Storm Heroes

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Letters

CAMPUS RAPE DEBATE

Regarding “From Campus to Courtroom,” December, page 54, let me add that this article hardly begins to describe the problem. It reiterates a usual myopia in the literature in this area: (1) focusing on student-to-student disputes and (2) focusing on sexual violence.

The problem on campus today arises from the fact that anyone, even someone not part of the campus community, may file a complaint against another person—student, staff or faculty—and have that complaint prosecuted by campus authorities (often the same person conducting ADR, investigation, adjudication, enforcement and institutional risk management). In addition, grounds for complaint can be as modest as belief or feeling that an aggrieved was offended—nothing at all to do with sex, violence or physicality. That’s a recipe for abuse of the rights of everyone involved, and that’s without even discussing due process.

Richard J. Peltz-Steele
North Dartmouth, Massachusetts

Why should a sexual assault victim and the person accused get different treatment outside the legal system because they happen to be enrolled in some college? They should not.

Sexual assault is a criminal matter, and colleges and universities have no more business getting involved beyond reporting allegations to the police than an employer does.

We are not even talking about allegations between minors. About 15 years ago, the early child care trend across the country was to delay the start of schooling, with the result that graduating high school classes are composed entirely of 18- and 19-year-olds, rather than 17- and 18-year-olds. That means all college students are 18 or older and hence legal adults. The allegations should be investigated by professional law enforcement; and if warranted, criminal charges should be filed and prosecuted through the legal system. We either have rule of law or we do not. You can’t have rule of law sometimes.

The bottom line is that any college involvement in criminal allegations of any kind beyond reporting the allegations to law enforcement is engaging in extrajudicial vigilantism, and such involvement is inappropriate. I’d like to see university administrators held to the same standards as employers would be for interfering in what are clearly criminal matters.

Tyrone Jackson
Boston

The objective is to prevent these regrettable situations from occurring in the first place. In almost all of these unfortunate encounters, both parties were inebriated. Commonly, one or both of them was not old enough to drink legally. This strongly suggests that universities, in their parens patriae capacity, should adopt much stronger anti-drinking policies and then vigorously enforce them. Why underage drinking is countenanced on campuses is a matter that deserves serious examination. Surely this is a situation where an ounce of prevention is worth more than a pound of cure.

Thank you for a great article.

Thomas Goetzl
Bellingham, Washington

WEB 100 SUGGESTIONS

In “Welcome to the Web 100,” December, page 34, why is the National Constitution Center’s podcast We the People not on this list? And More Perfect? They’re both great.

Nathan Clark
Lincoln, Nebraska

CORRECTIONS

“The Truth Is Out There,” January, page 8, should have stated that ABA Legal Fact Check launched Aug. 17.

“Marital Discord,” January, page 16, should have stated that the Tahirih Justice Center estimates more than 14 million girls under age 18 will marry each year during the next decade. Also, the story should have reported that teens who marry are 50 percent more likely to drop out of high school; they are also more likely to live in poverty later in life.

Heidi K. Brown’s photo in “Distilling Fear,” January, page 22, should have been credited to Krista Bonura.

The photo of Richard Hooks Wayman with his family in “Fostering Change,” January, page 62, should have been credited to Pedro Blanco.

“Making Success Accessible,” January, page 64, should have described Deepinder “Deepa” Goraya as a former member of the board of the National Association of Attorneys with Disabilities. She is still a member of the association. Also, Anuradha “Anne” Gwal’s photo should have been credited to Varano Photography.

Due to editing errors, “A Thorough Vetting,” January, page 66, miscounts the ratings of the ABA’s Standing Committee on the Federal Judiciary for President Donald Trump’s 59 nominees. As of Dec. 4, the committee had rated 34 well qualified, 18 qualified and four not qualified, with three candidates not yet rated.

The Journal regrets the errors.
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Champions of the Rule of Law

ABA plays key role in promoting the principle at home and abroad

President Dwight Eisenhower, when he first proclaimed a national Law Day in 1958, said that, “The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.”

Eisenhower was referring to the totalitarian horrors that prompted World War II, but today the lessons of history are just as relevant.

The rule of law is an essential element of a civilized society. And promoting the rule of law—at home and abroad—is one of the ABA’s four core goals. It is at the center of everything the association does.

For instance, by standing up for judicial independence, we promote the concept of impartial justice for people throughout the world. By advocating for legal services for the poor, the ABA gives a voice to the powerless. And by reviewing the qualifications of judicial nominees, the association tries to ensure that only the best and fairest jurists receive lifetime appointments to the bench.

Our dedication to the rule of law does not stop at our borders. Gaps in the rule of law exist around the globe. Corruption, marginalization and human rights abuses in other countries drive extremism, conflict and mass migration, the effects of which we feel at home.

Weakness in the rule of law abroad also affects U.S. commercial interests, creating instability and risk for U.S. foreign investment and supply chains and an uneven competitive playing field for U.S. workers.

The ABA’s Rule of Law Initiative (ABA ROLI) has made a profound impact on the world and, in doing so, has helped American lawyers. Its efforts include:

• Combating violent extremism: With military responses to terrorism proving insufficient and counterproductive, attention has turned to preventive approaches that address the underlying grievances that can breed extremism. These grievances can include corruption, disenfranchisement and violations of human rights, which stem from gaps in the rule of law. Legal responses can provide peaceful solutions and avert frustration and extremism before it festers.

I recently visited Morocco, where ABA ROLI programs focus on educating citizens about their legal rights and remedies under a 2011 Constitution and facilitating civil society engagement with local government. Giving citizens a chance to participate in their government is a strong antidote to extremism. Another ABA ROLI program in Libya is giving citizens a stake in the ongoing constitutional reform process.

• Forced migration: As the world strains at the record high of 60 million people forced to flee their homes, the ABA is advancing rule-of-law responses in countries immigrants are leaving, traveling through and making their new homes.

Many ABA ROLI programs address the violent crime and human rights violations at the root of the mass migration. In the Democratic Republic of Congo, ABA ROLI works to bring justice to victims of sexual violence, a residue of that country’s two decades of conflict. In El Salvador and Guatemala, ABA ROLI helps develop the capacity of law enforcement and the judiciary to curb murderous gangs that have forced hundreds of thousands to flee.

In transit countries, such as Turkey, ABA ROLI is working with lawyers to educate Syrian refugees about their legal rights to housing, health care and schooling. In the United States, a destination country, the ABA’s Commission on Immigration works through its ProBAR program in Texas to provide legal representation to immigrants and asylum-seekers.

• Labor rule of law: The ABA demands that labor laws are compliant with international standards. In Mexico, ABA ROLI is developing a new program that will help establish labor law clinical programs at three leading Mexican law schools.

The ABA does this work around the world with a mix of pride and modesty—pride in the U.S. rule of law tradition but cognizant that our system is neither perfect nor always a perfect fit for other countries. There is no one-size-fits-all. Rather, the rule of law is a system of checks and balances that needs constant testing, nurturing and strengthening.

The ABA has a critical role in developing and sustaining the rule of law. We continue to build on our experience to share and develop together with our justice sector colleagues around the world and ensure that the rule of law thrives.
Some state courts and pro bono programs are working to provide legal representation in evictions and other civil cases.

Justice for All
Advocates promote a right to counsel in civil cases, too

ALTHOUGH THE GUARANTEE of a right to counsel in criminal cases came in the 1963 U.S. Supreme Court decision in Gideon v. Wainwright, the same right does not apply in civil cases.

Now, a growing movement is promoting a right to counsel in critical cases that involve housing, child custody and domestic violence. Women, children, families of color, the elderly and people who have disabilities are disproportionately affected by an inability to afford legal representation. Pro bono services can help bridge the gap, says John Pollock of the National Coalition for a Civil Right to Counsel.

In an effort to narrow the justice gap for low-income, unrepresented litigants in these types of civil cases, California superior courts have begun to collaborate with pro bono programs. Funded by the Sargent Shriver Civil Counsel Act, the California pilot began in 2011 and has served about 27,000 people facing home loss, child custody disputes, or a critical need for guardianship or conservatorship.

“Shriver was a real watershed moment, legislatively,” Pollock says, because it significantly expanded civil representation through government funding, rather than foundations.

According to a 2017 report to the Judicial Council of California, Shriver project attorneys help settle cases,
which positively impacts all parties and frees up limited judicial resources. The pilot was so successful that in 2016, Gov. Jerry Brown made the Shriver project permanent.

Retired Justice Earl Johnson Jr. chairs the Shriver project’s implementation committee. Promoting a right to counsel in civil cases is the cause to be involved in, “a cause for our country,” he says. “The Pledge of Allegiance ends with ‘justice for all,’ but we don’t provide that.”

With federal funding for the Legal Services Corp. down, there’s been an explosion of right-to-counsel pilot programs, litigation and legislation at the state level, according to Pollock. In Washington, D.C., a program provides representation to subsidized-housing tenants in eviction cases. Mississippi is measuring the impact of providing counsel to parents in child welfare cases. In Wisconsin, a program in Winnebago County provides representation to domestic violence victims. And others are popping up across the country.

Helping low-income litigants resolve these kinds of civil cases positively affects society, advocates say. Many studies show “providing counsel helps avoid significant taxpayer costs in the form of shelters, foster care, prisons and ERs,” Pollock says. “In Gideon, it was found that it’s important for people to be represented by lawyers in criminal cases. Are we willing to say that someone losing their children or dying at the hands of a batterer are not as bad as going to jail? What are our priorities as a society?” —Erin Gordon

The War on Lunch Shaming

Policymakers work to protect kids from stigma

When Jennifer Ramo became executive director of the legal nonprofit New Mexico Appleseed in 2009, the Albuquerque Public Schools were making national news for serving cold cheese sandwiches instead of hot meals to kids whose parents were behind on their lunch tab. Now, after passing the first anti-lunch-shaming law in the country, the state is a national model for school lunch policy.

Under federal law, many of the students Ramo encountered were eligible for a free hot meal. But about 50 percent of them weren’t enrolled in the program, she says. “We worked really hard to improve our enrollment numbers in the state,” Ramo says. “But the lunch shaming still continued.”

After enrollment, many students began to rack up lunch debt and were confronted in egregious ways. It was a common story across the country: Children unable to pay for their lunch had hot meals thrown in the trash, were denied food, had their hands stamped with “I need lunch money,” and were required to complete chores to settle their debts. But after public outcry and efforts by advocates and legislators, a number of states are waging a war against lunch shaming, rethinking mealtime policies for low-income students.

Legislatures across the country, along with the U.S. Department of Agriculture, which administers the National School Lunch Program, are taking a stand to implement safeguards to protect needy students from lunch shaming. In September, New York City officials announced that all 1.1 million public school students will receive a free daily lunch. The “universal free lunch” approach has been widely praised for creating a system that will help students who already receive free lunch, as well as those who may never have applied out of fear of stigmatization.

Among other states, Texas and California have passed laws sparked by lunch shaming. And anti-hunger advocates continue to lobby for a national policy. According to the USDA, more than 20,000 schools have expanded free
In sexual assault trials, many prosecution witnesses see themselves as advocates and members of the prosecution team. Some witnesses will do whatever is necessary to win and send the defendant to prison. This may include lying, exaggerating, and misstating facts. NACDL’s *Pattern Cross-Examination for Sexual Assault Cases* was written for criminal defense lawyers on the front lines in the war on sexual assault. It contains pattern questions that can be used to dominate prosecution witnesses and level the playing field at trial.

**SUMMARY:**

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food offerings for breakfast and lunch, including ones in New York City, Chicago and Detroit.

New Mexico has taken the strongest stance on the issue yet. The Hunger-Free Students’ Bill of Rights passed last April, outlawing lunch-shaming practices. The law is the model for a federal bill introduced in Congress last May. For New Mexico advocates, it was a victory years in the making.

Spurred by Ramo’s team at New Mexico Appleseed and sponsored by state Sen. Michael Padilla, the Hunger-Free Students’ Bill of Rights requires that all kids receive a meal regardless of what they owe, and that kids are to be left out of debt repayment discussions.

“We are a credit society,” Ramo says. “And I cannot think of a single other credit relationship where if you don’t pay they take food from your children.”

Squeezed budgets nonetheless put pressure on schools to collect lunch money. About three-quarters of school districts have unpaid school lunch debt, and it’s trending upward. A recent report by the School Nutrition Association says 76.3 percent of school districts had unpaid meal debt at the end of the 2014-15 school year—up from 70.8 percent in 2012-13.

Many schools still can chase the debt by withholding transcripts and serving alternative meals for students who aren’t paid up. But as of July 1, 2017, the USDA requires all school districts to clarify their policies on meal debt repayment.

While the poorest districts can avoid lunch shaming through Community Eligibility Provision programs that feed schools cash-free, outside those districts “there’s a lot of kids who are above the poverty line, but they’re still incredibly poor,” Ramo says. “The real thing we need to do is start covering more kids with free meals.”

—Annalies Winny
Kitchen Service

This Denver lawyer serves up culinary history with a side of social justice

Adrian E. Miller has a lot on his plate this month. As the author of *The President’s Kitchen Cabinet: The Story of the African Americans Who Have Fed Our First Families, from the Washingtons to the Obamas*, his schedule is chock-full of speaking engagements and appearances—after all, February marks Presidents Day and Black History Month. Miller relishes the opportunity to illuminate these important contributions, history nearly lost to disinterest, disrespect and discrimination. It’s something this Georgetown University-trained lawyer and former politico regularly uses food writing to do, from his first book on soul food to his current book project about African-American contributions to the art of barbecue.

I have a lot to ask you about—your legal career, your work with the Clinton administration, your segue from law and politics to food writing. But first, am I the only one who has a hard time putting Denver and soul food together?

I always tell people: I immediately lose street cred on the subject when they find out I’m from Denver. I am a Denver native, but my parents are from the South. My mom is from Chattanooga, Tennessee, and my dad is from Helena, Arkansas. I grew up eating soul food, and barbecue was our special occasion food from Memorial Day all the way through Labor Day.

**So maybe the better question is: How did you end up becoming a lawyer?**

I decided I wanted to be a lawyer at an early age because I was fascinated by politics. I wanted to be president of the United States, so I figured a great route to that would be to become a lawyer. Over time, my interest in being president waned, but I still wanted to make the world a better place, and I thought law would make this possible. I kept trying to meld my legal career to my civil rights beliefs and trying to figure out a way to advance the interests of people of color in our society.

It sounds like your White House gig was a perfect fit. Tell me about that and how you got the position.

I got the position the old-fashioned way: I knew somebody. A law school friend of mine from Georgetown called me out of the blue and said, "I am working in the White House, and do you have any friends who might be interested in working on the president's Initiative for One America?" The basic idea behind the initiative was that if we all just got together, had a conversation and listened, we might realize we have more in common than actually divides us. I became head of the search committee, but only my name went on the list! I moved back to D.C. in 1999. A lot of people thought I was crazy—I was basically uprooting myself and getting half of my law firm salary, but how many times do you get a chance to work in the White House?

**When Clinton’s term ended and the program basically ended, how did you leap into food writing?**

I was unemployed and watching way too much daytime television. I thought, "I should read something." I went to the bookstore and saw this book called *Southern Food: At Home, on the Road, in History* by John Egerton. In that book, he wrote that the tribute to African-American cookery has yet to be written. I reached out to him via email and asked him: "You wrote this 10 years ago; do you still think it's true?" He emailed back and said yes.

**So you decided to write it?**

Yes, and *Soul Food: The Surprising Story of an American Cuisine, One Plate at a Time* became a love letter to African-American cooks across the nation. It was while researching that book that these African-Americans who cooked for presidents started popping up in my research. I decided to write the next book about how these fascinating people were celebrated culinary artists, first-family confidants and civil rights advocates.

**Were there instances where public policy influence...**
came from the kitchen?
Yes, and the best example is Lyndon Johnson with his longtime cook, Zephyr Wright. The Johnsons would drive back and forth from their Texas ranch to the White House, and while they were driving through the Jim Crow South, Wright suffered so many indignities that she stopped traveling with them and stayed in D.C. When President Johnson personally lobbied for the Civil Rights Act of 1964, he used the experiences of Zephyr Wright to convince members of Congress to support the bill. When he signed the bill, he actually gave her one of the pens and said, “You deserve this more than anyone else.”

Do you have a favorite story?
The Zephyr Wright story is my favorite, but this one always gets a lot of laughs: The Trumans loved to have a drink called an Old-Fashioned before having dinner in the White House. A longtime White House butler named Alonzo Fields was in charge of making drinks for the Trumans, and on their first night, he makes them an Old-Fashioned. Bess Truman takes one sip and says, “Can you make this a little drier? We aren’t used to our Old-Fashioneds being so sweet.” So the next time the Trumans ask for the drink, Fields reworks the recipe. Bess Truman takes one sip and says, “This is terrible!” The next time, Fields is a little annoyed, so he just serves them two splashes of straight bourbon on ice. Bess Truman takes one sip and says, “Now that’s how we like our Old-Fashioneds!”

How did you discover all these great stories?
It was not the easiest thing to do. I went to several presidential libraries and looked in the archives. I read every presidential biography and autobiography I could, and I have every single presidential cookbook ever published. But the bulk of my research came from old newspapers. These newspapers chronicled daily life, but they infrequently gave the cook’s full name, or they’d just indicate “colored cook” or “Negro cook.” The information was all scattered around, and I had to look at several sources to piece it all together.

You’ve become a successful food writer—your first book won a James Beard Award, and the second has been nominated for an NAACP Image Award. Was it difficult to break into publishing?
It was an interesting and humbling experience. I shopped my first book around to 22 publishers, and 20 said no. With the second book, there wasn’t that much interest in it, and I am getting mild interest so far in the third book on barbecue. I joke with my friends that if ever I am feeling too good about myself, I will submit a proposal to a commercial publisher. That will bring me back down to earth.

Obviously you love food and food history, but do you like to cook? Can you cook?
I am not professionally trained, but I have skills.

—Jenny B. Davis

Scientists at the Hebrew University of Jerusalem have developed ingenious ways to overcome global energy and food shortages. Powered by the support of American Friends of the Hebrew University, researchers continue to develop technology to address challenges that come with climate change. Because Knowledge Moves Us.
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 Angela C. Zambrano

By the time I was a teenager, my mother was single and raising three children. In the summer, without the finances to afford child care, my siblings and I stayed home alone during the day while she went to work. I can still remember her driving home each day to make us tomato soup and grilled cheese sandwiches during her one-hour lunch break.

This memory of my mother rushing home to take care of us, throw a load of laundry in the washer, and scramble back to work all in just 60 minutes still brings me to tears. Now, as a working mother myself, I realize how hard it was for her to balance and how much she sacrificed for her family—all while doing so with hardly any family support, money or job flexibility.

When people ask me how I make it work, I point to my mother—who did so much with so little—as my role model. As lawyers, we have it so much easier than my mom or many other women in the workplace today.

As a child in a financially disadvantaged household, our mother encouraged us to succeed in school and modeled that for us by taking college courses at night and eventually obtaining a college degree herself. I attended the University of Kansas by scraping together a collection of scholarships and working a collection of part-time jobs.

After graduating, I was lucky enough to be admitted to Southern Methodist University Dedman School of Law. SMU gave me an opportunity to work in a world-class law firm with clients and opportunities that neither I nor my mother could have imagined. My career has opened doors for me that I did not know were possible.

However, it has proved difficult to navigate decisions about motherhood along the way, although I am acutely aware of how much easier I have it as a working parent than my own mother did. Yes, I work long hours in a demanding profession. But I have the flexibility to attend my children’s school activities in the middle of the day, coach my children’s sports, and be a Girl Scouts troop leader. If my kids get sick, I have the ability to take care of them while working from home. If my car breaks down, I can call an Uber and get my kids to school and myself to work. If we forget to buy the materials for a school project, we can pay full price at the last minute.

As female lawyers and mothers, we face many obstacles in our profession. However, when the balancing of work and family is especially difficult, I try to remember that as lawyer moms most of us have many resources available to us, from flexible hours to emergency transportation and child care. We’re able to go home and have dinner with our children but still “log on” to take care of our clients’ problems when our little ones are asleep, something many other working women still can’t do—and certainly something my mother couldn’t take advantage of in the 1980s. The benefits I enjoy make me a happier mother and, as a result, a happier lawyer.

