with disabilities went to the U.S. Capitol, where many abandoned their
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mobility devices and crawled up the building’s 83 steps.

The next day, more than 100 protesters who chained their wheelchairs together were arrested at the Capitol Rotunda. Protests are prohibited at the structure, according to a Times article about the incident, and police used large chain cutters and acetylene torches to break up the chains. The Senate passed the bill, and President George H.W. Bush signed the legislation into law that July.

“I think we would have had the votes to pass it without the protest, but it still was very effective. Senators had to walk around or through the wheelchairs and over bodies of the disabled,” says Coelho, who resigned from Congress in 1989.

‘THE ADA GENERATION’

After the ADA became law, a big change was that expectations grew for children who have disabilities, says Robyn Powell, a disability rights attorney who also teaches at the Boston University School of Law and is a doctoral candidate and researcher at Brandeis University.

“I’m part of what is considered the ADA generation; I was 8 years old when it passed. I was expected to go to school and get a job. People who grew up prior to the ADA had less expectations,” says Powell, a member of the American Bar Association Commission on Disability Rights. She has arthrogryposis, which causes restricted movement in her joints.

Despite the post-ADA expectations, she says, disabled people are still perceived as dependent on others. Powell rarely meets lawyers who have visible disabilities outside the disability rights field. She thinks law firms often won’t hire lawyers who have visible disabilities because there’s a stereotype that they won’t be able to keep up with work demands. (See “Making Success Accessible,” page 64.)

“In general, most people who are not familiar with disabilities have low expectations of all people with disabilities,” adds Howard A. Rosenblum, CEO of the National Association of the Deaf.

“With respect to deaf lawyers, we are often perceived as unable to function as effective speakers with the necessary eloquence to work successfully and persuasively. Many of us have shown such stereotypes to be completely wrong, but not enough lawyers in for-profit firms have had enough opportunity to interact with lawyers with disabilities to understand our ability to practice law effectively,” says Rosenblum, who had finished his first year at the Chicago-Kent College of Law when the ADA became law.

Jason Turkish, a Southfield, Michigan, attorney who is legally blind and has an eye muscle condition, was 3 years old when the ADA passed. He attended a mainstream school. By the time he was in second grade, he knew he had to advocate for himself.

“I was my own first client, and I don’t think that is unique. You learn at a young age to speak up or you get left behind. You also learn at a really young age to find teachers who care because there are a lot of them,” says Turkish, whose clients include Angelo Binno, a legally blind man who alleges that the Law School Admission Test is discriminatory under the ADA because it requires spatial reasoning and the ability to diagram.

The Supreme Court in March 2017 denied cert in Binno’s lawsuit against the ABA, after the 6th U.S. Circuit Court of Appeals at Cincinnati found that because the LSAT is written, administered and scored by the Law School Admission Council—which is not part of the ABA—Binno had no standing to sue the association. Last May, Turkish filed a similar lawsuit against the LSAC, which is pending.

“This is such a young civil rights movement,” Turkish says. “It’s the relative youth of this movement, from a legal perspective, that creates a really special obligation for attorneys who practice disability rights law. Most of the disability rights law from a precedential standpoint is still being parsed out in the federal courts, and there are endless areas of issues of first impression to be litigated, because this is such a new movement.”

Howard Rosenblum
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LAUREN STILLER RIKLEEN heard plenty of millennial bashing during her years as a partner at a Boston-area law firm—but she never bought it. "The stereotypes don’t match up with my experience as a lawyer and as a mother of two millennials," she says. "I’ve never understood the constant negative refrain."

Rikleen was so baffled by the disconnect, in fact, that she launched a second career geared toward helping different generations effectively work together. In her book *You Raised Us, Now Work with Us*, Rikleen (a member of the ABA Journal Board of Editors) investigates and unravels common myths about 20- and 30-somethings and offers practical advice on how to bridge generation gaps. The reality, she found—and one that’s backed up by countless examples of young lawyers who are tackling a variety of problems in the profession—is that millennials are neither entitled nor lazy.

As younger attorneys flood the workforce and begin replacing the retiring baby boomer ranks, even the most conservative law firms are realizing that younger attorneys won’t accept the rigid hierarchies and old-fashioned processes that defined their own careers. At the same time, millennials also won’t receive the same mind-boggling hourly rates that clients formerly paid without batting an eye. With all these changes, experts say firms may need to invest time and resources in helping a multigenerational workforce interact effectively.

As Rikleen dug into her research, she began to understand that work-life balance matters previously had been considered “women’s issues” and were now being redefined as generational concerns. “Young lawyers—men and women alike—are thinking of work-life integration and how to live a whole life,” she says. That’s a good thing—but a host of miscommunication and mislabeling have created intergenerational tension. Worse yet, these misunderstandings threaten to calcify into fixed beliefs that can prevent a younger generation from developing to its full potential. Bridging the generational divide, then, is critical to creating a functional work environment, and separating generational myths from reality is the first step.
MYTH NO. 1: THEY HAVE A SENSE OF ENTITLEMENT

The biggest myth, Rikleen says, is the idea that millennials feel entitled. “What we’re seeing is the manifestation of a generation that was raised with an enormous degree of self-confidence,” she says. “My parents did not have the resources that we did as parents of millennials. We were constantly told how important it was to raise emotionally secure, healthy children.” This child-centric upbringing combined with youthful enthusiasm results in a confident, achievement-oriented attitude common among new workers.