My mother has passed now, and I cannot tell her thank you every day like I want to. But I can be an advocate for women (and men) to obtain workplace benefits that make parenting easier and more enjoyable. I try to do that, and be grateful, every day of my law practice.

Angela Zambrano is a partner in Sidley Austin’s Dallas office and co-leader of the firm’s commercial litigation and disputes practice, where she represents companies and boards of directors in commercial litigation and internal investigations, including class actions and multifacjursjencial disputes. She was the 2016 president of the Dallas Women Lawyers Association. Last year, the SMU Dedman School of Law recognized her as an emerging leader; she also received the 2017 Distinguished Alumni Award from SMU Women in Law.
Did You Know?
Arrests by deportation officers have soared, while Border Patrol arrests have plunged to a 45-year low. The Border Patrol made 310,531 arrests during fiscal year 2016, a decline of 25 percent from a year earlier and the lowest level since 1971. Despite the significant decline, arrests increased every month since May—primarily families and unaccompanied minors. U.S. Immigration and Customs Enforcement made 143,470 arrests, an increase of 25 percent. After President Donald Trump took office, ICE arrests surged 40 percent from the same period a year earlier.
Source: apnews.com (Dec. 5).

Unequal Pay
Pay for top corporate lawyers surged about 10 percent on average between 2015 and 2016. But male general counsels continued to earn far more than their female counterparts, according to a report by legal recruiting firm Major, Lindsey & Africa. Compensation for GCs increased 9.6 percent, from an average of $395,000 to $433,000. The average pay for female general counsels decreased from an average of $396,000 to $376,000, while the average for male GCs increased from $394,000 to $456,000 over the same period.
Source: biglawbusiness.com (Dec. 4).

Clerk Controversy
The U.S. Supreme Court’s clerk ranks are less diverse than law school grads or law firm associates—and are predominantly white and male, according to research by the National Law Journal. Since 2005, 85 percent of all law clerks have been white. Of the 487 clerks hired by justices over the past 13 years, 20 were African-American, eight were Latino and 40 were Asian-American. Of the 36 clerks hired by sitting justices this term, one is African-American, two are Latino and three are Asian-American. Twice as many men as women gain entry. This term, of the court’s 38 law clerks, 14 are women and 24 are men.
Source: law.com (Dec. 12).

UN Justicia Files
The United Nations special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment is urging U.S. authorities to investigate and consider criminal charges against jail officials in Arkansas, Ohio, Oklahoma and Tennessee. This is for the “clearly gratuitous infliction of severe pain and suffering” from the use of Tasers on inmates. After reviewing jail incidents from a special investigation by Reuters, the U.N.’s Nils Melzer said the “grave abuse” from stun gun use in some jails violated the U.N. prohibition on cruel, inhuman or degrading punishment and, in some cases, amounted to torture. Reuters also identified 104 cases of prisoners who died after being shocked with Tasers.
Source: reuters.com (Dec. 7).
What’s in a Name?
For some law schools and universities, namesakes stir up controversial pasts
By Stephanie Francis Ward

The University of California at Berkeley School of Law holds a special place in Miriam Kim’s heart. A 2002 graduate, she speaks proudly of fellow alumni with progressive values and calls herself a “Boaltie.” The nickname comes from Boalt Hall, a campus building named in recognition of John Henry Boalt, a Nevada lawyer who made his fortune in the mining industry and came to California in the late 1880s.

Few had given much thought to the name behind the building—until a recently publicized research paper revealed Boalt’s beliefs were unlike those of many who’ve attended classes in the building named after him.

In 1877, Boalt wrote a paper advocating the end of Chinese immigration to the United States, arguing that the Chinese would never assimilate to American culture and could not live in harmony with whites. His paper sparked the creation of the Chinese Exclusion Act of 1882, which was the first U.S. law that prevented a specific ethnic group from entering the country.

That bit of Boalt history has remained mostly unknown to students and faculty, but news of it spread quickly after Charles P. Reichmann, a lecturer at Berkeley Law, came across Boalt’s writings and published a paper called “Anti-Chinese Racism at Berkeley: The Case for Renaming Boalt Hall.” He also wrote an op-ed about it in the San Francisco Chronicle in 2017. The revelation about Boalt’s past was not well-received.

“I was extremely upset to hear that [Boalt] had advocated for the Chinese Exclusion Act,” says Kim, who co-chairs the Berkeley Law Asian Pacific American Alumni Association. “Boalt Hall was such a diverse and inclusive place for a woman of color like me, so it was...
disappointing to hear that John Boalt was racist and a major proponent of the act."

Boalt was never officially part of the school’s name, but it’s been referred to as Boalt for more than 60 years. The name, however, is attached to a wing of the main building.

Berkeley Law dean Erwin Chemerinsky, who is also a columnist for the ABA Journal, formed a committee to discuss the naming controversy, and the school planned a town hall-style meeting to address it.

FOUNDERS’ FAULTS

Just across the bay, the University of California’s Hastings College of the Law in San Francisco also faces criticism for the man associated with its name: Serranus Clinton Hastings. He was a successful politician, lawyer, and landowner who gave $10,000 to start the law school in 1878. But historians have found that he helped organize a group of men who massacred hundreds of Native Americans living near land that Hastings claimed for himself.

Such controversies over names and racist histories at colleges and universities are not isolated incidents. Harvard Law School revamped its official seal to remove the family crest of early donor and slaveholder Isaac Royall Jr. after donors is big business with its name: Serranus Clinton Hastings, says he understands that the donation agreement with the school’s namesake included such an opportunity. Both schools say discussion around the issue is important, regardless of whether the names stay or go.

Kim, a trade secrets litigator and partner with Munger, Tolles & Olson, says she associates the Boalt name with Elizabeth Josselyn Boalt, John Henry Boalt’s widow, who established the school in 1906.

A classically trained pianist, Boalt created a trust instructing that two pieces of San Francisco property she owned be sold and the proceeds used to build the Boalt Memorial Hall of Law. Little is known about her views on the Chinese Exclusion Act, but some historians plan to examine a bundle of her letters the school possesses.

Kim says that if Boalt indeed did not share her husband’s views, she’s inclined “to reclaim the Boalt name and change it to Elizabeth J. Boalt Hall. ... At minimum I think we need to do an education campaign to raise awareness. If we just get rid of the name and nobody knows why, that’s a pointless exercise in my view.”

At UC Hastings, Faigman assembled a committee to consider the law school’s use of Hastings’ name. He’s also hired a historian for $10,000 to write about the man’s character and actions, as well as the period in which he lived. “At this point in time, we do not anticipate that the name of the school will be changed. However, I do not want to prejudge what the history tells us, or what the committee recommends,” Faigman says.

Robert Anderson, a University of Washington law professor who directs the school’s Native American Law Center, says he heard about Hastings’ history only recently. “I knew Indians had been murdered regularly throughout the country, but I hadn’t heard of civil efforts to hunt down California Indians,” says Anderson, a member of the Bois Fort Band of the Minnesota Chippewa Tribe. “It’s pretty shameful to have a school named after someone who carried out these activities. It’s kind of a slap in the face to all Indian people in California.”

Benjamin Madley, an associate history professor at UCLA, drew recent attention to Hastings’ actions in his book, An American Genocide: The United States and the California Indian Catastrophe, 1846–1873, in which he writes about eight vigilantes charged with killing Native Americans in the Napa and Sonoma regions. Hastings, who served as the California Supreme Court’s first chief justice, released the accused men on bail. None of the cases was ever tried.

His research also found that Hastings organized a group known as the Eel River Rangers, which killed hundreds of California Indians.

“As I speculated in the book, I think he probably wanted to protect his investments in horses and cattle on his Eden Valley ranch,” Madley says.

A SIGN OF THE TIMES

Indeed, finding someone from that time period who had the means to fund a law school yet didn’t abuse people to make a fortune would be difficult, says Alfred Brophy, a University of Alabama law professor.

Brophy largely favors preserving institutions’ names so the past is not forgotten. “To some extent, schools are slow to make name changes. One reason I think they have had very difficult times with changing names is that they are controlled by people with a lot of money, who by
The Docket

and large are not very sympathetic," Brophy says.

Others say that keeping names like Boalt and Hastings doesn’t set a good example for students.

“I believe that institutions have a responsibility to model good moral and ethical behavior for our students. A responsible institution of higher education cannot model standards of ethical behavior and basic human decency for students and alumni while condescending or turning a blind eye to atrocities committed by its namesake,” says John LaVelle, who directs the Indian Law Program at the University of New Mexico School of Law. A member of the Santee Sioux Nation, he’s also a Berkeley Law graduate and has no attachment to the Boalt name.

“I’m proud to have graduated from that law school. Now that I know the history of the name, I would not frame my pride around the name,” he says. “We can all have pride in a university without insisting on honoring a name that is associated with a very nefarious and racist past.”

Many public officials throughout the American West had opinions similar to those of Hastings and Boalt, and many white voters back then agreed with them, says John S.W. Park, an Asian-American studies professor at the University of California at Santa Barbara.

“White supremacy was so ingrained in American history that if we were to remove everyone who was a white supremacist, we’d be busy,” says Park.

He notes that two streets in San Francisco—Van Ness and Geary—are named after former mayors known for their racist views.

“I certainly don’t mourn the removal of a Confederate statue or the renaming of Boalt Hall,” he says. “But I also wouldn’t mind just teaching the very young kids in San Francisco that [James] Van Ness and [John] Geary were total racists. It’ll help them see that intersection in a new way.”

Let Us Pray

Circuit split on constitutionality of legislator-led prayer may lead to Supreme Court review

By David L. Hudson Jr.

The most divisive part of the First Amendment is, arguably, its first 10 words: “Congress shall make no law respecting an establishment of religion.” Author Stephen Mansfield titled a book Ten Tortured Words and Supreme Court Justice Clarence Thomas described church-state jurisprudence as being “in shambles.”

Once again, the great church-state debate appears to be headed to the high court. At issue is the constitutionality of so-called legislator-led prayer before public meetings. With federal appeals courts divided, the justices may soon consider whether local government officials violate the establishment clause when they open meetings with prayers. The answer will depend, in part, on how the justices interpret the clause.

There’s near-unanimous understanding that the establishment clause prevents the government from creating a national church—like the Anglican Church during the time of Henry VIII—and that it prohibits passing laws favoring a particular religious sect. After that, agreement dissipates rapidly.

Some view the clause as erecting a “wall of separation between church and state,” to use the phraseology of Thomas Jefferson and, before him, Rhode Island founder Roger Williams. Those subscribing to a more separationist view quote Justice Hugo Black that this wall of separation “must be kept high and impenetrable.” Others believe that religion always has been an important part of the public square and should be treated more favorably than nonreligion because of the establishment clause’s complementary and contradictory religious liberty cohort, the free exercise clause.

The issue of legislator-led prayer is significant and remains commonplace at many local government meetings across the country. “The practice of legislative prayer is still common, and the prayers typically are short Christian prayers,” says Jennifer A. Kreder, a law professor at Northern Kentucky University.

Such prayer practices must not be coercive or discriminatory, says Richard B. Katskee, legal director for Americans United for Separation of Church and State. “If you go to a meeting to petition the commissioners and they themselves tell you to stand and pray with them, disparage your faith, and try to proselytize you to theirs, it’s hard not to think that you’d better go along to get along. That’s highly coercive.”

DIVIDED INTERPRETATIONS

The question of whether such commissioner-led prayers violate the establishment clause has divided the federal appeals courts. In September, the full panel of the 6th U.S. Circuit Court of Appeals at Cincinnati voted 9-6 to uphold the prayer practice at county commission meetings in Jackson County, Michigan, in Bormuth v. County of Jackson. A couple of months earlier, the full panel of the 4th Circuit at Richmond, Virginia, had invalidated a similar practice in Rowan County, North Carolina, in Land v. Rowan County by a vote of 10-5.

In Bormuth, the 6th Circuit majority reasoned that such prayers were an important part of history and tradition, and a way for public officials to “lend gravity to public business.” Judge Richard Allen Griffin wrote that “history shows that
legislator-led prayer is a long-standing tradition.”

The majority reasoned that such official-led prayer is supported by the Supreme Court’s decisions in Marsh v. Chambers (1983) and Town of Greece v. Galloway (2014). In Marsh, the court upheld 6-3 the Nebraska legislature’s custom of having chaplain-led prayer before sessions. In Galloway, the court, voting 5-4, upheld a New York town’s practice of having religious leaders in the community open town meetings with prayer.

However, the 4th Circuit took a much different view in Lund. To the appeals court, it was constitutionally significant that commissioners led the prayers, rather than chaplains or other religious leaders.

Writing for the majority, Judge J. Harvie Wilkinson III explained: “The prayer practice served to identify the government with Christianity and risked conveying to citizens of minority faiths a message of exclusion. And because the commissioners were the exclusive prayer-givers, Rowan County’s invocation practice falls well outside the more inclusive minister-oriented practice of legislative prayer described in Town of Greece.”

“Prayers by legislators raise very different issues in terms of government endorsement of religion,” says constitutional law expert Erwin Chemerinsky, dean at the University of California at Berkeley School of Law and an ABA Journal columnist. “I thus find Judge Wilkinson’s opinion quite persuasive.”

Rowan County already has filed a petition for certiorari to the high court with hopes of restoring the prayer practice. “The circuit split is wide and deep. Furthermore, the issue of legislator-led prayer is frequently recurring and exceedingly important,” says Brett B. Harvey, senior counsel for the Alliance Defending Freedom and co-counsel for Rowan County. “Legislative prayer is a significant way for government officials to signify the gravity and importance of their proceedings.”

Peter Bormuth, who challenged the prayer practice before the Jackson County Board of Commissioners in Michigan, also says he will appeal the 6th Circuit’s decision. “The very strong opinion by the 4th Circuit in Lund certainly gives me hope that the Supreme Court will grant cert in my case,” he says.

Bormuth adamantly objects to the idea that history and tradition support these prayer practices.

“The lines between pastor and legislator, church and state have been blurred to the point of elimination.”

—Marcy Hamilton

Their history and tradition argument is a joke,” he says. “From colonial times onward, even in the theocratic states of Massachusetts and Virginia, legislators did not lead prayers; ministers did. And most denominations felt that ministers should not hold public office. Several of the original states had laws to such effect, and a few of the newer states also enacted such legislation. For the first 100 years of our United States, it was commonly accepted that having legislators lead opening prayers violated the establishment clause, and practice reflected that understanding,” Bormuth says.

HISTORY AS A GUIDE

Others disagree. “The history and tradition of legislative prayers helps determine the intent of the First Amendment,” says Mat Staver, founder and chairman of Orlando, Florida-based Liberty Counsel. “The drafters of the Amendment were familiar with this history and tradition, and they gave no indication they intended to discontinuie legislative prayers.”

Although Harvey of the Alliance Defending Freedom, who also litigated the Town of Greece case, believes legislative prayer is not coercive—others do.

“There is unmistakable coercion when a lawmaker leads prayer and invites others to join in public,” says Benjamin N. Cardozo School of Law professor Marci Hamilton, who successfully challenged the application of the Religious Freedom Restoration Act as applied to the states before the Supreme Court in City of Boerne v. Flores (1997). “The lines between pastor and legislator, church and state have been blurred to the point of elimination.”

Despite the circuit split, Kreder of Northern Kentucky University explains that both cases were decided correctly by the respective appellate courts. In Bormuth, “the 6th Circuit correctly applied the Supreme Court standard from Marsh, allowing the long-standing practice of a moment of nondenominational prayer or silence prior to government meetings,” she says. In Lund, Kreder adds, “the elected officials went further than what the court allowed in that the elected officials expressly and uniformly invoked Jesus Christ and denigrated others not sharing their faith.”

Some believe the Supreme Court could move the needle significantly in the next establishment clause case, particularly with the court’s addition of Justice Neil M. Gorsuch.

“Since Justice Gorsuch adheres to originalism, he will find that legislative prayers are not prohibited by the First Amendment,” predicts Staver. “This is the only historically accurate conclusion one can reach based on the original intent of the establishment clause.”

Chemerinsky also sees a similar outcome. “I do think that there are likely five votes to significantly change the law of the establishment clause, to allow more government support for religion and more religious participation in government,” he says. “I assume that Justice Gorsuch will join with the conservatives here: Roberts, Kennedy, Thomas and Alito.”

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In late 2013, federal law enforcement authorities served a warrant at Microsoft Corp.’s headquarters in Redmond, Washington, seeking information about an email account the government thought was being used to aid illegal drug activity, including making drugs for import into the United States.

The warrant sought the contents of all emails in the account as well as records that might identify its user. The warrant was issued under the Stored Communications Act of 1986—a federal statute already before the U.S. Supreme Court this term in another high-profile case on data privacy.

Now the statute is at issue in United States v. Microsoft, a major case about whether U.S. corporations must disclose data that they store abroad to federal authorities. The case underscores the growing impact and legal complications of cloud computing—when providers and their customers store data on servers rather than on a device such as a computer, tablet or cellphone.

Microsoft, responding to the 2013 warrant, disclosed certain account-identification records that it routinely stores at its data center in Dublin.

Microsoft manages more than 1 million server computers in over 100 data centers in 40-plus countries across the globe, based on figures cited in the case record. The company migrates customer emails daily from one data center to another for various business reasons but typically sends them to a center close to the customer’s location.

Microsoft refused the government’s request to retrieve the contents of the emails sought under the warrant and stored in the Dublin center. The company stresses that it generally doesn’t oppose legal requests for data and seeks to aid law enforcement. But in this case, it asked a federal magistrate judge to quash the subpoena. The magistrate refused, setting the case on a path toward the Supreme Court, which will hear arguments on Feb. 27.

‘THIS UNBRIDLED POWER’

According to David M. Howard, corporate vice president and deputy general counsel at Microsoft, this case is about whether the U.S. government can “come to Microsoft and force Microsoft to effectively go into its Irish data center, collect that private or confidential information, copy that information and transmit that information to the United States, and turn it over to law enforcement without the cooperation and assistance of the Irish government—all without any consideration of whether the production of that information is consistent with Irish law.”

“Our view is this statute ought not to be interpreted to allow the government this unbridled power, but that Congress needs to consider under which circumstances a warrant ought to be allowed outside the United States,” says Howard, referring to the Stored Communications Act. “Using this outdated statute is not the right vehicle to do this.”

Solicitor General Noel J. Francisco, in the federal government’s merits brief, argued that under the Stored Communications Act, “the government may compel a U.S. service provider to disclose electronic communications within its control, regardless of whether the provider stores those communications in the United States or abroad.”

According to Francisco, the focus of the statute is on domestic conduct and does not violate the so-called presumption against extraterritoriality—the principle that acts of Congress are meant to apply only within the territorial jurisdiction of the United States unless Congress makes clear otherwise.

Because Microsoft’s U.S.-based security team is able to access emails stored in Dublin or any of its overseas data centers, it may copy and shift that information to the United States to comply with the warrant, the government argued.

“Because any disclosure to the government occurs in the United States, such disclosure involves a permissible domestic application of” the statute, Francisco said in the brief. The federal government has
appealed a unanimous decision by a three-judge panel of the 2nd U.S. Circuit Court of Appeals at New York City, which ruled for Microsoft and held that the SCA's warrant provision does not apply outside the United States.

The panel went on to hold that much of the focus of the 1986 statute and later amendments is on protecting the privacy of consumers. And “the invasion of the customer’s privacy takes place under the SCA where the customer’s protected content” is stored—in this case at Microsoft's Dublin data center.

A warrant that requires a provider to access its data abroad calls for the provider to seize the data from that site while acting as an agent of the U.S. government, the 2nd Circuit held.

An en banc panel of the 2nd Circuit split 4-4 on whether to rehear the case, which left the panel's decision in force. Each judge who would have heard the case wrote a dissent, with one arguing that a Stored Communications Act warrant is more like a subpoena seeking information “within the grasp” of the U.S. provider.

A CASE OF GLOBAL INTEREST

The Supreme Court heard arguments late last year in another case involving the Stored Communications Act, Carpenter v. United States. At issue is whether the government’s pursuit of cell-tower data from a criminal suspect requires a warrant or merely a court order authorized under the statute that does not require meeting the same probable cause standard of a warrant.

That case is mostly an issue of domestic concern. But the Microsoft case has attracted interest from as far away as New Zealand, Ireland, the United Kingdom and the European Union.

Allyson Ho, a partner at Morgan, Lewis & Bockius, filed an amicus brief on behalf of the New Zealand privacy commissioner. In support of neither party, she wrote in the brief: “Applying [the Stored Communications Act] to data held in New Zealand could entail civil and, for certain data protected under New Zealand law, criminal liability.”

U.S. technology industry groups and other business interests, as well as privacy advocates and others, back Microsoft. The federal government, meanwhile, is supported by a group of 35 states that worries a ruling for Microsoft could hamper state investigations of crimes such as drug trafficking and child sexual exploitation. “The risks to public safety of

and, for certain data protected under

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stigations of crimes such as drug traf-

ficking and child sexual exploitation.

“The risks to public safety of

the 2nd Circuit’s decision are real

and immediate,” says Benjamin

D. Battles, the solicitor general of

Vermont and the main author of

the states’ brief.

SETTING A BAD PRECEDENT?

Ireland, the host country of the data center at issue, argued in an amicus brief (in support of neither side) that it has a treaty with the United States for mutual cooperation on law enforcement matters.

“Ireland therefore considers that

the procedures provided for in

that treaty represent the appro-

priate means to address requests such

as those which are the object of the

warrant in this case,” the country’s

brief said, suggesting it does not

support the U.S. government’s

broader view of its investigative

authority.

The Brussels-based European

Commission, representing the

EU’s 28 member states, stressed

in an amicus brief (also for neither

side) the EU’s strong data privacy

regulations.

Storing data in an EU country and “transferring it from the European Union to the United States constitutes data ‘processing’ to which the EU data protection rules apply,” the brief said.

Microsoft has expressed concern that fulfilling the U.S. government’s warrant in this case would subject the company to harsh financial penalties when even stronger EU data protection rules go into effect in May.

But the United Kingdom takes a different tack. It said in a brief that when seeking electronic data from a U.S.-based provider, it often seeks to make the request through an existing mutual assistance treaty with the United States.

But the nation passed a law in 2016 that “enables the compul-
sion of an overseas provider offer-
ing services in the U.K. to provide certain electronic communica-
tions sought by a U.K. warrant despite those communications being stored outside of the U.K.”

The United Kingdom argued that a location-based approach to law enforcement access to data “no longer makes sense in the digital age.”

Andrew J. Pincus, a Mayer Brown partner who filed an amicus brief on behalf of business and privacy groups, says the desire of the United States and United Kingdom to reach into other countries to obtain data sets a bad precedent.

The brief was signed by, among other things, the BSA (an association representing tech companies that include Apple and Microsoft); the U.S. Chamber of Commerce; and the Center for Democracy and Technology, a Washington, D.C.-based privacy advocate.

“If the Chinese government—or pick your country—could call in Microsoft and say, ‘Get me Andy Pincus’ emails, or get me this reporter’s emails,’ that would be quite con-

cerning to most Americans,” Pincus says. “Both consumer advocates and companies are worried about the government’s accessibility to their information without going through the legal process that protects them in their own country.”

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Paint a Picture

Evoking jurors’ sympathetic imagination is key for lawyer storytellers

By Philip N. Meyer

In January 2017, before President Donald Trump’s inauguration, I attended the annual Association of American Law Schools conference in San Francisco. I stayed at the Mark Hopkins Hotel high up on Nob Hill—a walk away from the conference site at the Hilton in the business district near Union Square.

My well-appointed vintage-style room was on an upper floor that overlooked the city, the Golden Gate Bridge and the bay. At night, a thick fog rolled in, blocking out the views—fog so dense that it was impossible to see beyond it. The fog gradually burned off in the morning. Nob Hill appeared first, then the city below, the tops of the bridges and, finally, Sausalito and Marin in the crystalline distance beyond Alcatraz Island and the bay.

Sitting in a coffee shop on Nob Hill, I read Shane Read’s new book, Turning Points at Trial: Great Lawyers Share Secrets, Strategies and Skills. In it, the reader meets an eclectic and engaging cast of some of the most successful litigators in the country. These lawyers select one of their cases for analysis, rather than merely recount war stories. Read chooses one aspect of each case (opening statement, direct examination, cross-examination, deposition, closing argument and appellate oral argument) and then reviews relevant transcripts from this “turning point,” analyzing why it was outcome-determinative.

Read allows his attorneys to provide their own commentaries, and each chapter comes with a takeaway checklist of lessons for practitioners.

The first opening statement Read analyzes is by Mark Lanier, a Houston-based trial attorney, church pastor and Bible teacher. The story Lanier tells is a simple one: A 59-year-old man, Bob Ernst—an athlete and distance runner, a good man—took the drug Vioxx to treat tendinitis in his hand. He died suddenly of a heart attack a year after he began treatment.

The drug company Merck was sued by his surviving spouse, Carol, alleging that the Vioxx had caused the attack, and that the company did not provide sufficient warnings about the drug’s possible side effects. Lanier became the first plaintiffs attorney to sue Merck successfully on a Vioxx claim. At the trial in rural Texas, Carol Ernst was awarded $24 million in compensatory damages and $229 million in punitive damages.

Lanier cleverly borrowed a thematic frame from the TV show CSI: Crime Scene Investigation and cast the jury into the role of a detective uncovering a mystery, especially pertaining to the crucial element of causation. But the story Lanier told went much deeper. It was, in part, about the relationship between Bob, the deceased husband, and his wife, Carol—a character-based love story affirming the value (in dollars) of Bob’s life and his relationship with Carol.

Against this, Lanier posed the plot-driven melodramatic villainy of the drug company as the basis for punitive damages: Merck not only denied that the drug caused Bob’s death but also claimed that the testing of side effects was sufficient (because the drug had received FDA approval). There were no warnings accompanying the drug, and Lanier argued that Merck purposely suppressed evidence, including studies linking the drug to heart attacks.

Lanier transformed the anticipated but not-yet-presented evidence into a compelling story. His opening cut against conventional legal folk wisdom about not overdoing or overcooking opening statements. Lanier employed a meticulous composition of artful PowerPoint slides, playing off images that enhanced his powerful words—images showing Bob and his wife leading a happy life, and then Bob’s image fading away.

Later, I watched Lanier’s YouTube videos, which are lectures he delivered to a torts class at Harvard Law School. Lanier is empathic, passionate and fully engaged with his audience and his material. Like many effective trial lawyers, he goes without notes and appears psychologically with his audience and his material. Like many effective trial lawyers, he goes without notes and appears psychologically naked, enabling him to fully gauge and read the faces of his audience, matching their unspoken emotional needs and expectations.

WATCHING MOONLIGHT

After breakfast, buzzing on an overload of caffeine and pastries, I finally headed downhill from the coffee shop. San Francisco is a magnificent city for walking, and I was in no hurry to get to the conference, strolling along the waterfront on the Embarcadero. The fog rolled back in. Then came a downpour. I had no umbrella or raincoat, so I went inside the Embarcadero Center shopping complex. A boutique multiplex theater was just opening. I watched an afternoon screening of Barry Jenkins’ movie Moonlight.

Moonlight is an understated and profound movie about black lives in Miami, beginning in the 1980s. Jenkins’
characters inhabit such a different world from my own, one I have not seen before, at least not depicted in this way. The story is enthralling precisely because it cuts against so many popular cliches and stereotypes. It avoids the easy messaging of many commercial films and doesn’t pander to the lowest common denominator of unambiguous moralism and comfortable cultural affirmations seen in Hollywood.

Also, the story does not track the conventional linear Hollywood movie structure. The plot presents three discrete elliptical pieces set in different times: The initial story is about a brutalized young boy, Little, who initially finds some intimation of the possibility of love with a surrogate father, a crack dealer who sells to his addicted mother.

In the second piece, Little has grown into the adolescent Chiron. He has an awakening of his own sexual identity with his close friend Kevin. But then Kevin betrays Chiron and his sexuality to the now-adolescent gang of thugs. Chiron is physically brutalized. He takes violent revenge on the leader of the gang and is incarcerated.

In the final episode, more years have passed; after his release from prison, Chiron has remade himself as the buff and hardened drug dealer Black. He reconnects briefly with his mother, who is now in drug rehab, and the film closes with the suggestion of the possibility of love and a reconciliation with Kevin.

The characters are evoked with compassion, captured meticulously in complex and compelling performances. This world is reconstructed with an overwhelming cinematic beauty. There is not a false note or a bump in the lyrical composition of the story.

Sitting in the plush reclining seats, I was completely drawn in; I inhabited empathically the world of these characters and lived their stories with them.

KAFKA AND THE IMAGINATION

After the movie, I wandered through the business district along the Embarcadero, drifting toward the law professors’ conference. I was still thinking about Jenkins’ Moonlight and about Lanier’s Vioxx opening statement. The stories told are, in different ways, commercial and artistic. 

I imagined how difficult it must have been for Jenkins and his producers to initially pitch his story to get funding to make this seemingly unsparring movie—somewhat akin to Lanier pitching his story to a jury, walking the twisted and difficult line between art and commerce.

I also thought how Moonlight was akin to Lanier’s opening statement in deeper ways. Both storytellers were sharing tales of suffering and injustice, both attempting to derive human meanings and truths from the events depicted in their stories, artfully and purposely engaging the sympathetic imagination of their audiences.

As I headed to the conference, I was hyperaware of the many homeless people on the street along the Embarcadero, ignored by the legions of businessmen and office workers now going home. A young woman sat on the sidewalk clutching a battered Raggedy Ann doll. She began sobbing a name, “Pammy.” Was it the doll’s name? Her child’s name? Perhaps her dead child’s name? Then she began howling; her pain pierced the street noise. Pedestrians, myself included, stepped carefully around her.

Afterward, I drifted through crowds of busy shoppers gorging on consumerism in the department stores at Union Square. I couldn’t shake the image of the young woman howling and clutching the Raggedy Ann doll.

At the Hilton, before heading into the final sessions at the law professors’ conference, I scrawled my own version of Franz Kafka’s famous dictum on the back of a lawyer’s professional card about how stories—in books and in life—are the ax that cracks open the frozen sea inside us.

Back home, I found the card in my wallet. The emotional power of Lanier’s opening statement, of Jenkins’ Moonlight, and of the sidewalk scene of the young woman with the rag doll howling a child’s name all returned to me. Evoking the sympathetic imagination is crucial to the work of all storytellers, including lawyers, and helps explains why these stories remain so vivid in my mind’s eye and in my heart so many months later.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.
Reining in Jurist Investigations
Opinion warns against judges doing research on facts related to cases
By Raymond J. McKoski

In Formal Opinion 478, the ABA Standing Committee on Ethics and Professional Responsibility addresses the restrictions imposed by the 2007 ABA Model Code of Judicial Conduct on a judge searching the internet for information helpful in deciding a case. The ABA opinion concludes that Rule 2.9(C) of the Model Code prohibits a judge from researching adjudicative facts on the internet unless a fact is subject to judicial notice.

Rule 2.9(C) clearly and definitively declares that "a judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Acknowledging the integral part that search engines play in everyday life, Comment 6 to Rule 2.9 bluntly tells judges that the prohibition "extends to information available in all mediums, including electronic."

While recognizing that the internet, including social networking sites, provides immediate access to a limitless amount of information potentially useful to a judge laboring over difficult case-specific factual issues, the recent ABA opinion highlights two important justifications for the prohibition against electronic factual research.

First, information found on the web may be fleeting, biased, misleading and sometimes downright false. Second, unless the narrow judicial-notice exception applies, gathering even trustworthy information from the internet compromises the division of responsibility between the judge and the parties so essential to the proper functioning of the adversarial system. The committee emphasizes this point by describing the "defining feature" of the judicial role as a judge's duty to base decisions only on evidence presented in court and available to the parties.

The limitations on independent factual research by judges are not solely a matter of judicial ethics. Rule 2.9(C) is one of the few provisions of the Model Code that integrates an evidentiary rule into an ethical standard. Rule 2.9(C) permits a judge to consider a fact from sources other than the evidence submitted by the parties as long as the judge abides by his or her jurisdiction's requirements for taking judicial notice of the fact. Incorporating a rule of evidence into an ethical rule complicates the analysis because, as noted by the committee, judicial notice standards and procedures vary significantly from jurisdiction to jurisdiction.

To illustrate how Rule 2.9(C) and the doctrine of judicial notice interface, the committee examines Federal Rule of Evidence 201, which governs judicial notice. FRE 201(a) and (b) permit judicial notice of a fact that relates to the parties in a case (an adjudicative fact) only when that fact is "not subject to reasonable dispute" because it is (1) "generally known" or (2) "accurately and readily determined" from a source "whose accuracy cannot reasonably be questioned." Even if a "fact" meets this rigorous test, the judge must provide the parties with an opportunity to contest the need to notice the fact and a chance to challenge the accuracy of the fact. Like most state rules governing judicial notice, the federal rule only bars judicial notice of adjudicatory facts. The doctrine does not restrict a judge's independent research of legislative facts, such as statistical, sociological and economic studies, which differ from adjudicative facts in that they are not unique to the litigants but are facts that assist a judge in deciding questions of law or policy.

The committee offers four guidelines to help judges determine the ethical propriety of investigating facts on the internet. Because the guidelines are by necessity general in nature, the committee also provides hypothetical scenarios to illustrate their application.

GUIDELINES AND HYPOTHETICALS

First, the committee suggests that when a judge determines that information in addition to the evidence presented by the parties is necessary to decide a matter, the judge should turn to the parties rather than the internet to supply the needed facts. Second, and related to the first guideline, Rule 2.9(C) bars a judge from using the internet to corroborate or discredit adjudicative facts or supplement the evidence provided by counsel.

To illustrate the application of the first two guidelines, Opinion 478 offers a hypothetical situation in which a judge checks Yelp and Google Maps to determine the hours that a defendant's restaurant is open for business. At trial, neither party presented evidence on the issue. Since the restaurant's hours of operation are relevant to whether the hypothetical plaintiff can prevail on a claim for unpaid wages, this gap in the parties' evidentiary presentations cannot be filled by the judge's independent research. If the jurist requires the information to decide the case, the only recourse is asking the parties to present evidence on the restaurant's business hours.

Third, the committee notes that judges may use the internet to educate themselves about subjects unrelated to a pending or impending case. Use of the internet for such educational purposes is no different than attending judicial seminars or reading books. The hypothetical scenario offered to illustrate this point concerns a jurisdiction that regularly hears environmental contamination cases. Before such a case is assigned, the judge may read...
online articles supplying background information on the subject. However, the committee hastens to add that even general research is inappropriate if a judge's purpose is to obtain information to help determine adjudicative facts.

Fourth, Opinion 478 cautions judges to avoid seeking background information on litigants and lawyers if the judge seeks the information to help decide a case. In the committee's hypothetical used to illustrate this guideline, a judge reviews the social media and business websites of parties and their counsels to gain general information about the parties, survey the lawyers' client lists, and review the lawyers' writings. According to the committee, Rule 2.9(C) flatly prohibits conducting online research to obtain information about a party or juror in a pending or impending case. Gathering information about a lawyer is more nuanced. If a judge's only purpose is to learn about a lawyer's background, experience or licensure status, the judge may do so over the internet to the same extent as a judge might review a lawyer's listing in a printed legal directory. But, again, a jurist may not use the information gathered to help decide factual issues in a case.

The committee offers another hypothetical that involves researching facts about a litigant. In the scenario, a judge needs the litigation history of a party. So the judge searches the court's computer files to identify the party's pending and closed cases, as well as the facts of each case. The committee's analysis begins by reciting the generally accepted rule that a judge may take judicial notice of a court's paper and computerized files. Indeed, many states have added provisions to their codes of judicial conduct that grant judges the authority to consider court files. For example, Rule 2.9(C) of the Montana Code of Judicial Conduct provides that a judge may consider online court records at bail and sentencing hearings. Opinion 478 cautions, however, that judges must (1) maintain technological competence to navigate computerized records; (2) exercise care to ensure that the judicially noticed records pertain to the same party currently before the judge; (3) not take judicial notice of sealed court records; and (4) advise the parties of the court's intention to judicially notice court records.

A final scenario is offered to remind judges that they may not sidestep Rule 2.9(C) by assigning law clerks, interns or other nonjudicial court employees the task of performing the prohibited internet research. Rule 2.9(D) places a duty on judges to make reasonable efforts to ensure that employees under the judge's supervision and control do not violate Rule 2.9(C).

**AN IMPORTANT OPINION**

With more than 3.5 billion Google searches every day, browsing the internet for “facts” has become routine. But internet searches cannot become routine for judicial officers. A judge's role in an adversary system should be limited to considering facts produced by litigants and, generally, should not include judges producing and then considering their own facts. Moreover, whenever a judge independently notices a fact, that fact will necessarily help or hurt a party and therefore potentially create an appearance of judicial partiality.

Opinion 478 reminds judges and lawyers that judicial notice is a narrow doctrine, and that failure to follow the constrictions of the doctrine harms the adversary system and adversely impacts the appearance of judicial impartiality. Equally important, the opinion tells judges that before taking judicial notice of an adjudicatory fact, they must advise the parties of their intention and provide an opportunity for the parties to respond.

Raymond J. McKoski is a retired Illinois Circuit Court judge and the author of *Judges in Street Clothes: Acting Ethically Off-the-Bench.*
A Fireside Chat with George Campbell
Advice from an enlightened Scot about eloquence, analogies and how to handle a hostile audience

By Bryan A. Garner

If you follow this column, you know that I occasionally interview writers of the past. I ask them questions and they speak through their books—no spiritualist required. This month, we’re talking with George Campbell (1719–1796), the Scottish rhetorician and professor of divinity. A major figure in the Scottish Enlightenment, he was an erudite student of persuasion. I sat down recently to interrogate his The Philosophy of Rhetoric (1776). In the following exchange, Campbell uses 18th-century language, so it may take you a moment to adjust to his style.

Garner: You write a great deal about eloquence. How do you define it?

Campbell: Eloquence is the art or talent by which the discourse is adapted to its end. All the ends of speaking are reducible to four: every speech being intended to enlighten the understanding, to please the imagination, to move the passions, or to influence the will.

Garner: Lawyers are commonly trying to influence the minds of judges and juries. Our goal is to persuade. That may involve enlightenment, gratification and even playing on emotions. Right?

Campbell: Although the lawyer may intend to move his audience, he only declares his purpose to convince them. To profess an intention to work upon their passions would be in effect to tell them that he meant to bias them by his art and, consequently, would be to warn them to be on guard against him. Nothing is better founded than the famous aphorism of rhetoricians: The perfection of art consists in concealing art.

Garner: What's required for this perfection?

Campbell: Simplicity of word choice and precision in arrangement, from which results clarity.

Garner: That's certainly true. But the law or facts of a case are often far from simple. How can a lawyer efficiently communicate a complex legal argument?

Campbell: The syllogism is the shortest way of communicating principles. If a syllogism be regular in mood and figure, and if the premises be true, the conclusion is infallible.

Garner: That's the tough thing, though, isn't it? The truth of the premises.

Campbell: The whole foundation of the syllogistic art lies in these two axioms: “Things which coincide with the same thing coincide with each other” and “Two things, whereof one does, and one does not, coincide with the same thing, do not coincide with one another.” On the former rest all the affirmative syllogisms, on the latter all the negative.

Garner: What's the best use of analogies?

Campbell: Analogy is generally more successful in silencing objections than in evincing truth, and on this account may more properly be styled the defensive arms of the orator than the offensive. Though it rarely refutes, it frequently repels refutation, like those weapons which, though they cannot kill the enemy, will ward his blows.

Garner: Let's shift gears. Why should we care that our speech and writing be interesting?

Campbell: Attention is a prerequisite to every effect of speaking and writing; and without some gratification in hearing and reading, there will be no attention, at least of any continuance. The attention must inevitably flag. But there is still a further end: Lively ideas have a stronger influence than faint ideas to induce belief. They are also more easily retained.