The downside? Older people who were not raised in the same way can find that confidence jarring. “Millennials have a comfort with speaking up that other generations mislabel as entitlement,” Rikleen says. Rather than rolling their eyes at so-called entitled behavior, employers should welcome the self-esteem they see in their young employees. A willingness to speak up can yield wonderful results that would never come from quietly accepting the status quo.

Take, for example, the three women who founded the Knight, Morris & Reddick Law Group in Chicago. While doing contract work for a firm in 2012, Yondi Morris-Andrews was horrified when she heard a partner flippantly refer to his associates as “slaves.” “I knew I couldn’t work in a culture like that,” she remembers. Rather than keep her head down and swallow her indignation, Morris-Andrews went home, tweeted that she needed to start her own firm—and was quickly retweeted by her friend Keli Knight. Soon after, she met with Knight and Jessica Reddick at a Starbucks. Though Reddick and Knight didn’t know each other, “it immediately felt natural, like we’d been planning this for a really long time,” Morris-Andrews says. The three young lawyers talked for more than an hour, about everything from flip comments that were insulting to real concerns that being part of their generational cohort might be a barrier to career growth and success.

Knight had her own reasons for getting involved. After taking over a role from an older male attorney—and being told she was doing a better job—Knight learned she was making substantially less than he had. She left that firm and joined a small real estate law firm, where she was on the partner track. As the recession hit, however, the firm’s fortunes changed: “It made me realize that I had to venture out on my own,” she says.

Today, the three represent clients who include NBA star Derrick Rose. They also run a boutique legal staffing agency and have expanded to Los Angeles. Many of their clients are fellow millennials and entrepreneurs who respond well to the firm’s active Instagram presence that provides glimpses into their interests outside the office. “We’re very serious about being true to ourselves and being different from a typical firm,” says Morris-Andrews.

Indeed, millennials seem to have abandoned the old pursuit of work-life balance in favor of work-life integration. In today’s always-on, technology-saturated work environment, juggling boundaries has given way to posting Instagram pics of leisure pursuits alongside tweeting about interesting legal wins.

MYTH NO. 2: THEY’RE SLACKERS

Knight’s eagerness to strike out on her own is hardly an anomaly for this generation. Perhaps more than any other trait, a willingness to leap into entrepreneurialism separates 20- and 30-something lawyers from their Gen-X and

“IN ADDITION TO LEARNING HOW TO BE A LAWYER, I GAINED AN UNDERSTANDING OF THE CONCERNS LAWYERS FACE WHEN THEY’RE EVALUATING TECHNOLOGY AND ADAPTING TO IT.”

— Nehal Madhani

PHOTOGRAPHS COURTESY OF ALT LEGAL AND KNIGHT, MORRIS & REDDICK LAW GROUP
"WE’RE VERY SERIOUS ABOUT BEING TRUE TO OURSELVES AND BEING DIFFERENT FROM A TYPICAL FIRM."

—Yondi Morris-Andrews
boomer counterparts.

A first-generation immigrant, Nehal Madhani graduated from the University of Pennsylvania Law School and landed a job working in Kirkland & Ellis’ bankruptcy practice. But four years in, he left that safe, rarefied world to launch his own company. It wasn’t easy. Madhani’s first startup, a marketplace that connected companies with legal help, sputtered out after a few months. “Small businesses have a high failure rate and are stingy on the legal fees—so not the best customers,” he says.

Undaunted, Madhani decided to start over, drawing on a kernel of insight gained from his own experience as an entrepreneur. He had handled his own intellectual property filings for the first business and quickly became frustrated by the laborious process. So Madhani decided to automate IP deadlines by connecting to databases that would automatically download the latest filings and by creating algorithms to review data and identify deadlines. Today, his company, Alt Legal, has hundreds of customers, ranging from small firms to Am Law 100 members, and manages hundreds of thousands of filings. It’s clearly filling a huge need. “One of our clients has 20,000 IP filings,” Madhani points out. “You just cannot track that manually.”

Alt Legal is looking to expand internationally and wants to start analyzing its IP data to offer customers insights about, for example, who might be infringing on their IP or how to...
file paperwork to increase your likelihood of patent success. The training he received as a corporate lawyer, he says, was critical to Alt Legal’s growth. “My experience at Kirkland was amazing,” he says. “In addition to learning how to be a lawyer, I gained an understanding of the concerns lawyers face when they’re evaluating technology and adapting to it. That’s been invaluable.”

There are countless other examples of millennial-helmed legal startups trying to fix the industry’s pain points. “Millennials have more entrepreneurial opportunities than any other generation, combined with a sense of confidence that makes the challenge more inviting and a greater comfort with risk that comes with being young,” Rikleen says.

Millennials’ boldness about striking out might also stem from their exposure to the criticism and frank feedback that comes with living on social media, notes Avery Blank, a Yardley, Pennsylvania-based generational strategist and consultant who has a JD. “We have that thicker skin because social media really gives you the opportunity to feel the real-world effects of how people react to us and what we’re thinking.” In this regard, millennials are hardly the fragile snowflakes of longtime portrayals. “We’ve toughened up, and I think that’s allowed us to be a little more willing to take risks.”