Garner: Alas, lawyers must often deal with dreary technicalities.

Campbell: At the bar, critical explications of dark and ambiguous statutes, quotations of precedents sometimes contradictory, and comments on jarring decisions and reports often necessarily consume the great part of the speaker's time. It's a mixture of metaphysics and verbal criticism. But when the argument does not turn on the common law, or on nice and hypercritical explications of the statute, but on the great principles of natural right and justice, as sometimes happens, particularly in criminal cases, the advocate is much more advantageously situated for exhibiting his rhetorical talents.

Garner: What role do the passions play?

Campbell: When persuasion is the end, passion must be engaged. The coolest reasoner in persuading always addresses himself to the passions some way or other. This he cannot avoid doing, if he would speak to the purpose.

Garner: Can you give an example?

Campbell: You assure me, “It is for my honor.” Now you solicit my pride, without which I had never been able to understand the word. You say, “It is for my interest.” Now you bespeak my self-love. “It is for the public good.” Now you rouse my patriotism. “It will relieve the miserable.” Now you touch my pity. There is no persuasion without moving the passions.

Garner: Doesn't the nature of the audience affect the degree to which an advocate tries to evoke passionate responses?

Campbell: When the hearers are rude and ignorant, nothing more is necessary in the speaker than to inflame
their passions. His word will satisfy. And therefore bold affirmations are made to supply the place of reasons. Hence it is that the rabble are ever the prey of quacks and impudent pretenders.

Garner: How important is it that the advocate be sympathetic in the listeners’ or readers’ minds?

Campbell: Whatever lessens sympathy must also impair belief. Sympathy in the hearers to the speaker may be lessened in several ways, chiefly by these two: by a low opinion of his intellectual abilities and by a bad opinion of his morals.

Garner: Here we are 242 years after you wrote your Rhetoric, and it seems that many people aren’t bothered by a speaker’s impaired morals—not, that is, if they belong to the same political party. Our nation has become astonishingly divided and partisan.

Campbell: If the speaker and the bulk of the hearers belong to contrary parties, their minds will be more prepossessed against the speaker, though his life were ever so blameless, than if he were a person of the most flagitious [villainous] manners, but of the same party. This holds true for all parties, religious and political. This difficulty even the divinest eloquence will not surmount.

Garner: That’s a depressing thought.

Campbell: The more gross the hearers are, the more susceptible they are to such prejudices. Nothing exposes the mind more to all their baneful influences than ignorance and rudeness; the rabble chiefly consider who speaks, people of sense and education what is spoken.

Garner: How should a speaker handle the hostile audience?

Campbell: When the opinion of the audience is unfavorable, the speaker must be much more cautious in every step he takes to show more modesty and greater deference to the judgment of his hearers; perhaps, in order to win them, he may find it necessary to make some concessions in relation to his former principles or conduct—so that, like men of judgment and candor, they would impartially consider what is said and give a welcome reception to truth, from whatsoever quarter it proceeds. Thus he must attempt, if possible, to mollify them, gradually to insinuate himself into their favor, and thereby imperceptibly to transfuse his sentiments and passions into their minds.

Garner: I suppose it’s very different with a receptive audience.

Campbell: When the people are willing to run with you, you may run as fast as you can, especially when the case requires impetuosity and dispatch.

Garner: What special challenges do lawyers face as advocates?

Campbell: We know that the lawyer must defend his client and argue on the side on which he is retained. We know also that a prior application from the adverse party would probably have made the lawyer employ the same acuteness and display the same fervor on the opposite side of the question. This circumstance, though not considered a fault in the character of the lawyer, but instead a natural and ordinary consequence of the office, cannot fail, when reflected on, to make us shyer of yielding our assent.

Garner: What’s the most important thing you teach your students?

Campbell: Every sentence ought to be clear. The effect of all the other qualities of style is lost without this. Whatever is the ultimate intention of the orator—to inform, to convince, to please, to move or to persuade—still he must speak so as to be understood, or he speaks to no purpose. He may as well declaim before his audience in an unknown tongue.

Garner: Is it possible to be too clear at times?

Campbell: In what we read, and what we hear, we always seek for something in one respect or other new, which we did not know, or at least attend to, before. The less we find of this, the sooner we are tired. Superfluities are apt to disgust us quickly. The reason is not because anything is said too clearly but because many things are said that ought not to be said at all.

Garner: You seem to assume an attentive readership. What about inattentive readers?

Campbell: With them—and they are a pretty numerous class—darkness frequently passes for depth. They regard clarity and superficiality as synonymous. But it is surely not to their absurd notions that our language ought to be adapted.

Garner: Indeed. Thank you for allowing us to time-travel to 1776 to hear your thoughts—surprisingly apt even today.

Campbell: I rather enjoyed it myself, Bryan. Do come read me again.

Perhaps I just imagined that last response. But the visit was memorable.]

Bryan A. Garner, the president of LawProse Inc., is the editor-in-chief of Black’s Law Dictionary and author of many books, most recently the memoir Nino and Me: My Unusual Friendship with Justice Antonin Scalia. George Campbell was a professor of divinity at Marischal College in Aberdeen. Besides his The Philosophy of Rhetoric, he wrote Lectures on Pulpit Eloquence and The Four Gospels.
The Art of Resting

It’s critical for lawyer well-being, so here’s how to fit rest into your schedule

By Jeena Cho

In 2011, I was diagnosed with social anxiety disorder. In hindsight, this result was foreseeable: My boyfriend and I decided to start a bankruptcy practice in 2009 in the midst of the financial crisis. We were both working around the clock. I never thought about sustainability, creating a law practice where there is time not only to work but to renew, restore and rejuvenate.

When we got married, the honeymoon was the only vacation we’d had in over three years. I recall sitting on the porch of a beautiful house in Kauai with nothing to do and full of anxiety. I had no idea how to rest.

Returning to wholeness meant adding consistent and intentional habits to pay attention to my own well-being. I learned to guard myself from unintended consequences of lawyering, such as burnout, vicarious trauma and compassion fatigue. I was able to tap into my natural sense of curiosity and creativity, which led to surprising insights and different ways of seeing challenging client issues.

I returned to a deeper sense of meaning and purpose for why I practice law. Rest wasn’t an adversary to my law practice, but rather essential and complementary.

Focusing on making small, incremental changes over a sustained period of time is the key to creating any new habit. This includes learning how to rest. As Alex Soojung-Kim Pang wrote in his book Rest: Why You Get More Done When You Work Less, “Rest turns out to be like sex or singing or dancing, "If you reflexively reject the idea that you can and should carve out time for rest, consider what effect this belief has.

Think about rest in the context of self-care. Self-care is an activity for you, by you. No one else can eat more kale or go to the gym for you. It’s about identifying your own needs and taking steps to meet them. Consider activities that feel nourishing and nurturing.

Self-care doesn’t have to take a lot of time or money. It’s about the attitude or the intention you bring to the activity. Are you taking proper care of yourself? Are you treating yourself kindly?

SELF-CARE ACTIVITIES

Movement. The word exercise is associated with specific activities, such as going to the gym. Broaden your definition to include any activities that involve moving the body. Find movement that feels good. Be flexible. One day, your movement practice might be an hour at the gym; the next day, it might be playing with your kids in the park.

Creativity and hobbies. Do an activity simply for the fun of it. Think back to your childhood and see whether there are activities you used to enjoy that have fallen by the wayside.

Journaling and writing. Writing is an excellent way to process held feelings, explore your inner world and tap into your creativity. One of my favorite practices is described as Morning Pages on the Julia Cameron Live/the Artist’s Way website. You simply sit down each morning with a pen and paper to write whatever comes to mind.

Mindful eating. There is no shortage of diet tips and what you should (or shouldn’t) eat. However, how you eat is as important as what you eat. Simply described, mindful eating means paying attention while you are eating. If you regularly eat mindlessly, shoving food into your mouth while doing email, only to look down and realize your plate is empty, consider making small adjustments to how you eat. Look at the food—all the colors, the flavors, the smells. Savor the experience.
AN ELUSIVE STATE

There’s no off button for the brain. You can go for a massage or sit down to read for pleasure, but the mind may not immediately go into rest mode. It’s natural for the mind to race, think about a case and wonder whether you sent that email.

Trying to force the mind to stop thinking is as effective as holding down a beach ball in the ocean. It takes a lot of effort, and sooner or later it will pop back up. Rather, frame it as an invitation for the mind and body to rest. Your mind or body may have other plans, but you’re still doing your part by creating an optimal state for rest.

You can go on a weeklong vacation to Hawaii, sit on the beach and sip your favorite beverage, yet your mind may still be back at the office, working frantically. These moments can be very frustrating. Part of learning how to rest is increasing self-knowledge about how your mind works. Rather than criticize yourself for feeling anxious, invite the anxiety to sit down for tea.

Finally, if you’re struggling to overcome guilt or negative self-talk about taking time to rest, remember: You cannot serve from an empty vessel.

MINDFULNESS PRACTICE (IN JUST 6 MINUTES)

Here’s how to let go of stress and anxiety: Begin by finding a comfortable posture, allowing the eyes to soften and taking a moment to congratulate yourself for being here. It’s helpful to work through stress and anxiety not by thinking about the content but rather noticing where in the body you’re holding the stress or anxiety.

Do a body scan. Starting with the head, move the attention slowly—down the neck, shoulders and torso, and notice whether there is any tightening or tension. Move down the arms and hands, then into the lower body—the hips, then the legs. Feel your feet on the floor. Take a nice, long breath. Make it the longest breath you’ve taken all day.

If you notice the mind going into thinking or worrying mode, recognize that in this moment there is nothing to do except simply be here.

With each inhalation, you’re drawing in fresh energy. With each exhalation, you’re releasing and letting go of anything you no longer need.

Close the practice by beginning to wiggle the fingers and toes and very gently moving your body in any way that feels good to you. When you feel ready, allow the eyes to open. (You can hear an audio version of this guided meditation at jeenacho.com/wellbeing.)

Jeena Cho consults with Am Law 200 firms, focusing on actionable change strategies for stress management, well-being, resilience training, mindfulness and meditation. She is the co-author of The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation and practices bankruptcy law with her husband at the JC Law Group in San Francisco.
GAME THEORY

LAWYERS ARE TURNING TO SIMULATIONS TO TEST HOW SAFE THEIR SYSTEMS ARE  BY JASON TASHEA
LAST FALL, MacKENZIE DUNHAM WAS A LAW STUDENT WORKING AT A PERSONAL INJURY FIRM in Houston when one of the firm’s two partners called the office to say their car had been broken into and he would not make it in.

Not worried, the partner mentioned that among his stolen belongings was a MacBook he used for work.

This was when Dunham realized the theft was not just a nuisance—it was a major breach of client documents.

With no stated firm policy, he leaped into action by rejecting the computer’s access to the firm’s various online accounts and remotely wiped the machine.

“I just did what I could to minimize [the breach],” Dunham says. Without his efforts, “the person that had the laptop would have access to client files.”

After the incident, Dunham created the firm’s first security policy and made sure all firm devices were trackable and able to be remotely wiped.

Now a staff attorney at Access Justice Houston, a nonprofit law firm he founded, Dunham says this lesson taught him that “you need to be prepared to have every device that has ever touched client information ... stolen.”

Like that laptop in Houston, cybersecurity is a moving target. And as technology evolves, threats and vulnerabilities evolve, too. To not be caught on the back foot, firms are using simulations to find vulnerabilities and build or bolster their cybersecurity systems, as well as cultivating firmwide culture change to train employees.

“It has to be as natural as putting on your shoes every morning,” says Ruth Hill Bro, a co-author of the second edition of The ABA Cybersecurity Handbook and co-chair of the ABA Cybersecurity Legal Task Force.

This means making “data protection a part of your law firm culture,” Bro says. No longer solely an IT issue, she says everyone must be involved, from the top down. For the skeptics, she says to “insert your name into the most recent headline.”

Those headlines are becoming more common. According to the Identity Theft Resource Center, a nonprofit that helps those who have experienced identity theft, more than 1,300 data breaches happened in 2017, which exposed more than 174 million records that had personal identifying information such as Social Security and credit card numbers, emails and passwords.

And according to the ABA’s 2017 Legal Technology Survey Report, 22 percent of respondents suffered a security breach at their law firms.

To put that into monetary terms, the research firm Cybersecurity Ventures estimates that ransomware attacks alone, like WannaCry, created $5 billion in damages last year, up from $325 million in 2015. Further, according to Cisco’s 2017 Annual Cybersecurity Report, 22 percent of firms that were breached lost customers, 29 percent lost revenue, and 23 percent reported lost business opportunities.

FINDING THE WEAK SPOT

Cybersecurity simulations take a variety of formats, including threat assessments, digital penetration testing and paper simulations. At their core, they all intend to root out weaknesses or blind spots in a cybersecurity plan or network by creating a realistic representation of an attack.

There is some debate about the scope of these approaches. Red team simulations, for example, take an adversarial approach in which a group is asked to emulate a realistic attack on a system. This is an opportunity to test the system’s detection and response capabilities. Sometimes in these simulations, there is also a blue team, which attempts to defend from the attack. A variation on this theme is penetration testing. This happens when one or more person attempts to exploit known system vulnerabilities, and it can illustrate the breadth and depth of unpatched or unknown vulnerabilities. Neither of these approaches is meant to cause harm to the systems themselves but rather to show in real time the weaknesses and strengths of an existing system.

Another mechanism firms are using to assess their vulnerabilities is tabletop simulation. Justin Weissert, director of proactive services at cybersecurity firm CrowdStrike, sees the use “growing in the legal space.”

To create the paper-based simulations, CrowdStrike spends a day or two with an organization’s employees learning what current incident response practices look like, the firm’s technical capacity, and other human factors that can contribute to an incident response. With this information, CrowdStrike develops a daylong exercise for members of IT, the executive team, and legal and public relations to game out how they detect and respond to the scenario.

This approach is meant to help firm leadership grapple with vulnerabilities through targeted attack scenarios without testing their technical systems. Tabletops can provide context to gaps in security processes, Weissert says. For many, he says, it is eye-opening.

Through the process, organizations can “identify initial stepping-
Cybersecurity simulations take a variety of formats, including threat assessments, digital penetration testing and paper simulations. At their core, they all intend to root out weaknesses or blind spots in a cybersecurity plan or network by creating a realistic representation of an attack.

stones” for a playbook—a step-by-step guide to triage a cybersecurity breach, Weissert says.

Within that playbook, he also recommends that firms consider security audits when contemplating the acquisition of another firm. “It’s the same kind of thing as allowing an acquiring company to take a look at your books,” he says.

However, creating a plan is one step. Without companywide buy-in, the best-laid plans can crumble, and implementation has its hurdles, says Andy Sawyer, director of security at Locke Lord, who’s based in its Dallas office. “Anytime you make a change, whether it’s at a law firm or big bank or another business … you’re going to have opposition,” he says.

The fact that clients are demanding cybersecurity best practices is helping motivate the more recalcitrant. Sawyer says clients send assessment audits to be filled out by the firm as a condition of representation. With that, Sawyer can go to a resistant attorney and show the clients’ demands to help nudge the attorney.

With more than five years of experience building the firm’s security awareness program, he does not see the same amount of pushback he did earlier in the process. Getting attorneys to update their practices is critical for the issue that concerns him the most: phishing. “No one is attacking our firewalls anymore; they’re attacking us,” Sawyer says.

Historically, a hacker would attack the firewall to try to enter the system. Now, he says, phishing emails prey on human folly to enter the system, and they’ve changed significantly in the last two years. With increased phishing attempts, he says, employees are the target. To that end, this means “we rely on the technology, but we don’t rely on it exclusively.” He adds that “our security [is] more about people than technology.”

Sawyer says there are key components to the program’s success, which include constant outreach, firmwide communication, and the support from the firm’s leadership to implement firmwide security protocols.

For outreach and communication, he initially sent monthly newsletters that had introductory security tips, such as do not give your child a password to a

work computer. Over time, as the newsletter became more targeted, he began to provide CLE credits for security trainings, and he sends a “Phish o’ the Day” email that illustrates phishing attempts that evade the spam filter, which he says come about one every two minutes.

Sawyer’s focus on phishing attempts is well-placed. The same Cisco report says spam makes up 65 percent of email traffic, and up to 10 percent is malicious. That rate is climbing because of the increased use of botnets, a network of private computers infected with malicious software that gives control to a third party.

A CONSTANT PROCESS

Threat assessment, at its core, gets to the bigger questions, such as “What are you storing and why? And what you are communicating and how?” says Shauna Dillavou, principal at Security Positive, a security consultancy in Washington, D.C.

The assessment process, like a risk audit, allows firms or individuals to find their vulnerabilities and build procedures around those unique risks. Dillavou says this process is important because “guides that tell you to do ‘these three things’ aren’t for everybody.”

With communication being critical, Jill Rhodes, chief information security officer at Option Care in Chicago and co-editor of The ABA Cybersecurity Handbook, says cybersecurity is serious, but “the delivery of the message doesn’t necessarily need to be.”

Rhodes helps clients create cartoon mascots to reinforce security awareness. At Option Care, which provides at-home IV treatments, its mascot is a syringe called “the Infuser” that wears sunglasses and a cape.

“When people see that, whether or not they realize it, they refer back to information security,” Rhodes says. This, coupled with other initiatives, creates repetition that reinforces the message, she says.

Strong cybersecurity requires repetition, and it also requires constant revision. Bro of the ABA Cybersecurity Legal Task Force says completing an assessment or attending a training is not the end of the process. Cybersecurity “is not a destination,” she says. “It’s a journey.”
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Legal analytics are being used to determine gender diversity of firms
By Danielle Braff

Law often has been described as an old boys’ club. While many firms and companies have committed themselves to achieving gender diversity, it’s fair to ask whether the old-boys’-club mentality still exists—especially when it comes to trial lawyers. Do women actually play important roles on cases? Or are they there as window dressing?

Legal analytics can study the gender of attorney appearances in court to see whether a firm actually has true gender diversity. Even if a firm technically has a large number of women, it might not be giving them significant roles within the firm, says Michael Sander, founder of New York City-based Docket Alarm, which uses technology to help attorneys track and predict court case outcomes. (Docket Alarm was acquired by Fastcase on Jan. 10, and Sander is now managing director of Docket Alarm and director of Fastcase Analytics.)

“Traditionally, diversity is measured via head count—how many partners and associates are male or female,” Sander says. “But that’s a basic measure, and it doesn’t measure the substance of what they’re doing. We look at the appearances they made in court.”

So far, the technology has revealed dire numbers, according to Sander.

LACK OF REPRESENTATION

According to a 2017 report by the National Association for Law Placement, 22 percent of partners at major law firms are women. But they aren’t well-represented in court, according to Docket Alarm. Fifty-five of the top 100 law firms had less than 10 percent of their attorney appearances made by women. Eight of the top 100 firms never had a single woman on any of their cases. In patent court, 12 percent of court appearances were made by women.

“It was really, really awful,” Sander says.

But more law firms are requesting this data, says Doug Ventola, Boston-based managing director at Consilio, a technology company that provides analytics on legal spending as well as gender with its Sky Analytics tool.

Ventola says about 40 percent of his company’s clients are collecting or beginning to collect gender and other diversity data from law firms, which is a sharp increase since they first began providing this service in 2011.

“With ABA Resolution 113, which urges clients to assist in facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase to diverse attorneys, companies are more interested in understanding and measuring gender information as it relates to the work being performed by their outside law firms,” Ventola says.

Now that we have the data, it’s time to look at the root of the problem, says Daniella Isaacson, senior analyst at ALM.

“Traditionally, diversity is measured via head count—how many partners and associates are male or female.”

Michael Sander
Intelligence.

“Who is actually contributing to the work?” she says. “We’re really struggling in litigation to get women really to be more in the practice areas.”

But what comes first—getting women interested in taking a deeper role in certain male-dominated practice areas such as high-tech or pension law, or convincing the firms that women should be promoted in those areas?

If they knew they’d have a chance of being promoted, then maybe they’d be more interested, Isaacson says. The only legal fields in which women outshine men are immigration and family law. “It’s hard to say if the firms are pushing people into some practice areas and then it trickles down into the culture,” she adds.

VISIBLE DIFFERENCE

Some firms, however, are bucking the trend. In 47 percent of patent cases, a female attorney was present for McCarter & English, according to Docket Alarm.

“We don’t go out to look specifically for women, but we probably attract women to the firm because they see that we have women in positions of leadership and authority,” says Betty Hanley, head of McCarter & English’s intellectual property practice group and a member of its executive and compensation committees. “Women apply because they know this about us.”

Crowell & Moring was another firm represented by women in 47 percent of the patent cases. Unlike McCarter & English, it specifically targeted women in the recruitment efforts.

“We hire with an eye toward recruiting diverse talent because our experience has taught us that diverse perspectives provide us and our clients broader insight to solve the most complex legal issues our clients confront,” says Philip Inglima, chair of Crowell & Moring.

While those firms already are contributing to gender equality, Sander of Docket Alarm says he hopes his technology will spur other firms to do the same.

“If you have poor gender diversity, you can use this and have a goal and try to get to a different mark,” Sander says. “Hire new attorneys, and get different ones involved.”

Once firms achieve their goals, they also can use legal analytics as a marketing tool to advertise their gender-diverse firm, Sander says.

It’s a technology that could change the future of the courtroom, one woman at a time.
Holding Steady
Although more lawyers are performing the work of paralegals, job prospects for trained assistants seem good

By Marc Davis

Five years ago, it seemed like the paralegal industry was about to become obsolete. A January 2013 Associated Press report claimed that an increasing number of lawyers were using computer software and technology to do the work paralegals once did.

The report hit the paralegal industry like a sucker punch. The market had been red hot—the Bureau of Labor Statistics had previously predicted an 18 percent growth in paralegal jobs through 2020. In 2014, however, the bureau revised its projections, forecasting an 8 percent growth from 2014 to 2024. The bureau then adjusted that figure to a 15 percent growth from 2016 to 2026—a decrease of 3 percentage points from its original projection.

So was the AP report about lawyers relying more on technology much ado about nothing? Not necessarily. While solo and small-firm lawyers have increasingly turned to technology, they haven't completely turned their backs on hiring paralegals.

“In the past, with the big firm I was with, I used paralegals to issue subpoenas for documents, to organize them, file them electronically,” says Deborah G. Cole, a Chicago-based solo practitioner who specializes in commercial litigation and employment law and is among the growing number of lawyers who perform the work paralegals typically do. “Now I do it all myself, including documents searches; I know exactly what I’m looking for.”

Cole doesn’t use a secretary or office administrator either. She uses computer software to handle the usual tasks, including case management. “Still, I have a manageable caseload,” she says.

A major benefit of not using a paralegal, Cole points out, is the significant cost savings for solos and small firms. “Depending on the case, by my using software rather than a paralegal, I can save anywhere from $50,000 to $100,000,” she says.

Despite reports of the slow disappearance, “there will always be a need for paralegals,” says solo attorney Megan Zavieh, who has offices in Alpharetta, Georgia, and the San Francisco Bay Area and specializes in defending lawyers who face ethics investigations and state bar prosecution.

HELP ON TAP
Zavieh performs the work of paralegals, but on occasion she hires one on a per-need basis. The work, facilitated by technology, that she or a paralegal might do includes scheduling, creating tables of contents and documents, and preparing client intake forms and files.

But technology can’t provide the human touch, Zavieh says. “A large part of my job is being a counselor to my clients. I listen, I understand their stress [and] they can vent on to me,” she says.

Attorney Jill Vereb tells a similar story. Although she never wanted to be overwhelmed by paperwork, she declined to hire a paralegal or a secretary. Vereb, who runs a solo family law practice in Sugar Land, Texas, does all the work a paralegal might do.

“I do all the document research,” she says, by way of example. “When I do that myself, I’m less likely to miss something important that might be missed by a paralegal.”

By using a software program that converts PDFs, emails and other documents into searchable versions, she’s able to bypass much of the tedious work of reviewing what she describes as reams and reams of paper. “I enter a search word and it streamlines the process,” she says. “But when I’m superbusy, I may hire a paralegal on a temporary basis.”

By contrast, paralegals are part of attorney Luis Salazar’s legal team. But he doesn’t use as many as he did before. He is head of a small firm in Coral Gables, Florida, specializing in corporate compliance law, bankruptcy law and complex commercial litigation.

“Paralegals can’t appear in court as representatives of a client, but they’re with me in court when I’m litigating a case,” he says. “They’re familiar with the documents I might need and the exhibits. If I ask for something, they snap it up right away and give it to me.”

At one time, Salazar used nine paralegals. Now, however, he’s got just three.

“Maybe demand for entry-level paralegals is declining,” says Amy McCormack, co-president of Chicago-based McCormack Schreiber Legal Search. “But the market for trained paralegals is strong.”
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HURRICANE HEROES

When Harvey and Irma hit the U.S. mainland, the legal community rose to the occasion.
Then they reported to those shifts in large numbers. Importantly—put out the call for pro bono volunteers. Nneys got their legal aid colleagues loaner computers, kept office space to some of Lone Star’s units. Private attorneys, who were spread out across the city, helping Houstonians with their hurricane-related legal problems.

The fire took out Lone Star’s phone and email systems and other resources just as the agency was gearing up for a major disaster response effort. Right after the fire, Lone Star attorneys operating in hurricane shelters were working at a makeshift table made of a board atop two cardboard boxes with the words “Legal Aid” written on them with a felt-tip pen. Those who weren’t in shelters worked from home (if they hadn’t flooded), using cell phones and free web-based email accounts.

Lone Star attorneys soon discovered that they had a lot of friends in Texas. When they couldn’t answer calls to a state-wide legal advice hotline, their colleagues at Texas RioGrande Legal Aid took over. Law firms and non-profits throughout Houston donated office space to some of Lone Star’s units. Private attorneys got their legal aid colleagues loaner computers, kept them supplied with flyers to give out and—perhaps most importantly—put out the call for pro bono volunteers. Then they reported to those shifts in large numbers.

**LAWYERS REACHING OUT**

Attorneys affected by hurricanes Harvey and Irma have risen to the occasion in ways personal, professional and altruistic, even when dealing with storm damage of their own. And then another hurricane hit, and the need for legal assistance became even greater after Maria swept over the Virgin Islands and tore directly through Puerto Rico, where the destruction has far exceeded that of the U.S. mainland. In the weeks after Maria, Puerto Rico has been addressing its most vital needs first, including delivery of food and water and restoration of electricity. The mountain of legal needs that comes with the devastation isn’t far behind. (See “Across the Water,” page 64, on how the ABA is helping coordinate legal assistance on the islands.)

On the mainland, legal aid attorneys reported for duty seven days a week, mindful of the storms’ effects on the neediest. Attorneys in Florida and Texas volunteered in large numbers to help disaster survivors and opened their offices to fellow lawyers who found themselves with no place to go. In the name of due process, judges, prosecutors and public defenders rode out the storms at work.

And in the aftermath, all the players in the legal system have committed to making justice work—even under conditions that are less than ideal as the communities hardest hit continue their recovery.

“There’s no way any one person can do this,” says Saundra Brown, who manages Lone Star’s disaster response unit. “Remember the Timex watch [advertisement]—it takes a licking and keeps on ticking? Or the Energizer bunny? We just keep going.”

Here are some of those stories.

**KEEPING THE WHEELS OF JUSTICE MOVING**

On Sunday, Aug. 27, Hans Nielsen was sleeping on a couch in Houston’s main criminal courthouse when a colleague woke him. It was time to evacuate. Nielsen, a deputy district attorney with Harris County, was in the Harris County Criminal Justice Center because he’d volunteered to work during Hurricane Harvey. He and his colleagues got overtime pay for helping with overnight police needs, and the center seemed like a safe place to ride out the storm. After it was flooded by Tropical Storm Allison in 2001, the county had installed 4-foot watertight doors.

When Nielsen woke up, the water was 2 feet over those doors. The flooding had also pushed sewage into the building and burst pipes in the upper stories. “It was kind of game over at that point,” says Nielsen, chief of his office’s juvenile division.

To evacuate, the 30-plus people in the courthouse had to cross two streets filled with knee-deep, opaque brown water that had spilled over from Buffalo Bayou a block away. To keep evacuees from stumbling on unseen obstacles, authorities rigged a rope line for them to follow. Carrying their essentials in garbage bags, they followed the line to the nearby Juvenile Justice Center, where they stayed for three more sweaty days—the air conditioning went out—until the flood receded enough for replacements to arrive.

Public lawyers like Nielsen, and the judges they work with, have been doing their jobs in less-than-ideal conditions since Harvey and Irma. Even after the hurricanes, damage to some courtrooms and offices has meant making unusual accommodations to keep the wheels of justice turning.

Harris County fared better than some coastal parts of Texas where buildings were destroyed. As of January, courts from Aransas County were still operating out of borrowed buildings. Florida did a little better after Irma,
although cities north of the storm’s landfall suffered unexpected flooding, which forced a court in the Daytona Beach area to relocate.

Nonetheless, the damage is still extensive in Harris County. Harvey rendered the Criminal Justice Center unusable for at least nine months, which has meant finding new homes for the main offices of the district attorney and public defender, as well as 36 criminal courts. Nielsen says his colleagues, who were almost entirely housed in the center, are now sharing other county offices throughout the city.

An even bigger problem—and not just for prosecutors—was the fact that jury trials ground to a halt until mid-October. Because the underground Jury Assembly Room was ruined, jurors couldn’t be called. When trials resumed, judges were expecting them to proceed much more slowly than usual, thanks to the limited courtroom space. In a system with a Sixth Amendment right to a speedy trial—playing out in a county of 4.5 million people—that has created a lot of pressure.

To ease that pressure, Harris County Criminal District Judge Marc Carter tried to avoid setting cases for trial. His colleague, District Judge Jim Wallace, believes prosecutors were trying to help by offering defendants favorable deals. Though Wallace doesn’t exactly approve—he’s a former prosecutor and police officer—he says he’s not granting the kinds of delays that were once routine.

“Our trial docket is getting larger by the moment,” he says. “The reality of it is: If we can’t find a better way to try more cases, they’ll be sitting in jail for quite some time.”

Judges say defense attorneys have been understanding about the situation. Tucker Graves, president of the Harris County Criminal Lawyers Association, said in the months after the storm he’s heard complaints from some lawyers about the slow speed of trials. But Graves credits judges for recognizing the problem by setting the oldest jail cases for trial first.

Carter and Wallace have a lot of time to compare notes because they’re sharing a courtroom. When the Criminal Justice Center was destroyed, judicial authorities moved all 36 criminal judges into courtrooms designed for their civil colleagues, sitting two to a courtroom. To make room, the civil judges also doubled up. Wallace and Carter ended up sharing a courtroom at the Civil Justice Center.

Sharing a bench isn’t that much of a hassle, but being in a civil courthouse has been a major problem for criminal cases. The civil courthouse has no direct physical connection to the county jail and no cells for holding in-custody defendants. Thus, it initially was used only for hearings involving defendants out on bond.

For jailed defendants, hearings were being conducted in a makeshift courtroom at the jail—actually a series of long folding tables in a large open room. It’s loud, and privileged attorney-client conversations are conducted within everyone’s earshot. And because the public is not admitted inside, families must watch via closed-circuit television at the civil courthouse. Judges presiding over these hearings take turns visiting the jails.

People are doing their best, the judges say—but all the same, they’re concerned about how this will play out in the long run. They’d like to move back into the Criminal Justice Center as soon as they can, even if that means walking around construction.

“Yeah, we’re going to be inconvenienced,” Carter says with a laugh, “but … we would prefer to be inconvenienced in our old building because it would just serve the criminal justice system and the citizens of Harris County better.”

For public defender Robert Lockwood of Florida’s 16th Judicial District, the problem was not a lack of courthouses—it was getting there. His district encompasses the Florida Keys, a series of islands south of Miami, strung like beads along 110 miles of U.S. Route 1. It’s the only way to drive through the Keys, and after Hurricane Irma, it was lined with downed trees, washing machines and other detritus thrown around by winds as high as 130 mph. There was also a shortage of fuel—and Lockwood had sheltered in a hotel ballroom in Key West, 50 miles from where a makeshift court had been set up in Marathon. He had to call on favors to get the necessary gasoline.

Though new arrests were minimal after the storm, he says, a bigger problem was the inmates already in jail, who had all been evacuated to Palm Beach County. That’s a five-hour drive away, and the evacuation dragged on for two weeks. Although the Florida Supreme Court
had suspended legal deadlines for the hurricane, Lockwood didn’t like holding people for so long without charges—or in some cases, past their release dates.

So Lockwood convinced the high court to authorize his district to hear cases in Palm Beach County, and he enlisted the local public defender’s office to help his staff connect the Keys inmates with their families on the outside. It wasn’t necessary; jail authorities moved the inmates back shortly after everything was ready. But the cross-circuit cooperation broke new ground in which lawyers committed to helping one another for the clients and their families. “That’s why we all tried to get together,” Lockwood says.

LEGAL AID IN ACTION

Texas resident James McDonald has been eligible for disability benefits since 1995—for PTSD and depression stemming from Navy service in the Middle East and Somalia—but he never made the claim. He didn’t want to think of himself as disabled. But his emotional equilibrium suffered after Hurricane Harvey, when his landlords started demanding that his family vacate their house in the Houston suburb of Baytown.

There was little money to make the move; McDonald’s hours at his catering job had dropped to nearly zero following the storm, and his girlfriend hadn’t worked at all for a few weeks. Nevertheless, the landlords threatened to throw their things into the street if they didn’t leave within five days. Then they started a campaign of harassment, banging on the doors and sending a barrage of text messages. McDonald’s daughter, a senior in high school, was too anxious to sleep. And McDonald, who was driving for Uber at night to make ends meet, was finding the situation difficult himself.
McDonald got connected to the veterans unit at Lone Star Legal Aid. Attorney Justin Wilson got McDonald a temporary restraining order preventing the eviction and then brought him downstairs to Combined Arms, a Houston veterans’ organization that had donated office space to Lone Star. Combined Arms connected McDonald to federal disability benefits and treatment, then put him in touch with Main Street Ministries. The Christian nonprofit not only found him a new place to live but also funded the move. He was grateful and humbled. “I’ve never accepted help in anything,” McDonald says. “And suddenly I put it out there, and not only do I find help, but it’s like they’re just falling over themselves to try to help me even more.”

The judge who granted the restraining order suggested that the landlords wanted to make a FEMA claim, based on the misrepresentation that they lived in the house themselves. According to Brown of Lone Star’s disaster response unit, this kind of fraud is not uncommon after a disaster. In other cases, she says, landlords might use the damage as an excuse to evict low-paying tenants to make room for market-rate renters or to sell the building.

For legal aid agencies, which confront needs that far outstrip their resources, there’s no such thing as a slow day. But after hurricanes Harvey and Irma, their clients’ needs were too immediate to ignore. At first, disaster victims need help with the basics of life—securing benefits so they can eat and dealing with destroyed homes or landlord-tenant problems. Poverty exacerbates it all. “When you’re poor, everything’s harder,” says Brown. “They’re going to recover slower and worse.”

Legal aid agencies haven’t been handling these problems alone. In Houston, another major source of legal services to low-income communities is the Houston Volunteer Lawyer program, a project of the Houston Bar Association that connects private attorneys to pro bono firms, although attracting some, such as Brown, from bigger firms. Launched in 2014, TL has become both useful and entertaining, with the comfort level raised by Rule No. 1: no judges.

A repository for shared knowledge and information in wiki fashion, TL is a trusted source for how-to help and tips from experienced practitioners, for cross-state referrals, advice on the unwritten rules and realities of various courts, and a free-wheeling social gathering spot for political discussions, humor and surveys, such as one for the best way to cook bacon. Consensus: in the oven at 350 degrees for 15 minutes.

“Hurricane Harvey was the first real test for us,” says Andrew Tolchin, an attorney-mediator in the greater Houston area who created the Texas Lawyers page and whose mediation skills gained high marks when applied to disputes there, especially in the politics nook. TL had been adding about seven new members daily, but that rate more than doubled when the storm hit. “My sense is that hundreds, even thousands, of attorneys got a handle on flood law and some peace of mind with access to such timely, on-point information in their Facebook feed.”

When Tolchin, an elected member of the board of directors of the State Bar of Texas, posted a notice about the bar offering a free CLE course on flooding and recovery, it got 200 shares. “I’ve never gotten that many before,” he says. “You’re lucky to get that many for something other than a cat photo.”

One TL member’s cat did get attention. Stranded by flooding, the lawyer posted that she was unable to pick up prescription medicine for her pet. Another member got it and left it at an office near her that she could reach. Tolchin is not indulging in Texas-size speak when he adds, “It’s maybe the largest such group of just attorneys, maybe from a single state, but I think anywhere.”

Even if it is sui generis, similar Facebook groups likely will develop in other states as the use of social media increases.

**FLORIDA LEADS THE WAY**

In the e-governance realm—leveraging information technology for government services and operations—Florida is...
leading the way for court systems. Florida’s judiciary didn’t miss a beat when concerns about power surges prompted the controlled shutdown of servers, based in the state supreme court’s building in Tallahassee, on which a number of courts around the state have websites, email systems and online dockets. The high court immediately went to Twitter and Facebook to get out news on closings, extended deadlines and other need-to-know storm-related information for both lawyers and the public.

The court’s Facebook page even had a mustard-yellow logo, known as an event brand, to click for information on closings around the state. Florida’s court system was early to the social media game and is considered the leader nationwide. “It struck me this time that social media became the go-to way of communicating during the storm,” says Craig Waters, the Florida Supreme Court’s public information officer for the past 30 years. “Their use is extremely controversial around the country and some other courts tell me they’ll never adopt it. I have felt I was a voice crying in the wilderness.”

The supreme court began using Twitter in 2009 and now includes Facebook, Instagram, YouTube and LinkedIn, though Twitter and Facebook are the workhorses for breaking news and information. According to the National Center for State Courts, the judicial branches of 37 states and territories have some kind of social media footprint, while individual courts in some other states might do so on their own. Many courts and judges around the country are reluctant to use Facebook because of various ethical concerns—such as the term “friends” possibly rubbing against their need to be impartial.

Court challenges along that line, including one ongoing in Florida, concern individual judges on their personal Facebook pages having as “friends” lawyers who practice before them. The ABA issued Formal Opinion 462 in 2013 advising judges that they should disclose such a relationship when appropriate, but that they need not search through all of their social media connections if they’re not aware of one that might be problematic.

‘A MODEL GUIDE FOR OTHER STATES’

In 2015, Florida’s supreme court adopted a communications plan for the state judiciary to be implemented by the Florida Court Public Information Officers association. Last March, the FCPIO in turn adopted detailed model policies and guidelines for using social media, such as user agreements concerning content, and caveats such as nonendorsement of external hyperlinks.

“Florida’s communications plan is truly unique,” says Blake Kavanagh, an analyst with the National Center for State Courts. “It’s a model guide for other states looking to improve and coordinate their judicial communications system.”

When servers were down as Irma wended its way up the state, the Florida Bar and the supreme court got a lot of social media inquiries about bar exam results, which had been scheduled for release the following week. There were concerns that the bar examiners, who work in Tallahassee, would be delayed in tallying scores.

Waters sent out word via Twitter and Facebook on Sept. 13, in the still-fresh aftermath of Irma, that results would be posted as planned on Sept. 18. Of the 3,247 July test takers, 1,553 passed. Their anxiousness, and probably that of friends and family, was obvious: The court’s Facebook post announcing there would be no delay got 29,000 hits.

“That’s the most hits we’d ever gotten for a page,” says Waters.

The Florida Bar—all lawyers licensed to practice in the state must be members—redirected its always busy Facebook and Twitter accounts to deal strictly with Hurricane Irma-related matters.

“When the storm hit, we shut off everything else—bar news, social events, legal humor,” says Danny Aller, the bar’s public information coordinator for social media. Instead, they focused on the storm’s location, where to find relief when it passed, and how to volunteer legal aid to victims. The mix also was geared as much to the public as it was to the legal community, instead of the usual 80/20-percentage split toward lawyers.

One post gave a phone number to call and speak with a volunteer lawyer for storm-related legal help.