Ryan Alshak of San Francisco is an example of millennials’ ability to identify opportunities and pivot. The graduate of the University of Southern California School of Law is attempting to solve the long-standing bane of lawyers’ existence: time entry. It earned him a position as a 2017 ABA Journal Legal Rebel.

Alshak’s timekeeping software, Ping, not only automates the entry process but also aims to record data so that lawyers can better understand how they spend their time and create more accurate budgets.

Alshak didn’t always intend to become an entrepreneur. In fact, he was dead set on being the general counsel for the Los Angeles Clippers—so much so that he joined Manatt, Phelps & Phillips, the LA firm that counted the NBA team as a client. But all those dreams went up in smoke shortly after Alshak began working, when recordings of racist statements made by Clippers owner Donald Sterling were publicized in 2014. His firm...
dropped the Clippers, and Alshak’s life plan was thrown for a loop. After spending 18 months working on cases that took him to Israel, London and Switzerland, “I was having a fantastic time, but I couldn’t shake this feeling that I was just working on my partner’s case, my partner’s client,” he says. “I knew I could build something similar, but I didn’t want to wait that long. I wanted to create something now.”

His idea for a startup was born of personal experience during his three years as a corporate litigator. “I was the worst timekeeper in America,” Alshak says, laughing, remembering how he would inevitably wait until the end of the week to enter his hours. “I knew I was leaving a lot of time on the table.” Alshak decided to leave his job in May 2016 to build Ping full time. This past spring, the company was named one of the first participants in a new Silicon Valley legal tech accelerator program sponsored by LexisNexis.

It’s in the process of beginning several pilot partnerships with big law firms. Alshak, who estimates that lawyers are 20 percent off in their billing estimates, and that managing partners will slice off another 10 to 20 percent when reviewing a client’s bill, says that the days of being able to get away with being that imprecise are waning. “As the legal profession moves toward flat fees, clients are going to demand more transparency and more accuracy,” he says. Alshak says that eventually Ping will be able to use machine learning to determine how attorneys actually spend their time and make better estimates for clients.

Like Madhani, Alshak says his time in BigLaw was critical in helping him grow Ping. “I sell from a firsthand perspective of understanding what their pain is. That changes the game.” He also points to a new urgency among law firms when it comes to adapting to technology. “Law firms now understand that they have to move toward data-driven decisions to survive in this new economy,” he says. “That’s changed even in the past year.”

**MYTH NO. 3: THEY ARE DISLOYAL AND JOB HUNTERS**

Beyond solving long-standing problems through technology, millennials are also deeply committed to finding work that aligns with their values. Rikleen points to a 2012 study conducted at Rutgers University in which nearly 60 percent of young adults said they’d give up 15 percent of their salary to work for an organization whose values they share. Across the country, many young lawyers are rearranging their careers to accommodate more pro bono work.

This millennial tendency to pursue work that aligns with their values dovetails with another persistent
they were less than two years out of school, she and Stilwell decided to launch their own Washington, D.C., firm, helping noncitizens tackle legal issues related to the immigration ban. Trump's election and immigration policies were wake-up calls, Slatton says. And though they've confronted plenty of skepticism about how two 20-something lawyers can handle such thorny, politically charged cases, the pair say their passion—combined with social media savviness—has made up for inexperience. "We care so much, and we're totally dedicated to figuring out how to help out clients," Stilwell says.

Jessica Kornberg felt a similar call to action. After graduating from the UCLA School of Law, the San Francisco Bay Area native worked at Bird Marella, a Los Angeles boutique litigation firm. In 2014, she was appointed the first female CEO of Bet Tzedek, a 60-employee nonprofit that has provided free legal service to people in Los Angeles for more than four decades. Under Kornberg's leadership, the agency has created the county's first transgender medical-legal partnership, a small-business startup clinic and a program to respond to growing concerns around the deportation of undocumented immigrants. Although she studied ballet seriously as a child and worked for a New York City nonprofit that provided after-school programming following graduation from Columbia University, Kornberg has known that she wanted to be an attorney since fifth grade, when she learned that Thomas Jefferson was a lawyer. At Bet Tzedek, Kornberg oversees $15 million worth of annual legal services to low-income, disabled and elderly people in an increasingly challenging environment. While she acknowledges rising anxiety about new threats and deportation surges that affect...
her clients, “I’m constantly inspired by the energy with which my staff is responding to it,” she says. “We’re on track to serve four times as many people this year as last, and that is a direct result of the terror being created in our immigrant community. It is both maddening and motivating.”

Kornberg gives credit to mentors who helped her immensely in her early days as Bet Tzedek’s youngest chief. “There’s no way to talk about my career without focusing on key relationships,” she says. “People like to complain that millennials don’t stick around in one spot long enough. I’m trying to reshape that idea, because I think it’s amazing that we hop around like fleas. It means that so many different entities can be connected through colleagues.”