“That was shared 400 times,” Aller says. “On Facebook, that’s a crazy number for a bar association. It let us know the average person was finding it and sharing it.”

The state bar’s page averages 40,000 to 50,000 views in a 24-hour period, and the number grew to 300,000 during Hurricane Irma. The average of 15 posts daily nearly doubled.

In Texas, the court system relied on Twitter but not Facebook during Hurricane Harvey, tweeting news about court closures, legal aid hotlines and other storm-related information, says Megan LaVoie, public affairs director and special counsel for the Texas Office of Court Administration. “It’s amazing how the message on social media can spread like wildfire in these crisis situations,” LaVoie says. “There’s no other tool like it.”
opportunities. After the hurricane, the program kicked into high gear to help out, starting with staffing legal services tables in hurricane shelters, along with Lone Star. “We had over 500 attorneys sign up in the first two or three weeks,” says Michael Hofrichter, director of operations and compliance at Houston Volunteer Lawyers. “To put that in perspective, we typically have somewhere between 1,000 to 1,300 attorneys doing work for us over the course of a year.” Volunteers across Texas—and Florida—also showed up online and via telephone. The Disaster Legal Services program, a project of the ABA’s Young Lawyers Division, teamed up with the state bars of Florida and Texas to recruit lawyers to staff a hotline offering legal advice to hurricane victims. In all, the DLS says 932 volunteers had participated by January (and more are welcome). Both state bars also recruited their attorneys to offer online legal advice through Free Legal Answers, a project of the ABA Standing Committee on Pro Bono and Public Service that’s partially sponsored by the sections on Litigation and Business Law.

Tracy Figueroa, team manager for disaster assistance at Texas RioGrande Legal Aid, says a major source of questions is landlord-tenant problems, which tend to persist months after the storm. In the fall, her agency—which serves 68 counties along the Gulf Coast, Rio Grande Valley and Central Texas—was handling lots of those, as well as foreclosures, clearing real estate titles, problems with contractors hired to fix the damage and appealing wrongful FEMA denials.

Brown says Lone Star client Herman Smallwood had a typical FEMA appeal. He and his two sisters inherited a house from their mother years ago; he lives there and pays the property taxes, but his name wasn’t on the title when the hurricane hit. On that basis, his application for FEMA benefits was denied. As a result, Smallwood—who’s lived on disability payments since 2012—was living in a house that actually broke in places when flooding knocked it off the blocks that had elevated it. The drywall was collapsing. “The house just looked like a broken-down old horse—a brokeback horse,” he says. Brown says the denial was a clear violation of FEMA’s own regulations, which say an “owner” can be a person who lives in a property rent-free and is responsible for its upkeep. She’s filed scores of appeals on behalf of people in that situation, and she says they’re always successful. She’s expecting Smallwood’s appeal to be approved, but she worries about how many others there might be like him who didn’t get help.

For people in Figueroa’s service area, which includes some hard-hit communities between Corpus Christi and Houston, these problems were compounded by a housing shortage that predated the storm. Harvey worsened that by making a huge percentage of the area’s homes uninhabitable. As a result, even people who had FEMA vouchers were still living in shelters weeks after the storm, or they’d left the state to live with relatives. The situation was so bad that the state of Texas began installing mobile homes in October.

“I’m concerned about what’s going to happen to our community in general over the years,” Figueroa says. “I don’t know if they’re going to repopulate it the way that it was before, because there’s not a place for them to go.”

Eventually, Figueroa says, the legal problems created by the hurricane will move into long-term problems: bankruptcies, foreclosures and lawsuits over FEMA policies. One problem for her low-income clients—and for many others—will be getting their FEMA cases approved if they’re not harmed by a local disaster first.
Texas Lawyers’ Facebook Friend

DALE FELTON is a semi-retired Texas plaintiffs lawyer of some distinction, particularly as an insurance law expert in car and truck crashes. In one case, Arnold v. National County Mutual Fire Insurance Co., he prompted the state supreme court to create bad-faith law, though the opinion calls it the “duty of good faith and fair dealing.”

Felton has been a breakout star on the Texas Lawyers Facebook page, known to members as TL, even before the flooding of Hurricane Harvey. In 2008, a friend pulled him away from semi-retirement to take about 60 flood claims resulting from Hurricane Ike. Felton studied flood insurance, spending 21 days straight in a law library to learn about federal common law. He shared tips, insights and advice about flood insurance claims on TL after Harvey. Those included: federal court only, and no jury trials; no provision for attorney fees (the client can’t be made fully whole if the lawyer gets paid, but something is better than nothing); flood claims have a very strict timeline, and Felton determined nine different possible ones with Harvey, recommending the earliest.

“I told everybody to be on the safe side for right now, until FEMA’s director resolves that ambiguity,” Felton, a longtime Houston resident now living in tiny Navasota, says in an interview.

As the membership and page views grew at TL during and after the storm, so did Felton’s reputation within the group. “Some of his posts are like CLE courses,” says Andrew Tolchin, who created the Facebook page in 2014.

Andrew Weisblatt, a Houston business attorney, reposted a number of Felton’s offerings. “They were just so authoritative and so full of what people desperately needed,” he says. —Terry Carter

clients is when FEMA grants them money, then later comes back claiming the money was improperly paid and tries to claw it back. Recipients have 30 days to pay before penalties and interest start piling up—which is not much time for people of limited means. The litigation spawned by that or other bad FEMA policies can last years, she says; a lawsuit over 2008’s Hurricane Dolly, for example, was settled in 2017.

“Long term, it goes on for years,” says Figueroa. “These are not easy problems to solve.”

TWO HANDS: PRIVATE PRACTICE

Business litigator Charles Jimerson was up until midnight on Sept. 10—working on client matters rather than worrying about the potential impact of Hurricane Irma where he lives. In Jacksonville, 400 miles north of Irma’s U.S. landfall, there didn’t seem much to worry about. As a seventh-generation Floridian, Jimerson lived through plenty of hurricanes that fizzled.

When he awoke that Monday, the water in his living room was up to his ankles and rising. Irma unexpectedly pushed water levels in the nearby St. Johns River up 4 to 6 feet, causing Jacksonville’s worst flood in a century.

There was no time for Jimerson to save anything but his children—ages 5 and 6—and his two dogs. After carrying them to higher ground at a neighbor’s, Jimerson spent the rest of the day canoeing the neighborhood, trying to rescue people. His house would ultimately have to be bulldozed.

Jimerson & Cobb, the law firm he founded and manages, has fared slightly better. Though the firm’s office on the 14th floor of Jacksonville’s notable Wells Fargo Center was itself fine, 4 million gallons of muddy river water had wiped out electricity and telecommunications. Staff members had to go in and pull out essential files and a server—vital for the remote work they were now doing—without elevators, lights or air conditioning and against the wishes of building management.

It was, Jimerson says, a bonding experience for his team. But even more touching for him was the response when he sent out a plea to most of his business and personal contacts, looking for a place to put his 26 employees, as well as a place to live. He got about 350 responses within 36 hours.

“There’s a lot of really tough lawyers in this town, and high-character, high-integrity folks who had to deal with some adversity of their own,” he says. “But those people have two hands. And they’re going to help themselves and their family with the one hand, and they’re going to help everybody else in the community with the other hand.”

That’s a theme running through the private bar’s response to the hurricanes. When calls went out for help, hundreds of attorneys answered, offering a hand up to their colleagues as well as members of the public.

In Houston, one person who put out that call was tax partner Keri Brown of Baker Botts (no relation to Saundra Brown). The pro bono partner in her office, she was already helping Baker Botts’ management put together resources, both financial and legal, to help the firm’s own employees who were affected by Hurricane Harvey.

But a few days into the storm, Brown found herself wanting to do more. She was on the verge of volunteering to sort clothes in a shelter at 3 a.m. when she learned that Lone Star’s office had caught fire. She got loaner laptops from Baker Botts for the legal aid attorneys and organized law firms around the city to take turns photocopying the agency’s flyers. She also put out a call for volunteers via email and a Facebook group for Texas lawyers. (See “Social Media Unites Lawyers to Help Those in Need,” page 44.)

“Within an hour, I was turning people away,” says Brown, who’s chaired committees of the ABA’s Real Property, Trust & Estate Law Section. Brown scheduled shifts by hand for two days until she was able to turn that task over to the Houston Volunteer Lawyers.
Lessons from Katrina

Twelve years ago, Kathleen Bergin was a professor at the South Texas College of Law when Hurricane Katrina struck. As New Orleans’ nearest big-city neighbor, Houston welcomed thousands of refugees. Bergin and a colleague went down to one of the shelters to see whether they could help. They ended up passing out food.

“What happened after Katrina in those first couple of weeks was really just finding our way,” says Bergin, now a disaster legal services consultant who did extensive work after the 2010 earthquake in Haiti.

But 12 years have made a difference, says Randy Sorrels, a Houston personal injury lawyer who was president of the Houston Bar Association at the time of Hurricane Katrina.

“We acted very expeditiously [in 2005] but not as quickly as they reacted this time because there was a blueprint in place,” Sorrels, a partner at Abraham, Watkins, Nichols, Sorrels, Agosto & Aziz. “Within probably hours of the shelters being set up, there were lawyers in those shelters.”

That’s one lesson legal first responders say they learned from Hurricane Katrina: Have a plan in place to get help out right away. Jonathan Rhodes, executive director of the Louisiana Civil Justice Center, says the ABA’s Disaster Legal Services—a post-Katrina project of the Young Lawyers Division—has been a big part of organizing that.

“I think there’s been a very well-established protocol for disaster legal services between the ABA, FEMA, and then the local bar associations and legal service providers,” says Rhodes, whose legal aid organization was itself a response to Katrina.

Private attorneys learned some things, too. Sorrels, whose downtown Houston office has flooded three times in the past three years, says his firm has started backing up everything electronically; the filing cabinets even have wheels. Charles Jimerson, whose Jacksonville, Florida, law firm had to move out of its office when the building’s basement flooded, says his firm’s disaster plan relies heavily on remote working and a secure server for client files.

“We fancy ourselves as legal fire-fighters, and when you’re a legal firefighter you don’t get the luxury of the fire coming to you,” says Jimerson of the 10-lawyer business litigation firm Jimerson & Cobb. “So our lawyers are able to pick up and work remotely in any location.”

Another lesson from Katrina, Rhodes says, is that recovery will take years—and there’s still a role for lawyers to play, especially in Puerto Rico.

“We learned from Katrina that lawyers should be involved in … bigger-picture rebuilding efforts,” he says. “All these really deep issues that affect policy are also places that lawyers and the legal community can get involved to do what we do best, which is to promote justice.”

A Lawyers Network

Florida’s court system had its first big body slam with Hurricane Andrew in 1992. The storm left state courts in southeastern Florida closed for weeks as the state struggled to restore order. A man-made disaster struck next with the anthrax scare that followed the Sept. 11 terrorist attacks, which repeatedly forced the closing of courts throughout the state and prompted the chief justice at the time to establish a commission to make recommendations for future disasters.

“It was this commission’s recommendation that court communications were absolutely crucial for recovery,” says Craig Waters, the Florida Supreme Court’s public information officer for 30 years. “One of the bullet points in its package of recommendations was creation of the group of professional court communicators called the Florida Court Public Information Officers.”

The FCPIO organized soon afterward and had been meeting regularly for 12 years before Hurricane Irma hit. “Based on our statewide communications plan, FCPIO has strongly emphasized the importance of using social media—a point that proved crucial when Irma hit,” Waters says. “Twitter in particular became our most important link in communicating with the public as Irma was ravaging the entire peninsula of Florida. It now is clear that social media will be an essential tool for court communications in general and crisis communications in particular.”

—Lorelei Laird and Terry Carter

Interest continued to be overwhelming when Brown and partner Bill Kroger decided to host a free legal advice hotline via the Houston Bar Association.

In addition to their own lawyers, they got clients’ in-house attorneys and even staff members who wanted to help. The next day, Baker Botts hosted a CLE program on how to help hurricane victims; more than 700 people showed up or watched via the web. Even a lawyer who was gutting his own house at night would work long days on hurricane matters, she says.

Work wasn’t much of a refuge for those whose offices flooded. For personal injury firm Abraham, Watkins, Nichols, Sorrels, Agosto & Aziz, the Harvey flooding was the third flood in three years and the fifth since 2000. The problem is their location; the office is directly across Commerce Avenue from Buffalo Bayou.

In 2017, the flooding was exacerbated by wind damage to the roof that let rain into the second and third floors.

The firm might have moved on to a different building, but partner Randy Sorrels says the firm’s lawyers are proud of the historic, lavishly restored office, which is showcased at an annual holiday party. Instead of moving, they plan to turn the first floor into parking spaces. To make room on the two upper floors, the firm will enclose the balcony and get rid of rarely used features like a built-in bar.

After the storm, Sorrels says, his firm received dozens of offers from colleagues for office space, equipment and more. The firm accepted some of those offers, but by October, almost everyone was back, squeezed into hallways and one-person offices. The holiday party was canceled for 2017, Sorrels says—but 2018’s will be on schedule.

“I was president of the Houston bar when hurricanes Katrina and Rita came in, so I kind of led the charge on assisting others,” he says. “This time, we’re on the receiving end … and it’s really heartwarming.”

Web extra: Puerto Rican lawyers detail the continuing crisis there.
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It wasn’t long ago that professional dress for lawyers was constrained and predictable. Womenswear was derivative of menswear, closets were full of monochromatic color schemes, and nude pantyhose or a jacket and tie were part of the daily uniform. It was an era of boxy-shouldered suits, when business casual was an oxymoron and dress codes were often strictly enforced. These days, legal fashion has loosened up. Depending on where you live and your practice area, women are sporting sleeveless dresses at work and men are wearing dress shoes with no socks.

“We have a generation that has never worn pantyhose in their life, and that’s great,” says Tasha Brown, an attorney and business development executive at DLA Piper’s Chicago office. “I remember going to stores and stocking up on nude hosiery—that was what you did. That’s a change and a welcome one. I also see more color and flair where everything used to be navy and black. That’s nice—it’s good to have pops of color where we didn’t even have those before.”

Traditionally, lawyers have been among the most conservative dressers around (along with bankers and accountants) with the goal to err on the side of formality. Although there hasn’t exactly been a sea change in the underlying dress principles, there has been a growing trend toward comfort and style, which many are embracing.
LAWYER FASHION EVOLVES TO REFLECT BOTH PERSONALITY AND TRADITION

The cast of USA Network’s Suits sports the trendiest in attorney attire.
SARTORIAL SIRS
The changing fashion landscape prompted attorney Douglas Hand to pen *The Laws of Style: Sartorial Excellence for the Professional Gentleman*. The book, which was recently published by the ABA, is a lighthearted primer for men on better wardrobe choices, providing guiding principles on how to present yourself to enhance—and advance—your career.

“We’re at this inflection point aesthetically where business norms in manners of dress have changed,” says Hand, a partner at Hand Baldachin & Amburgey in New York City. “Casual Friday has given way to a casual workplace in a lot of offices and has thrown many men into a state of confusion.”

For men who find business casual too challenging, Hand has a solution: Wear a suit and tie. “It’s also the perfect vessel for men. Our problem areas, bodywise, suits solve. [Suits] attempt to reduce the male body to perfect balance—shoulders wider than the middle. You never know when you’re going to meet a client or a potential client, so wearing a suit rarely serves you wrong.”

Hand warns against copying the business-casual trends seen in other industries, such as the ubiquitous polo shirt and khakis favored by certain tech execs; he says it doesn’t translate.

“Everyone needs to do it better,” Hand says. “Inherent cavalierliness in dressing like that says to a client, ‘Hey, my job is so easy, any slob can do it.’”

FROM CASUAL TO COUTURE
Life often imitates art. Pop culture trends, film, television and politics have a trickle-down effect on fashion. In recent years, female politicians have helped reshape what’s acceptable, such as Hillary Clinton’s bright pantsuits or Michelle Obama’s sleeveless dresses.

“Michelle Obama gave us both arms and legs,” says Susan Scafini, the founder and director of the Fashion Law Institute and a law professor at Fordham University. “The first controversy was her eschewing stockings, then the much louder controversy over her showing her fabulous biceps. In her official portrait, she wore a sleeveless dress. She made it safer for
American women to show their arms in a more formal setting. You might wear a jacket to court, but we don’t have to wear one all the time to show our strength—the arms will do it for us.”

Fictional lawyers also are leading trends, like the characters on the popular USA Network show Suits. Set at a law firm in New York City, the show puts fashion front and center, boasting that the characters’ “winning wardrobes ... make them the sharpest team on television.” The show’s website provides a sartorial shopping guide from each episode for those who can afford to splurge on Balenciaga, Gucci or Tom Ford.

But high price tags aside, Suits costume designer Jolie Andreatta says the shapes and patterns worn on the show provide inspiration for everyday lawyerwear.

For the women on Suits, Andreatta says she uses a lot of consignments. “The clothes are recycled, which is wonderful, and they’re insanely good quality. I find Dior, Chanel—and I use a lot of it—but it’s consignment.”

Andreatta suggests scouring vintage stores and online sites to add personality and to find designer pieces at a fraction of the cost. “Never be afraid of tailoring: Don’t be afraid to take it in and cut it up. If a jacket is too long, don’t be afraid to cut 5 inches out of it. Or you could cut a lapel down” to update a look and fit, she says.

Andreatta began her career styling attorneys more than 20 years ago, when she and a friend would take racks of clothes into law firms and talent agencies. She says times have changed—the palette has expanded, allowing lawyers more license to inject fun elements into their wardrobes.

“She wants to be taken within firm culture as dressing as if you’ve already made it,” he says.

“For the female characters, it’s stronger and more to their benefit to just be women.”

Fictional lawyers aren’t the only ones who can find areas of self-expression through fashion. On Suits, Andreatta allows the personality of the male characters to shine through in a variety of ways. She adds romanticism with a decorative pocket square; others are dressed in vintage ties or bespoke, Savile Row-style suits.

Andreatta says the shirts for the male characters are custom-made; and the tailor she works with in Toronto, where the show is filmed, has dozens of lawyer clients who order custom suits and shirts. “It’s talent and craftsmanship that was starting to go away, and it seems to be coming back again,” Andreatta says, noting that this sort of patronage also supports the artisans who make the clothes.

**NOT TOO TAILORED**

Hand agrees there has been a resurgence in tailored clothing, but he cautions against overdoing it. “You don’t want to be taken within firm culture as dressing as if you’ve already made it,” he says.

“It all goes back to the laws of style: It drives gentlemen to the perfect mean. It will bring your style game up significantly, but if you’re the peacock in jeopardy of being that fashionable guy at the firm, it will rein you in a bit. Two words that I think are key in how I want to present myself and how any lawyer should: capable and elegant,” he adds.

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“Women lawyers I meet want to wear the items from Suits,” Andreatta says. “You want to look beautiful but not provocative. Even seven years ago, women were dressing to fit in, to challenge men—and that was their way to compete with their colleagues. Now, it’s stronger and more to their benefit to just be women.”

Female attorneys aren’t the only ones who can find areas of self-expression through fashion. On Suits, Andreatta allows the personality of the male characters to shine through in a variety of ways. She adds romanticism with a decorative pocket square; others are dressed in vintage ties or bespoke, Savile Row-style suits.

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For men, Hand recommends four fundamental suits every lawyer should own: a blue pinstripe, gray flannel, flat blue and charcoal pinstripe.

“I would overspend in this area because these are suits you can wear over and over again,” Hand says. “And a black suit, at least to me, is a tuxedo.”

Hand says his favorite suit, which he’s had for years, is an olive green, peaked-collar, double-breasted piece by Brioni. “But did I wear it in my first six years of practice? Not once. One, it made me look like I was trying to look like a partner, and I was at a firm with mostly investment banker clients. I needed to look like I was grinding away on their M&A deals, not on the terrace of a hacienda.”

Hand now works for fashion industry clients, which he says allows him more sartorial license.

THE CASE FOR FLAIR

You never get a second chance to make a first impression. This adage couldn’t be more critical than in the courtroom, where the arbiters might be weighing the legal case but also judging those making the arguments.