**MYTH NO. 4: THEY’RE TOO DIFFERENT FROM PREVIOUS GENERATIONS**

Nicole Abboud also owes her career to the relationships she forged early in her law practice. After graduating from Southwestern Law School, she tried her hand at several different kinds of law, from family to intellectual property. But after planning to be a lawyer her entire life, “when I started practicing, I realized I didn’t love it,” she remembers. In an effort to define her future and break out from the disillusionment and isolation that came with professional dissatisfaction, Abboud began asking other young lawyers about their own stories. She eventually created the *Gen Why Lawyer* podcast, which focuses on millennial attorneys who either redefined their law career in a way that increased their satisfaction or left law altogether.

“I had no experience whatsoever—I looked up free YouTube videos about what podcasting equipment to buy and how to record and upload to iTunes,” says Abboud of Culver City, California. Her initiative paid off, and *Gen Why*’s success led her to leave her law job to launch a video and podcasting business, Abboud Media, to help lawyers develop their personal brands.

“To be honest, I struggled a lot with an identity crisis when I left the law,” Abboud says. “The fact that I’m so vocal about my journey gives other people permission to speak up too. The whole point of my podcast was to make it inspirational and show lawyers that you don’t have to feel stuck. I feel lucky every day to reach people.”

Many of these young attorneys are also redefining how and when they work.

“We take meetings all over the city, we meet at each other’s houses, and we meet over brunch,” says Morris-Andrews of Chicago. “We’re not chained to the office”—even though they have an impressive one in the Willis (formerly Sears) Tower, and they work around the clock.

Rikleen believes this flexibility is a positive that leads to more sustained and focused work, not less. Older lawyers, she says, need to come around to the new way of working.

“I hear a lot of grumbling from my contemporaries. The quote would be: ‘Oh, the younger generation won’t put in the hours that we put in; they want...”

**“THE WHOLE POINT OF MY PODCAST WAS TO MAKE IT INSPIRATIONAL AND SHOW LAWYERS THAT YOU DON’T HAVE TO FEEL STUCK. I FEEL LUCKY EVERY DAY TO REACH PEOPLE.”** —Nicole Abboud
to go away on the weekends," she says. "I don't think that's true. Yes, there is a desire to lead a whole life, but that doesn't translate into a lack of commitment. It's just in a technologically driven world, millennials understand there are a lot of ways they can accomplish what needs to be done."

In the end, millennials' confidence, tech savvy and willingness to establish new work patterns will play an important role in establishing the future of law. As boomers retire in large numbers, there won't be enough Generation Xers to take their place.

As a result, Rikleen says, millennials' increasing role offers an "unprecedented chance to reconsider how and where we work."

This is crucial as millennial strengths are increasingly becoming client preferences, Blank says. "So it behooves an organization—a law firm—to think about what millennials do, what drives them and what their preferences are. Because the reality is that that's what more and more of their clients want."

Kate Rockwood is a freelance writer living in Chicago. She was born at the tail end of the Gen X generation.
Advocating for at-risk children is this member’s mission

By Jill Werner

Richard Hooks Wayman has always had a lot of faith in the legal profession. Although there were no lawyers in his family, he was certain from the time he was a boy that he wanted to become an attorney. “I knew it was a profession that could help people resolve conflict and mitigate harm,” he says.

After graduating from the University of Iowa College of Law in 1992, Hooks Wayman began his career by tackling child poverty and youth homelessness for the Legal Aid Society of Minneapolis. In his early days on the job, a seasoned colleague invited him out for a walk. “We walked for three hours, and I saw homeless youth sleeping on the streets,” he recalls. “They had been jettisoned from abusive and neglectful families.”

Seeing teens exposed to sexual exploitation, gang activity and drugs shocked Hooks Wayman. It was a far cry from his upbringing in rural Iowa.

His agency’s resources to assist homeless teens were equally shocking. “The best we could do for them was buy mosquito netting or a sleeping bag and point them to the safest park to sleep in,” he says.

MEETING THE NEED

Resources may have been inadequate, but passion in the youth services community was strong, as was Hooks Wayman’s commitment to the cause. After eight years as a litigator, he moved to nonprofit management, where he felt he could...
make a difference for young people on a broader scale. He has worked for organizations dedicated to ending youth homelessness in Minnesota, Massachusetts and Washington, D.C. Also, Hooks Wayman wrote the Minnesota Runaway and Homeless Youth Act and lobbied with others for five years to get the policy enacted.

He is now the national executive director of the Children’s Defense Fund, a privately financed nonprofit that promotes medical care, education, housing, nutrition and safety for children—particularly the 13 million who live in poverty.

“There’s no reason we have child poverty, except that we have a mal-adjustment in income and wealth and a lack of political will to change that,” he says.

When the Minnesota statute he wrote finally passed in 2006, it encompassed a spectrum of social services, including education, health and housing. Hooks Wayman says thousands of young people are now receiving services under the program.

“The answer is not charity,” he says. “The answer is community planning.”

He is confident that everyone agrees the basic needs of children must be met. The sticking point is how to achieve it. “I believe in my heart that child advocacy is a nonpartisan issue,” he says. “We need to focus on moving forward because that will get us through the political wrangling.”

A collective voice has the biggest impact, Hooks Wayman says, adding that the American Bar Association’s voice on Capitol Hill is greatly respected. In 2011, he joined the ABA and became involved with its Commission on Homelessness and Poverty.