“It has been found that in the first 30 seconds of meeting someone, people will form an opinion of you, and most of what they’re going to interact with is your appearance,” Hand says. “Not the RICO statute or the ’34 Act but what you look like. So if you look elegant and capable, that’s a good thing. But if you look like a schlub who doesn’t pay attention to the details, that’s not good.”

Shelley Duff recognized the power of personal style while she worked on a homicide trial as an assistant public defender in Pittsburgh in 2011. Duff was meticulous about how she dressed—carefully planning her ensembles from her sparkly earrings to her stilettos. The case ended up with a hung jury, and when Duff had a chance to talk to jurors about the verdict, she was surprised by what she heard.

“One girl said, ‘I couldn’t wait to see what you were going to wear every day!’ I remember thinking, ‘They are looking; they pay attention to that kind of stuff.’ It’s
something you don’t really think about, but you’re making an impression on the jury by what you wear. I don’t know if that’s good or bad, but it’s definitely something to think about,” she says.

Duff now works in private practice in Pittsburgh, but she hasn’t changed her approach to dressing. On top of being a career criminal defense attorney, Duff is a musician, so she gets to have fun with what she wears on stage. But she also lets her light shine through in court and at client meetings.

“As a lawyer, it’s a balance of being respectful and being an individual,” Duff says. “I want clients to have confidence in me and not to look disheveled. If you come in dressed sharply, it gets attention. People feel good and have confidence in you, and I definitely think that’s important.

“We have people looking at jail time or facing serious consequences. When someone meets me for the first time, you do have to fit that stereotype of what a lawyer’s going to look like,” she adds.

To that end, Duff says she always pulls back her hair, but she’ll still

throw on a pair of spiked high heels. Her look changes when she visits clients in jail or has a trial. That’s when her dress becomes more conservative.

THE BENCH RULES

According to Scafeldi, the rules vary from court to court, jurisdiction to jurisdiction. “In family court, you dress differently than you would in criminal court or appellate court,” she says.

“With that being said, it is still true that the courtroom is the last bastion of formality in America. We’ve stopped dressing up for the theater, for church, but when it comes to court, there are still rules,” Scafeldi adds.

Duff says she still likes to express herself with a fun scarf or bright jewelry, and she has some blazers with leather embellishments. But the idea isn’t to look glamorous in court. “The law still has that aspect of tradition. It doesn’t let you go too far, but I try to push the boundaries of what I wear and still be respectful,” she says.

“And as you gain a reputation in the community and courthouse, you get a little more flexibility. People know who you are; they know your reputation,” Duff adds.

“Everyone at court knows I’m a musician. I’d come in trying to hide the blue streaks in my hair, but people would say, ‘Do you have blue in your hair? We like it—it’s interesting.’”

Nonetheless, courtroom attire remains relatively conservative. “We have people looking at jail time until I went and got a jacket,” says Brown of DLA Piper. “I had on slacks and a blouse.”

Brown counsels lawyers at her firm to help them impress and snag clients, and this can involve advice on personal presentation and style. She emphasizes that a winning look doesn’t have to be cookie-cutter, and that letting personality shine through can help. After all, if you look good you feel good, and confidence resonates.

“I tell people: ‘Whatever you feel best in’—I’m not talking about ripped jeans—‘is what you perform best in,’ ” Brown says. “But what I don’t believe is that you have to dress like a man version of something to be professional, a respected lawyer and appropriate.”

Brown admits it can be difficult to find clothes that are easy, stylish and professional. She was an early adopter of MM.LaFleur, an online styling company that helps professional women create their own look—including dresses, blazers and accessories—and sends what they pick out as a complete outfit.

“I’ve shared them with other people. I find it easier than going to stores and chasing styles,” Brown says. “I don’t want to go spend $250 on a pair of slacks and more on a suit coat that

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I would only wear occasionally. You can wear something that’s a canvas and add a nice necklace, cool shoes and tights. If I’m trying to be lawyer-conservative, I’d rather do that than go entirely old-school.”

Virtual and in-person stylists provide a modern solution for busy legal professionals who might or might not care much about fashion and don’t have time for leisure shopping. MM.LaFleur stylist Shelby Goldfaden says the company’s goal is to “take the work out of dressing for work” by focusing on fashionable but timeless pieces that are machine-washable and wrinkle-resistant. “Most importantly, we want you to look good and not think about your outfit,” Goldfaden says.

The 5-year-old company has been conducting focus groups consisting of female attorneys to find out what they’re wearing in various professional settings and how that changes by region. Goldfaden says she was fascinated by the differences in dress norms.

“A few people said that in certain counties, women had to wear skirts to court and couldn’t wear pants,” she says. “Women in New York said wearing anything cropped made them look less serious. Color was very important in court—stick to neutrals—black, navy, charcoal. Others came in and said, ‘When I’m in the office, I can wear anything.’”

WHAT’S OLD IS NEW AGAIN

You can’t wear just anything if you’re taking the bar exam in Virginia. Sure, you’ve got to be mentally prepared, but you also need to be properly dressed.

The Virginia Board of Bar Examiners has a mandatory dress code stating that while law firms may have various “dress down” policies, “there is no ‘dress down’ or ‘casual dress’ policy at the Virginia Bar Exam.” Test takers “are expected to dress in proper attire. For men, proper attire is coat and tie. For women, proper attire is traditional business attire.”

This enforced formality may be welcome for some who are uncomfortable with the shifting concepts of propriety that blur the line. Fashion observers say there is somewhat of a backlash by the younger generation against the casual-dressing trend of recent years, with many millennials harking back to a more button-down style.

Perhaps it’s the cultural exposure to more conservative religious views or ethnic dress, as multiculturalism in America continues to expand. Or it could be the cycle of fashion, where everything old is new again and designers seek fresh trends by reviving old ones.

“I do think we’re seeing a lot more coverage,” says Scafi di of the Fashion Law Institute, noting longer sleeves and hemlines on the racks. “What I’m hearing is a little bit
more conservatism and a desire to dress more formally from the men. A generation of men in their 20s who don’t feel required to wear suits to work, so they’re starting to embrace tailoring a bit more. More of the sense of the advice to dress for the job you want. Women are aware of the need to look put together and professional at some level but are enjoying the freedom to dress as they want.”

Millennial attorney Danielle Schivek, counsel at Authentic Brands Group in New York City, understands that she has wardrobe options that weren’t available for attorneys even a decade ago.

Schivek is a fan of the sartorial swagger of the lawyers on Suits, particularly the character Jessica Pearson, a firm co-founder and former managing partner who “has never worn the same thing twice in six years,” according to the show’s website.

For Schivek, power-dressing has never appeared more fashionable. Even though Pearson dons a dress instead of a formal suit, “she’s a strong, competent and powerful person,” Schivek says. “Whatever dress it is—maybe Alexander McQueen and pumps—I don’t see anything wrong with that. Yes, she’s a woman, but she’s strong and influential. She [wears] amazing tops and dresses. But if I ran those outfits by someone from another generation, they would say, ‘No, you need a matching suit.’”

As a fan of fashion throughout school and her career, Schivek is an astute observer of current trends. She wrote an article in September for the New York Law Journal, “The Rewritten Rules of Power Dressing,” after she came across an old career-services packet from her school that encouraged women to wear skirt suits and pantyhose to interviews.

“I thought that was funny because I couldn’t remember the last time I wore nude pantyhose, other than when my mother forced me when I was young,” Schivek says. She remembers the traditional advice given by her parents: Avoid patterns, wear dark colors and stay within the lane. The general sentiment was: “You don’t want to be unique; you have to look like an attorney,” Schivek says. “But what does an attorney look like to you? It might be something different for me.”

But Schivek adds: “Mom is right a lot of the time, so in building my professional wardrobe, I definitely thought I needed a dark suit. But it’s a skirt from Escada, black wool with white wool in there. It has something a little fun for me. I couldn’t bear to do just plain black. Another suit has a tuxedo stripe down the pants leg and on the lapel.”

Schivek acknowledges that what a lawyer should wear depends on the audience, their position and personal taste. For some, clothing is a utilitarian afterthought. For others, it’s an art form.

On certain days, a lawyer’s outfit could be a suit of armor that prepares them mentally and visually for a legal battle. The next day’s look might require a break from the formality.

Schivek describes seeing her firm’s general counsel alternately in jeans, button-downs and a blazer but also dressed in a three-piece suit. “What an attorney looks like today is totally fluid and changing.”
The Attorney Helped Clean Up

SHORT STORY
BY LINDA OATMAN HIGH

Illustrations by David Owens

THE BLOOD
The attorney helped clean up the blood. It wasn’t in his job description—that was for sure—but Neil Blastman felt somehow responsible. It was his fault that the kid had gotten a permit to carry. It was his advice that sent the boy to that lowlife gun shop that didn’t care if the kid had been in a psychiatric hospital, didn’t care that he went to a wilderness camp because he couldn’t control himself in school, didn’t care that the 22-year-old had some anger issues that sometimes boiled over in unexpected ways.

Blastman always knew what he wanted to be: a lawyer, living outside of any city, defending good country people who maybe did bad things, maybe not. Neil Blastman wanted to uphold the law, sure, but he also just wanted to help human beings.

Neil Blastman was just that kind of guy. He cared. He cared too damn much.

It all started when he was 12. He read *To Kill a Mockingbird,* and he became obsessed. Atticus Finch was his hero.

His brother Joseph became a mechanic: greasy hands, black under his nails, callouses. But in a way, Neil was a mechanic, too. He was a mechanic of the legal system, driving and fine-tuning the engine, making certain the gears didn’t grind.

Neil’s hands were clean (he’d never admit it to anyone, but sometimes he actually had a manicure). His nails were free of dirt; his palms smooth.

He did have callouses, though—on his heart. This business was not for the weak.

Neil liked to think of himself as a hero and a statesman, a patriot and a man of the people. He worked pro bono sometimes, and he volunteered for good causes.

Public interest was his heartbeat.

Neil was a guardian of civilization, just like those amazing attorneys over in Pakistan who locked arms in the streets and were carried off by cops. They were acting in defiance of the president’s suspension of their constitution.

Blastman loved the U.S. Constitution. He knew it by heart, and he could say it word for word, if anyone ever asked him.

But nobody ever did.

His brother liked to ask questions, though. “What do you do all day?” and “Don’t you get tired of argument as your job?”

Joseph’s favorite question was “What exactly is a lawyer, anyway? Isn’t it kind of like being a crook who gets paid really good?”

Neil knew that his brother was only trying to rile him. Even though they were both in their 50s, they still behaved like kids sometimes.

“I do four things,” Neil always said. He rubbed his bald head as if it were a Magic 8 Ball. “One: I protect people from harm. Two: I work for the common good. Three: I settle disputes. Four: I encourage and persuade people to do the right thing. It’s simple. Four things.”

Joseph spit out his chew, a steady stream of brown liquid that spurted to the ground between them. “Shoot,” he said. “I do a lot more than that in the first five minutes of my day.”

Joseph and Neil grew up watching all those old Westerns, *Gunsmoke* and *Bonanza* and *Have Gun—Will Travel.* They played cowboys and Indians; they had toy rifles. When they were 12, they each got a real shotgun, a hunting rifle. They learned gun safety, and they ate what they shot.

“Remember the squirrel pot pie?” they asked one another, reminiscing about life in Pennsylvania in the good old days. “How about that rabbit stew Mom used to make?”

Mom was a single mother who raised them on two jobs. She’d be proud, of both of them. She took them on vacations to Atlantic City, bought new shoes and school clothes each September. She joined the community pool so that they could swim while she worked; she signed them up for Boy Scouts. And she made sure they had guns. After all, boys of single moms had to help provide for the family.

Neil knew one thing: Guns don’t kill people. People kill people. All those old TV shows weren’t for nothing; kids today knew little about real life.

Or death, as it turned out.

He first met the kid Tim on a day in September. Neil remembered it was a sunny day, autumnlike, leaves falling in a gentle and relaxing kind of way. Neil was mowing his yard (the grass was still green). Neil always took great care of his lawn: manicured and immaculate like a rich lady’s hands. (Neil had won a lawsuit for a guy once, in complaint of a neighbor’s overgrown lawn that attracted all kinds of varmints.)

Neil was humming some old Pink Floyd song, maybe *Wish You Were Here,* probably thinking about Mom.
He had a vibe that said I know who I am, and I’m good in this skin, and I don’t really care what anybody else thinks.

She’d died in August, taking her last breath in the home where they’d grown. Neil found her when he stopped in with the Sunday paper and a bag of whole-bean Starbucks. Mom always liked the sound and smell of coffee grinding away on a lazy Sunday morning. She deserved it; all those years of hard work in Kmart and Turkey Hill just to raise her two boys.

Neil stopped at the edge of the yard that day to swab the sweat from his face. He stood where lawn met road, and he surveyed his work. Perfect. His house, his lawn; they could be a spread in “Home Beautiful.” If only he had a wife to go along with all this perfection he’d created. Doesn’t every American woman aspire to marry an attorney? That’s what Neil had always heard.

But then again, you certainly couldn’t believe every word you ever heard. That’s what Neil Blastman knew.

The boy was wearing a long, black trenchcoat and a big, black wide-brimmed hat. He looked like a combination of an Australian outdoorsman and a 1999 Columbine kid. He had the biggest grin Neil had ever seen—at least here on Orchard Road, where you mostly noticed grim-faced farmers and apple pickers.

“Hey,” said the kid. “My name’s Tim.”

He confidently stuck out his hand, and Neil took it. Shook it. The boy wore some silver rings, sharp and hard against Neil’s palm.


“Nice to meet you, sir.”

The boy was a good-looking guy: nice dark curls and sparkly brown eyes. He had a vibe that said I know who I am, and I’m good in this skin, and I don’t really care what anybody else thinks.

“Likewise,” Neil said. “Great to meet you.” Kids with manners were rare finds these days.

“Where do you live?” he asked the kid.

“Right over there, up that lane.” The boy pointed, rings flashing in the sunlight. “With my mom. Well, really she’s my grandma but she adopted me.”

“Nice.”

“Not really. She doesn’t like me.”

Neil couldn’t figure out if this was a joke, so he just slightly snickered. Most teenagers thought their parents didn’t like them.

“I’m serious. She eats dinner alone, in her room, door locked.”

Neil shook his head, shrugged.

“To each his own,” he said.

“Maybe she just needs some peace and quiet.”

“No,” the kid Tim said. “She
afraid of these.”

He reached inside of that trench coat and he whipped out a knife: long and sharp and curved. It glinted threateningly in the light.

“Whoa,” Neil said. He took a step back. He'd defended a guy who killed somebody with a knife. The man had mental illness; that was the defense. Neil won.

“You don’t like knives?” asked the kid.

“Not by surprise,” said Neil.

And so it began. Neil befriended the boy. Sometimes he fed him. Sometimes he hired him to help with the lawn. Sometimes he gave advice. Neil learned not to mind the knives. He knew this kid would never hurt him.

“So what do you want to do, Tim?” Neil asked him one day when the boy was 19.

Tim shrugged.

“I don’t know. I did want to enlist in the Army but they won’t let me. On account of my Asperger’s. And all I wanted to do was serve my country. Help people."

“Well,” said Neil, “there are other ways to help. For example, maybe you could be an attorney. Like me.”

Tim laughed, in that great way he had of throwing back his head, eyes slanted, mouth wide open as the sound rolled out.

“I could never be a lawyer,” he said. “I’m not smart enough.”


Tim slid those sparkly, dark eyes at him, shook his headful of curly hair.

“I got a new knife,” he said. “Want to see?”

The kid helped Neil to redesign his website. Like all the young people, Tim was quite a techie, knew how to do everything on the computer.

Tim moved photos and words and captions and titles, and before you knew it www.neilblastman.com was a brand-new beast.

Featured on the home page was a great picture of Neil, one that Blastman leaned against a tree, looking casual and relaxed in a denim shirt and jeans, one Vans sneaker up against the trunk of the tree. He never wanted to be one of “the suits,” intimidating common people with jackets and ties.

Also on the home page was the fact that Neil specialized in Second Amendment rights, highlighted by tiny, electronically flapping American flags.

“Great job!” Neil said to Tim.

He slapped him on the back.

“I’ll pay you some cash.”

“Forget that,” Tim said with a grin.

“I want a hug.”

And so Neil wrapped the boy in an embrace, feeling his face against all that hair.

After the Second Amendment/gun rights addition to his website, Neil did start getting a few harassing emails on occasion. He didn’t care. He deleted, ignored, let it roll off his back.

Like the kid Tim, Neil was comfortable in his own skin. He liked what he did, and he knew he did a good job. A darn good job.

Neil was going into the jail one day, to have a consultation with a guy who’d gone on a little drug-dealing spree when he lost his job. Lancaster County Prison looked like a castle from the outside, a medieval fortress built in 1851 in a Lancashire, England, design.

“Oh, man!” said Tim, when he stopped by as Neil was getting into his car, a 2008 PT Cruiser he’d named Berry Blue. “I always wanted
to go inside of that place! Can I go to the jail with you?”

Neil laughed, not taking the request as one that was made in earnest.

“I'm serious,” Tim insisted. “I'd like to get inside one of those turrets and pretend to be a knight. It looks amazing.”

“That's from the outside looking in,” replied Neil. “Believe me, Lancaster County Prison is not any place you want to be.”

It was about three weeks after that when Tim presented his ideas about a gun to Neil.

“My grandma thinks it's a bad idea,” Tim said. “But we need it. For protection.”

Neil weighed his thoughts carefully before answering, sipping his coffee.

“Well, Tim,” he said. “I don't know if it's a good idea or if it's a bad idea. But what I do know is that you have a constitutional right to own a gun if you want to own a gun.”

Tim lit up like the sun.

“And a permit to carry?” he asked.

“Could I get a permit to carry?”

“Of course,” Neil said. “Almost anybody can.”

And so it went. Tim went to the gun shop and he bought a gun, and he got a permit to carry it. His grandma was not happy, but after all, the kid was 22.

“Just be careful, OK?” Neil said to Tim one day in early April.

“Oh, believe me, I have OCD,” Tim replied. “I check that the safety is on, like, a hundred times a day. And I empty the chamber before I hand it to anybody.”

“Good,” said Neil. “Excellent. Gun safety is a fine skill to have.”

He heard the sirens on April 9th, middle of the afternoon, Palm Sunday. Neil had been to church and was still in his dress clothes, feet propped, reading the paper. (Neil still subscribed to the newsprint version; he wasn't one for electronic reading.)

At first, he semi-ignored the screams of the sirens, thinking that maybe there'd been a wreck out on the main road. But then it sunk into his consciousness that the sound was nearby. In fact, it was right outside of his house.

Neil folded the paper, carefully. He placed it on the end table in the usual spot. He stood up from the recliner, stretched, looked through the living room window. Despite his slow and normal movements, Neil's heart was beating hard. He knew how to appear calm in any situation, how to fake peace when he was shook up.

Cops and medics and an ambulance were racing up the lane, right next door on Orchard Road. They were going up to Tim's house.

The kid who shot him was only 19. At first he claimed that Tim was trying to commit suicide, that he'd pointed the gun to his head and it went off. But then he changed his story, later that night, in the state police barracks. They took him in, to the prison, locked him up.

The bullet hit Tim in the head, left him with a gaping hole where his forehead used to be. He was brain-dead by midnight. Neil wailed, sobbing harder than he'd cried in a long, long time. The kid died by Monday afternoon. His organs were donated. There was no more Tim, no more grin, no more visiting kid with the loud laugh.

The autopsy results were released on Tuesday. Tim had been shot from across the room, by his own gun. The 19-year-old, Alex, was arraigned. It made the front page.

Neil sunk into the depths of despair. He hated that he'd even given Tim any advice. He hated that Tim followed his advice. Neil wished he could rewind the day of April 9th, make it all different.

But he couldn't. Of course he couldn't.

And so he helped to clean up the blood. He and a few farmers from Orchard Road sent the grandma out of the house, ripped up the still-wet blue carpet, threw it into a dumpster. They scrubbed and scrubbed the hardwood floor beneath, but the stains would not go away.

The shape of the blood remained.

Alex's mother called Neil Blastman, asked if he'd represent her son pro bono. Or if not that, maybe at a reduced rate. She couldn't afford much, was a single mom who lived in the trailer park.