“I was very impressed with the commitment of the ABA to address the inequalities of society and to effect positive change,” he says.

HOME SAFE

Hooks Wayman’s efforts to help at-risk children extend from his work life to his home life. He applied to become a foster parent early in his career and was raising two teenage daughters plus two dogs when he met the man who is now his husband, Aaron Hooks Wayman.

When their foster daughters grew up and left home, the Hooks Waymans became foster parents of 2-year-old twins. They adopted the twins after the birth parents’ rights were severed.

The Hooks Waymans continued to serve as foster parents, offering a home to a 13-month-old girl and her 13-week-old brother, both of whom they later adopted.

During the process, they learned there were two older siblings: 4-year-old and a 3-year-old boys. All four children were adopted and welcomed into the family.

“We bring the rainbow wherever we go,” Hooks Wayman says of his family, now living in Kensington, Maryland. “We’re loud and hilarious. It’s been a huge blessing.” He wishes more people would consider becoming foster parents, particularly of teens.

“At the end of the day, my heart is filled with joy. They also thrive on the ability to make a positive change. They want to be part of the solution.”

It will take a community, Hooks Wayman says, not only to resolve conflict in the lives of foster children but also to mitigate harm in all walks of life.

“I don’t need everyone to be a foster parent or a child advocate,” he says. “Find your passion issue, whether it be the environment, senior citizens or pets. Make a difference in the area that means something to you.”

“I believe in my heart that child advocacy is a nonpartisan issue.”

– Richard Hooks Wayman

PHOTO ILLUSTRATION BY SARAH WAFFORD; SHUTTERSTOCK

PHOTOGRAPH COURTESY OF THE CHILDREN’S DEFENSE FUND

PHOTO COURTESY OF THE CHILDREN’S DEFENSE FUND
Making Success Accessible

Attorneys who have disabilities are breaking down barriers in the legal profession

By Anna Marie Kukec

Deepinder “Deepa” Goraya of Washington, D.C., loves her work as an advocate fighting legal battles. After all, she had her share of personal battles even before she started to practice law.

Goraya was born three months premature. The incubator for her 2½-pound body pumped in too much oxygen, which caused the blood vessels behind her eyes to burst. That led to a lifetime of blindness and exposed her to inequities in the educational system. Her parents fought to keep her in neighborhood schools, while she used technology to translate her textbooks and homework to Braille or voice versions.

Goraya achieved high grades and earned a law degree from the University of Michigan. She is now a staff attorney with the Disability Rights Project of the Washington Lawyers’ Committee for Civil Rights and Urban Affairs. She also helped create the ABA Young Lawyers Division’s Disability Rights Committee and is on the board of the National Association of Attorneys with Disabilities.

“Attitudes have slowly changed and improved, but we have a way to go,” she says.

DRIVING INNOVATION

Goraya is among a growing number of lawyers with disabilities who have advocated for disability rights in the legal community. They have climbed the ranks to prominent jobs and helped smooth the road for the next generation. In the 50 years since the first disability rights victories were achieved in court, these lawyers have been helped by the passage of the Americans with Disabilities Act, emergence of new technology specifically for them, and a shift in societal attitudes, she says. (For more, see “Action for Access,” page 42.)

In October, Goraya moderated an ABA panel, “Persons with Disabilities: Driving Innovation in the Workplace.” The panelists said one in five Americans has a disability, and they discussed how businesses have expanded their recruiting and hiring practices for people with disabilities, who bring unique talents and skills to the fore. Those employees, in turn, help spur new approaches by providing different perspectives and through the adoption of assistive technologies.

But despite these advances, there’s work to be done.

“It is important for law firms and judges in courtrooms to still be educated about the obstacles we face and the attitudinal barriers,” Goraya says. “We still need an accessible building, a workable case system, wheelchair accessibility and the use of technology in the courtroom.”

ADVOCATING FOR EMPLOYEES

Nicole Saunders, an assistant state’s attorney in Duval County, Florida, is paralyzed from the waist down and uses a wheelchair. She chairs the YLD’s Disability Rights Committee.

“ATTITUDES HAVE SLOWLY CHANGED AND IMPROVED, BUT WE HAVE A WAY TO GO.”

— Deepinder “Deepa” Goraya
“This has become the right path for me,” says Saunders of Jacksonville. “The areas of advocacy and policy make me very passionate. I wanted to work through the law to help bring about change.”

Saunders says she has not been held back at work.

“They are very accommodating. It is a nonissue,” Saunders says. “I see my value and try to cultivate that.”

Saunders is working on a proposal for a program on how employers can accommodate employees who have disabilities. She plans to propose it at the ABA Midyear Meeting next month, with the hope that the YLD leadership will potentially accept it for presentation. It might become a live presentation that has panelists from different fields, or it might be an online CLE program.

“A lot of times, employers know the Equal Employment Opportunity Commission laws, but they don’t know how to effectively and efficiently implement them,” Saunders says. “We want to create inclusion in the workplace, and sometimes employers just don’t know where to start.”

COMMITMENT TO INCLUSION
Anuradha “Anne” Gwal, who has a brain tumor and is partially blind, is an assistant general counsel at Exelon in Newark, Delaware, and past president of the South Asian Bar Association of North America. About 13 years ago, she had two surgeries that resulted in tunnel vision, or partial blindness.

She remains on medications to continue to treat the tumor. A new type of radiation that pinpoints the exact location to be treated helped save her life.

“I had to decide if I wanted to see or I wanted to walk,” Gwal says about the surgery.

Gwal refers to her disability as invisible because no one can immediately identify it. That’s why she openly discusses her condition as part of her leadership roles with the ABA and SABA North America. She is scheduled to appear on an ABA panel next month to talk about her company’s inclusion efforts for people who have disabilities.

Although her company has been accepting of her medical situation and her partial blindness, Gwal knows other companies, and society in general, have a ways to go. “Companies, law firms and law schools can find a way to help the party deal with the stigma and help them to acclimate to the company culture,” Gwal says. “It’s all about inclusion, and they will improve by leaps and bounds. Once we understand the disability, we can effect change.”

Robert Gonzales, chair of the ABA Commission on Disability Rights, says the group has created a pledge for legal employers to sign: Disability Diversity in the Legal Profession: A Pledge for Change.

The pledge, which was introduced in 2009 and updated in 2014, asks major businesses, law firms, judges and law schools to commit to hiring people who have disabilities and to treat them with respect and dignity. The employers are provided goals and scores on how well they do.

“The pledge has had a dramatic impact on the companies and has given lawyers an opportunity they may not have had otherwise,” Gonzales says. The pledge is online at ambar.org/thepledge.

Gonzales agrees with Goraya that new technology has had a major impact on lawyers who have disabilities. Many companies and organizations, including the ABA, are upgrading their websites to make them more accessible. Once the ABA website redesign is completed, lawyers with disabilities will be able to participate in webinars and other educational programs more easily.

“At the ABA, we’re planning to finish the upgrades by mid-2018,” Gonzales says. “Then lawyers, whether they’re blind or deaf, will more easily be able to access the site like anyone else.”

But many legal tech companies still have to make their products accessible to attorneys who have disabilities. When the organizers of the ABA Techshow 2016 conducted a survey of vendors, of the 79 respondents, eight could confirm that their products were accessible.

With the profession becoming increasingly reliant on technology, unless the status quo changes, attorneys who have disabilities could find themselves cut off from many opportunities.

The ABA Techshow 2017 included a workshop to help vendors meet the needs of disabled customers, but none chose to attend. The organizers are planning a series of events in conjunction with the ABA Techshow 2018, which is March 7-10 in Chicago, including an online career fair for lawyers with disabilities.
A Thorough Vetting
Its rating system under fire, the ABA stresses importance of federal judicial candidate evaluations
By Lee Rawles

Amid criticism from Republican senators and a lack of cooperation from the Trump administration, the ABA is standing by the judicial nominee ratings produced by its Standing Committee on the Federal Judiciary.

“The American Bar Association has been impartially evaluating federal judicial nominees since 1953,” says ABA President Hilarie Bass. “During those 64 years—through both Republican and Democratic administrations—the ABA’s Standing Committee on the Federal Judiciary has thoroughly vetted thousands of nominees using a fair and nonpartisan process that no other organization can match.”

The committee’s work came under fire after some of President Donald Trump’s judicial nominees were rated “not qualified,” with Republican members of the U.S. Senate Judiciary Committee criticizing the ratings.

During a nomination hearing for Leonard Steven Grasz, who received a unanimous not-qualified rating for a position on the 8th U.S. Circuit Court of Appeals at St. Louis, Sen. Orrin Hatch of Utah called the committee’s decision “ridiculous” and “political.” But Sen. Sheldon Whitehouse, D-R.I., pushed back, pointing out that the vast majority of evaluations of Trump’s nominees had resulted in “well qualified” or “qualified” ratings.

As of December, 59 evaluations had been completed, 51 of which received one of those two ratings.

“So I think it would be hard for the committee to ascribe the outcome in this case to a general partisanship of the ABA process,” Whitehouse says. “It would not be consistent with the facts.”

The current criticism is also not consistent with past praise of the committee’s work. For example, Judiciary Committee Chairman Chuck Grassley, R-Iowa, told Nancy Scott Degan, who then chaired the committee, “I would like to compliment anybody who serves on evaluating these judges at all levels” when she was testifying about the well-qualified rating Neil Gorsuch received for his nomination to the U.S. Supreme Court.

So just how does the committee operate, and what are its ratings based on?

JUDICIAL STANDARDS

Since President Dwight D. Eisenhower first requested the ABA’s participation in 1953, the committee has assessed judicial candidates on three metrics: professional competence, integrity and judicial temperament. In an in-depth background on the committee’s policies, the three standards are explained:

When the committee evaluates “integrity,” it considers the nominee’s character and general reputation in the legal community, as well as the nominee’s industry and diligence.

“Professional competence” encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law and breadth of professional experience.

In evaluating “judicial temperament,” the committee considers the nominee’s compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law.

The evaluation is nonpartisan; no candidate is assessed for their “philosophy, political affiliation or ideology.” The committee also never suggests or recommends judicial candidates. The committee has only three ratings: well qualified, qualified and not qualified.

However, not all presidential administrations have welcomed the ABA committee’s ratings. Since the Eisenhower administration, the norm was for the committee to complete its evaluation before the official nomination. The exception to this was during President George W. Bush’s tenure, when he chose to announce his judicial nominees.
before the committee had evaluated them. And on March 17, the White House alerted the ABA that President Trump had also decided not to submit his judicial candidates for evaluation before nomination.

THE PROCESS
When a judicial candidate is put forward, the ABA committee’s chair will assign either a current or past member of the committee to act as a lead evaluator.

The evaluation kicks off when the evaluator is sent the candidate’s completed Senate Judiciary Committee questionnaire and a waiver of confidentiality by the Department of Justice. The evaluator will read the candidate’s legal writings, research their background and conduct extensive interviews with their colleagues. These confidential interviews could be with co-counsels, opposing counsels, law professors, community leaders or judges the candidate has either worked with or appeared before.

Toward the end of the process, the evaluator meets with the candidate and gives the individual the opportunity to respond to any adverse comments that could reflect poorly on them. If something said to the evaluator under the promise of confidentiality couldn’t be revealed to the candidate without exposing the person who said it, the information isn’t used in the evaluator’s report or considered by the committee.

The evaluator will follow up on any relevant information that came to light during the interview.

The evaluator will turn in a report to the chair, generally within 30 days, along with a recommendation of well qualified, qualified or not qualified. If a candidate is given a not-qualified rating, it means that the evaluator feels he or she did not meet the committee’s standards in at least one of the three categories. The committee takes a not-qualified rating so seriously that when evaluators think they’ll be recommending that rating, they will alert the chair so that a second evaluator can be appointed to conduct a review and compile another report and recommendation. In that case, both reports will be submitted simultaneously to the committee.

Fifteen members including a chair sit on the Standing Committee on the Federal Judiciary for staggered three-year terms. Each federal district has a member on the committee except for the 9th Circuit at San Francisco, which has two due to its size.

All the members agree not to participate in any partisan political activities or endorse or donate to any federal campaigns during their time on the committee. They also agree not to accept a nomination to a federal judicial seat during their term or within a year afterward.

After the committee has a chance to read through the reports, the members vote—with the chair abstaining, except in the case of a tie. If a minority disagrees with the majority’s rating, that will be noted. If the rating is to be made public, the split will also be made public.

“These ratings are developed only with an immense amount of diligence and attention to the protocols established by our committee over the course of more than five decades,” testified Pamela Bresnahan, the current chair of the ABA committee, before the Senate Judiciary Committee. “We estimate that each standing committee member will spend 300 to 600 hours on conducting evaluations, reading formal reports and voting this year.”

THE GREAT UNKNOWN
But not every rating the committee makes reaches the public.

While it’s accurate to say that the last officially nominated federal judicial candidate to receive a not-qualified rating from the committee prior to Trump’s nominees was Michael Brunson Wallace when he was nominated to the 5th Circuit at New Orleans in 2006, other not-qualified ratings may have been made since then.

The committee’s strict standard of confidentiality doesn’t just apply to its interviews. Its ratings are never made public until a judicial candidate has been officially nominated, and it elaborates on what is discovered during the evaluation process only if committee members are asked to testify before the Senate, as Bresnahan did in November.

When the White House partici-
pates in the prenomination process, the president can choose not to officially nominate that candidate before a not-qualified rating can go public. President Bill Clinton chose to advance four nominees who received such a rating, three of whom were confirmed by the Senate. Although no official nominee under President Barack Obama had a not-qualified rating, the New York Times reported in 2011 that the ABA gave that rating to 14 of about 185 potential candidates the Obama administration asked the ABA to evaluate.

As of press time, of the 59 nominees Trump had announced, the committee rated 34 well qualified, 17 qualified and four not qualified, with five not yet rated. But the confidentiality of the process means it’s not possible to make a direct numerical comparison between ratings of the candidates nominated by Presidents Bush or Trump during the post-nomination process with the committee’s publicly available ratings of judicial candidates put forward under other presidents since 1953.

The committee’s evaluations are not static; an evaluation can be reopened if new significant information surfaces before a candidate is confirmed. A past candidate will also be re-evaluated if he or she is renominated or nominated to a higher court.

For example, when Clinton nominated David F. Hamilton to the U.S. District Court for the Southern District of Indiana in 1994, the committee testified that it gave him a not-qualified rating because it found he did not have enough relevant experience to meet their standard for professional competence. The Senate voted to confirm Hamilton. When Obama nominated Hamilton to the 7th Circuit at Chicago in 2009, the committee unanimously determined that Hamilton deserved a well-qualified rating.

**TIME CRUNCH**

With the committee only able to begin the evaluation process post-nomination and Trump nominating candidates for the federal judiciary at a rapid pace, the workload is intense. If the committee can’t complete its evaluation in time, its ratings and reports can’t be considered by the Judiciary Committee, and senators lose the opportunity to hear committee testimony about the candidate.

The committee has no role in scheduling nomination hearings, and it may not be notified in time for its evaluations to be completed. In the cases of Holly Lou Teeter and Brett Joseph Talley, who were both rated not qualified for positions as district judges, the Judiciary Committee held their nomination hearings before the ABA committee had announced the ratings. Both were voted out of committee and advanced for a vote before the full Senate within days of their ratings being announced.

The work of evaluating federal judicial candidates could become even more difficult. In November, the Times reported that an anonymous source told the newspaper the White House has also considered telling future nominees not to participate in the committee’s interview process or to sign confidentiality waivers that allow the committee to view disciplinary records.

But the committee has the full support and backing of the ABA, Bass says. “Because federal judicial posts are lifetime appointments, ensuring that lawmakers have as much information as possible about candidates before approving them is critical. The federal judiciary is a fundamental part of our government and appointing the most qualified people to it is integral to our democracy,” Bass says.

Bresnahan told the Senate committee in November: “We take great pride in the thoroughness of these evaluations. We believe that the standing committee’s ratings are helpful to the Senate, the Department of Justice and the White House. “We also believe,” she continued, “that the public has come to expect that there will be a thorough, independent assessment of a nominee’s professional qualifications by their peers in the profession. We also believe that the standing committee’s performance of this volunteer service has helped instill public trust in the federal judiciary.”
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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, Jan. 14, with “January Caption Contest” in the subject line.

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

Congratulations to Andrew King of Little Rock, Arkansas, for garnering the most online votes for his cartoon caption. King’s caption, below, was among more than 85 entries in the Journal’s monthly cartoon caption-writing contest.

“Counsel, we are all tired of your word games.”
—Andrew King of Little Rock, Arkansas

Cartoon Caption Contest

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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 during the 2018 Midyear Meeting in Vancouver, Canada, on Feb. 4, beginning with the business session at 9 a.m. and followed by a forum to hear from candidates seeking nomination at the 2019 Midyear Meeting. This portion of the meeting is open to Association members. The Committee will then vote in closed session on nominations for officers and members of the Board of Governors for terms beginning at the close of the 2018 Annual Meeting. Contact Leticia D. Spencer at 312-988-5160 or leticia.spencer@americanbar.org with questions.

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 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

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The Yazoo Land Fraud Becomes Law

From Georgia’s first settlement in 1733 as the 13th and last of the American colonies, its history was one of persistent contradictions. Conceived in popular history as a refuge for imprisoned debtors, early Georgia was every bit as prudish as older religious outposts to the north. It was first governed by a corporate board from London and—seemingly whimsically—forbade rum, lawyers and Catholics. It also resisted the advent of slavery until 1751, long after the odious practice gained an economic stranglehold on the rest of the American South.

Because the province of Georgia was viewed primarily as a buffer between England’s more established northern colonies and Spain's holdings in Florida and beyond, its original grant included a massive swath of land that stretched westward above the 31st parallel, all the way, as the grant hyperbolically described it, to “the south seas.” In historical reality, that meant as far west as the Mississippi River.

After the Revolutionary War, America’s vast frontier holdings became a full-blown attraction to pioneers, profiteers, politicians, thieves and opportunists who envisioned fortunes to be made from the newly acquired wilderness. Georgia, like other states rich in real estate and little else, was vulnerable to almost any scheme that seemed likely to attract a new population of white settlers to displace the indigenous people within its borders.

By 1794, a consortium of four companies sought to buy 40 million acres of Georgia’s western land for $500,000, or 1.25 cents per acre. Because stockholders in the companies included some of the most influential legislators and officials in state and national government, the sale was authorized by the Georgia legislature without serious opposition. By one account, all but one of the legislators who voted for the sale were stockholders in the companies that benefited from the Yazoo Land Act, signed into law by Gov. George Matthews on Jan. 7, 1795.

The sale yielded an immense and almost instantaneous profit to the four companies: the Georgia Co., the Tennessee Co., the Upper Mississippi Co. and the Georgia-Mississippi Co. It also yielded a fiery popular opposition to what quickly became excoriated as the “Yazoo legislature.” When a newly elected “anti-Yazoo” legislature convened in early 1796, the Yazoo Land Act was repealed and burned by state officials.

Although the sale had been annulled, the business of recovery proved problematic. In anticipation of the repeal, speculators had sold much of the land to out-of-state interests at remarkable profits. On the day of the repeal, for example, the Georgia-Mississippi Co. sold 11 million acres for eight times the purchase price. Moreover, many landholders who had been unaware of the controversy simply refused to yield back their ownership. For much of the next decade, state officials moved unsuccessfully to undo the damage wrought by a massive legislative fraud.

In a fragile new nation that still struggled with the tensions between state sovereignty and federal power, the issues of compensation and land repatriation became a volatile national concern. By 1804, the Yazoo controversy had swept into the U.S. Congress, where Virginia planter John Randolph raged against fellow Virginian James Madison and any attempts to settle Yazoo claims, even in the national interest. Their feud resulted in a stalemate in Congress, leaving the issue to be decided by the U.S. Supreme Court.

In *Fletcher v. Peck* (1810), land speculators Robert Fletcher and John Peck argued about the validity of a sale of Yazoo land that took place between them. The question was whether Georgia’s 1796 repeal of the Yazoo Land Act could invalidate their contract.

In a decision that helped establish primacy and durability of the private contract, Chief Justice John Marshall ruled that the Yazoo Land Act, even if it proved to be a fraud on the public, made the ensuing contracts legal.
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