“They were arguing over a video game,” the mom said, crying. “A stupid, damn video game.”

Neil didn't have to consider. He didn't have to think. He followed his gut and the words tumbled out of his mouth before he knew what was happening.

“No,” he said. “No. Thank you for calling, though. Thank you for thinking of me.”

Neil Blastman was always polite. His mother had taught him right.
A Practitioner’s Guide to Class Actions
Second Edition
Marcy Hogan Greer, Editor

Now completely updated and expanded, this comprehensive guide provides in-depth knowledge of the many intricacies of a class action lawsuit along with a valuable, state-by-state analysis of the ways in which the class action rules differ from the Federal Rule of Civil Procedure 23. Chapters are organized in three sections for ease of use: Anatomy of a Class Action and Special Issues in Class Actions (Volume I), and the Jurisdictional survey of Local Requirements Governing Class Actions (Volume II).

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As someone who has lived in the Virgin Islands since graduating from law school in 1982, Tom Bolt has experienced hurricanes before, including Hurricane Marilyn in 1995, which destroyed his home. “After that, we said never again, and we built back stronger and better than before,” says Bolt, shareholder and managing attorney of BoltNagi and a member of the ABA Board of Governors.

But hurricanes Irma and Maria were still strong enough to wreak havoc on the BoltNagi law office on St. Thomas, which he describes as totaled. “It was kind of a combination one-two punch,” Bolt says. “Irma peeled off the roof, and then Maria saturated everything inside.”

In the wake of the catastrophic Harvey, Irma and Maria, the ABA has been working with federal, state and territorial groups to provide disaster assistance to those affected. For the U.S. territories of Puerto Rico and the Virgin Islands, the need has been particularly great because power and telecommunications infrastructure will not be as easy to restore.

The ABA mobilizes aid to Puerto Rico and the Virgin Islands after Hurricanes Irma and Maria

By Lee Rawles

Rodriguez-Vidal, a managing member with Goldman Antonetti & Cordova and chair of the minority caucus in the ABA House of Delegates. “In addition, there was a curfew that was imposed on everyone, so we were unable to work full time, and we were only able to work a certain few hours of the day so that everyone could go home and meet the curfew.”

The firm’s employees may have had a functioning office to come to, but that didn’t mean they had power at home or running water, even in the capital city.

“There’s always a degree of preparation before any hurricane, and you know what you’re supposed to go buy,” Rodriguez-Vidal says. “But you never prepare for 90 days of no electricity. It’s impossible for you to store, in your home, 90 days of...
supplies. The rule of thumb used to be five days’ worth of supplies—you know, a gallon per person per day of water, all these other food-stuffs, and batteries and different sorts of things that are just common sense, like having your gas tank full in your car. But in a disaster of this magnitude, that only goes so far.”

who can’t afford a lawyer. In the case of Puerto Rico—which had no reliable telecommunications—and the Virgin Islands, the second part of this mission proved to be a challenge. So the DLS reached out to an organization on the mainland for help.

The Louisiana Civil Justice Center in New Orleans agreed to partner matched with at least one client. FEMA had received 1.2 million applications for assistance in Puerto Rico alone as of December, he says. “We’re still seeing that people don’t have phone communication,” Rhodes says. “And we've maxed out the available volunteers.”

Resources for lawyers looking to volunteer their time are available at ambar.org/DisasterRelief. Spanish-speaking attorneys and attorneys who are licensed in Puerto Rico and the Virgin Islands are in high demand. But a mentorship program is also being developed, so lawyers who have disaster legal services experience can provide advice to attorneys who may be doing that work for the first time.

FEMA also has been coordinating pro bono legal assistance at FEMA’s disaster recovery centers in Puerto Rico and the Virgin Islands. Amanda Huff Brown, a Microsoft FIRST RESPONDERS

At the ABA, members of the Disaster Legal Services program are generally the first to mobilize immediately after a disaster. Last year was an incredibly busy year for the DLS, led by the volunteer team of director Andrew VanSingel and 10 other ABA members. Even before the hurricanes and the wildfires on the West Coast, the DLS was responding to the needs of people in Michigan and West Virginia, which had been struck by storms, floods and mudslides last summer. Although VanSingel has a full-time job with the IRS as a local taxpayer advocate in Chicago, in the wake of hurricanes Harvey, Irma and Maria it was unusual for him to come home after work and spend many more hours coordinating Disaster Legal Services’ response.

“I drink about a gallon of coffee a day,” VanSingel says. “You may have a problem when you walk into Starbucks and they have your order ready without you saying a word, which happens now.”

The DLS program, which is run by the Young Lawyers Division, has a memorandum of understanding with the Federal Emergency Management Agency to provide disaster legal services at FEMA disaster recovery centers and to establish toll-free hotlines for survivors with the ABA, FEMA, and local bar associations and legal aid providers on the islands to run the disaster hotline services for Puerto Rico and the Virgin Islands. The LCJC’S role for the residents is to collect intake data, provide basic information about issues such as the FEMA claims process, and arrange for referrals to attorneys licensed to practice in the appropriate jurisdictions. From 9 a.m. to 4 p.m. CT, Monday through Friday, islanders affected by the hurricanes can call 800-310-7029 for assistance.

In the first three months of operation, the Louisiana Civil Justice Center took about 1,200 calls, says executive director Jonathan Rhodes. In December, the hotline was averaging 30 to 50 calls per day, and 120 volunteer attorneys had been operating.

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NextGen fellow with the ABA Center for Innovation in Seattle, is the project manager for the DLS response in the Virgin Islands; and Courtney Emerson of Fox Rothschild in Wilmington, Delaware, is her counterpart in Puerto Rico.

“In other disasters that I’ve dealt with there’s never been anything like this,” Brown says. “It is a locale problem.”

With so many people utterly reliant on cellphones for communicating and the power grid down, finding ways to keep phones charged was extremely difficult.

Brown says one of the ways the ABA has been able to be most effective in the Virgin Islands is acting as a central coordinator. The Virgin Islands, which had a pre-Hurricane Irma population of about 107,000, doesn’t have a law school. The Virgin Islands Bar Association has more than 1,000 members, many of whom evacuated to the mainland or are in scattered locations.

The progress toward restoring normalcy in the Virgin Islands has been much slower than Bolt anticipated. But he has been heartened by the response of his colleagues. “Almost every section and division of the ABA has reached out to help with the recovery,” he says.

In the commonwealth of Puerto Rico, with three law schools and a pre-Hurricane Maria population of about 3.35 million, the DLS has tried to adapt its services to meet the very different circumstances. The ABA is one of several legal organizations based on the mainland United States now present in Puerto Rico and providing assistance. The DLS worked with volunteer attorneys from the Legal Service Corp. in Puerto Rico to staff 29 disaster recovery centers on the island.

“But once the courts in Puerto Rico reopened, and some of their nondisaster-related legal needs began to resume, they have become dedicated to their original mission and their original cases,” says Emerson of Fox Rothschild. So while the disaster recovery centers are still staffed by attorneys, the DLS is focusing efforts on referring people to the hotline to be matched with legal representation.

Recovery for Puerto Rican lawyers will be greatly complicated by the commonwealth’s dire financial straits. In summer 2016, the U.S. Congress established a fiscal control board under the Puerto Rico Oversight, Management and Economic Stability Act to handle the restructuring of the island’s debt.

A 10-year recession already had left many Puerto Rican lawyers struggling for paying clients, and many had left the island, says attorney Laura Miguel, a member of the House of Delegates for Puerto Rico.

“Puerto Rican lawyers need work and clients to keep moving, to not quit the profession, to not move from the island, and to keep running the economy. Otherwise, the island will keep suffering the exodus of attorneys,” say Miguel and her attorney husband, José L. González Castaño.

RESILIENCE AND RECOVERY

Establishing resilience in the wake of disasters is one of the main focuses of the ABA’s Committee on Disaster Response and Preparedness, so much so that the Twitter handle is @ABAResilience.

The committee has launched a three-part webinar series based on the recent disasters, which is available online to members. Bolt and Rodriguez-Vidal participated, sharing what preparations their firms had put in place before the hurricanes and the lessons they’ve learned from the recovery efforts.

The chair of that committee, Chauntis Jenkins-Floyd of Porteous, Hainkel & Johnson, has personal experience with recovering in the wake of a hurricane. A New Orleans resident, she was at a YLD conference in New Mexico when Hurricane Katrina hit.

“I never forgot that experience and how my ABA colleagues rallied around me, literally looked for me because they knew I was headed back to New Orleans,” Jenkins-Floyd says. “And they opened up their homes for me to stay in until I could go home. And so when I had the opportunity to serve as chair of this committee, it was a no-brainer.”

Although lessons from past disasters can help in planning and preparing for future ones, Jenkins-Floyd advises keeping in mind that all such events are different. “No disaster is cookie-cutter; no disaster is going to be the same; because of the unique communities, the people who live there, the geography—there’s a number of factors that make the effect of each disaster like this unique,” she says.
Pushing Forward for Reform
ABA-supported criminal justice efforts are under consideration in Congress

By Rhonda McMillion

Hoping to regain momentum for criminal justice reform, the ABA is supporting several pieces of legislation currently before Congress. These include reauthorizations of both the Juvenile Justice and Delinquency Prevention Act and the Second Chance Act, as well as bills seeking changes to sentencing and corrections practices.

The most comprehensive of these is S. 1593, the Sentencing Reform and Corrections Act of 2017, a bipartisan bill introduced by Senate Judiciary Committee Chairman Charles E. Grassley, R-Iowa, Sen. Richard Durbin, D-Ill., and 10 other co-sponsors.

The legislation “takes a number of important steps forward to reduce reliance on mandatory minimum sentences for low-level drug offenders and to improve fairness and the achievement of justice in the federal system,” the ABA told Congress. The bill’s provisions would enhance recidivism-reducing prison programs; expand “compassionate release” for elderly, terminally ill prisoners; ban solitary confinement for juveniles; and permit juveniles to obtain expungement of certain criminal records. A similar measure supported by the ABA stalled during the 114th Congress.

Another important component of the bill is the creation of a National Criminal Justice Commission, an idea supported by the ABA since it was introduced in 2009. Under this proposal, the 14 members of a bipartisan commission—nationally recognized experts in various fields—would undertake a comprehensive, 18-month review of all areas of the criminal justice system and develop recommendations for ensuring justice at every step. S. 573, a bipartisan stand-alone bill to create the commission, also is pending.

While there has been no action on comprehensive criminal justice legislation this Congress, the House and Senate passed separate bills—H.R. 1809 and S. 860—that last fall to reauthorize the Juvenile Justice and Delinquency Prevention Act and reflect the changes in the juvenile justice field since the act was last extended more than 13 years ago.

Urging House and Senate leaders to quickly resolve the differences between the two bills, ABA President Hilarie Bass wrote that final action “is critical to protecting juveniles in the justice system and to ensuring federal funding priority for juvenile justice programs that researchers have shown improve outcomes for these young people.”

Bass added that the ABA specifically supports extending protections that limit youth contact with adult offenders in correctional facilities and phasing out use of the valid court order exception. The VCO exception, introduced to the juvenile justice act in 1980, has resulted in youths being jailed or securely confined for “status offenses” such as truancy or running away that would not be crimes if committed by adults.

SUPPORT FOR A SECOND CHANCE

The ABA president also expressed support during this Congress for H.R. 2899, a bipartisan bill introduced by Rep. Jim Sensenbrenner, R-Wis., to reauthorize the Second Chance Act, which provides federal grants for prisoner re-entry and recidivism-reduction programs.

Since the Second Chance Act was signed into law in 2008, more than 700 grants awarded to government agencies and nonprofit associations in 49 states and the District of Columbia have provided employment training, education, housing and other support for over 137,000 former inmates transitioning back to community life after completing their sentences.

“By providing the resources needed to coordinate re-entry services and policies at the state and local levels, reauthorization of the Second Chance Act will ensure that the tax dollars spent on corrections do not simply fuel a revolving door in and out of prison,” Bass wrote to the House Judiciary Committee.

The association also is keeping a close eye on S. 1593 and H.R. 1437, bills to discourage courts from using payment of money bail as a condition for pretrial release in criminal cases.

Detaining defendants for not paying bail “interferes with their ability to defend themselves and, in many instances, deprives their families of support,” wrote ABA Governmental Affairs Director Thomas M. Susman in a letter to the judiciary committees in the House and Senate.

This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is editor of ABA Washington Letter, a Governmental Affairs Office publication.
Under Examination
As more law schools consider using the GRE as well as the LSAT, questions remain about the tests’ predictive value

By Stephanie Francis Ward

In 2016, the University of Arizona announced that its law school would accept Graduate Record Examinations scores as well as the traditional Law School Admission Test from applicants. Since then, debate has swirled around how valid and reliable both standardized tests are in predicting how applicants would perform in law school.

The Educational Testing Service, which designs and administers the GRE, claims that exam’s ability to predict law school success is comparable to that of the LSAT. The Law School Admission Council, which designs and administers the LSAT, counters that its exam is specifically designed to test skills needed to excel in law school, and that the validity of the exam has years of research.

“The LSAT is the only test designed specifically for legal education, the fairest mechanism to ensure a level playing field, and gives law schools a uniform method of assessing each applicant’s ability to thrive in their studies and in the profession,” Kellye Y. Testy, president and CEO of the organization, said in October.

In the past year, more than 10 law schools have announced that they will accept the GRE in admissions, including those at Northwestern, Harvard and Georgetown universities.

Under a proposal being considered by the council of the ABA’s Section of Legal Education and Admissions to the Bar, ABA-accredited schools could have more flexibility to consider alternate ways of testing applicants.

At their November meeting in Boston, council members decided to consider doing away with Standard 503, which with a few exceptions mandates that accredited law schools “require each applicant for admission as a first-year JD degree student to take a valid and reliable admission test.” While schools are not required to use the LSAT under the current standard, if they use a different admissions test, they must “demonstrate that such other test is a valid and reliable test to assist the school in assessing an applicant’s capability to satisfactorily complete the school’s program of legal education.”

Under a proposal being considered by the council, Standard 503 would be removed and Standard 501—which requires admitting competent candidates—would be rewritten to make the presence of a valid admissions test a factor for determining whether a law school is in compliance, rather than a requirement.

According to Maureen O’Rourke, chair of the council, the current standard for using admissions tests other than the LSAT is difficult for some, based on resources.

“It just seems to me unfair that a giant school who can put together a big psychometric study can do this, while a tiny law school is not going to have enough people to validate the study,” said O’Rourke, the dean of Boston University School of Law, at the council’s November meeting.

The latest proposed revision, which is out for notice and comment, follows an earlier proposed revision—which the council eventually decided not to pursue—that suggested the council establish a standardized process to determine the validity and reliability of law school admissions tests other than the LSAT.

At the November meeting, Barry Currier, the ABA’s managing director of accreditation and legal education, noted that commissioning validity studies can be complicated.

“I don’t think it’s that easy to hire an expert and say, ‘Can you give us validity?’” Currier said. “They say, ‘Why don’t you tell me the validity you want, and I will give you a report.’ The devil is in the details.”

When the ABA Journal asked Currier whether any of the law schools that recently announced they would be accepting the GRE had submitted validity reports to the ABA, or if the organization had reviewed any submitted studies, he replied that it would be “premature to comment while the notice and comment period continues.”

HOW DO YOU TEST A TEST?

The researchers who develop and evaluate tests designed to measure psychological characteristics like intelligence or scholastic aptitude are known as psychometricians.

“We define, gather and evaluate the sources of evidence that have been designed to support the interpretation and use of scores for a particular purpose,” says Chad Buckendahl. A founding partner with ACS Ventures in Las Vegas, he has a doctorate in quantitative and qualitative methods in education, as well as a master’s in legal studies.

If a validity study is done to evaluate the appropriateness of using particular test scores, the psychometrician would look at multiple information sources and see whether they seem to show that using a specific test score makes sense, in terms of what test providers want the exam to accomplish, Buckendahl says.

At this point, it appears that only the creators of the LSAT and the GRE are interested in having their tests used in law school admissions. However, some psychometricians say that most graduate entrance exams could likely give law schools a good sense of how applicants would perform.

“All of these tests—the GMAT, the GRE, the MCAT and the LSAT—are all measuring similar constructs by the use of text,” says educational psychology professor Kurt Geisinger.
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of the University of Nebraska at Lincoln, although he cautions that he couldn’t say that for sure without extensive studies. Geisinger, who directs the school’s Buros Center for Testing, has been hired as an expert witness by a party suing the LSAC, and he has also served as a technical adviser for the ETS.

Whether entrance exams besides the LSAT and the GRE could accurately predict how candidates will perform in law school would depend on what the tests measure and how that relates to what is expected from those students, according to Buckendahl.

“The ability to communicate in written form, research and think analytically—these are traits that most graduate students will need to have to succeed,” Buckendahl says. “The question is to what extent and in what context those skills are written form, research and think analytically—these are traits that most graduate students will need to have to succeed,” Buckendahl says. “The question is to what extent and in what context those skills are.

DIVERSITY DOUBTS

Some critics contend that reliance on the LSAT for admissions has led to a more homogenous, less diverse student body. Many law schools rely on the LSAT in ways that are unsupported, in terms of its predictive value, and that’s not good for diversity, says Aaron Taylor, executive director of the AccessLex Center for Legal Education Excellence in Washington, D.C.

When Harvard Law School announced last March that it would accept the GRE in admissions, it stated that doing so would expand access to legal education for students nationally and globally. At Northwestern University, law school dean Daniel Rodriguez told the Chicago Tribune in May that students with more diverse study areas, like science and technology, were taking the GRE. But Taylor says both GRE and LSAT score trends are typified by racial, ethnic and socio-economic disparities.

“So unless law schools fundamentally alter the manner in which they use admissions tests, adoption of the GRE will only preserve the unfortunate status quo as it relates to diversity. Applicants with lower scores will still be shut out of law school to extents that are unsupported by the predictive value of the tests, whether it’s the LSAT or the GRE,” he says.

Taylor says the LSAC itself advises that law schools not use LSAT scores as the sole admissions criteria, or place excessive significance on score differences, and that law schools should avoid the improper use of cutoff scores.

“The LSAT is designed to be a partial predictor of first-year grades,” Taylor says. “It has value as an admission criterion, but it should not drive admission decisions. The same principles apply to the GRE.”

In terms of academic experience diversity, he’s doubtful the introduction of the GRE in law school admissions will change much.

“Adoption of the GRE is about growing the pool of potential law school applicants. The diversity justifications are questionable, at best,” he says.

A hearing on the council’s proposed revision, along with other suggested revisions to accreditation standards, is scheduled for April 12 in Washington, D.C.

Written comments on the proposed changes are being accepted through April 2. The draft revisions and information about how to submit comments can be found on the website of the legal ed section in the Resources section under Notice and Comment.

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

RESULTS OF THE UNCONTESTED 2018 REGULAR STATE DELEGATE ELECTIONS

On Dec. 8, 2017, the Board of Elections certified the results of the 2018 State Delegate Elections. For a complete list of the State Delegates elected for the 2018-2021 term, go to ambar.org/resultsstateelection.

GOAL III MEMBERS-AT-LARGE

The ABA President will appoint one Goal III Minority Member-at-Large and one Goal III Minority Member-at-Large to the Nominating Committee for the 2018-2021 term. These appointments will be made from broadly solicited nominations from the diversity commissions, sections, divisions and forums, state and local bar associations, and the membership at large. If you are interested in submitting a nomination or have questions, contact Leticia Spencer (Leticia.Spencer@americanbar.org, 312-988-5160) c/o Office of the Secretary, by Friday, May 4.

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Woman Member-at-Large to the Nominating Committee for the 2018-2021 term. These appointments will be made from broadly solicited nominations from the diversity commissions, sections, divisions and forums, state and local bar associations, and the membership at large. If you are interested in submitting a nomination or have questions, contact Leticia Spencer (Leticia.Spencer@americanbar.org, 312-988-5160) c/o Office of the Secretary, by Friday, May 4.
CONGRATULATIONS to Theodore J. MacDonald Jr. of St. Louis for garnering the most online votes for his cartoon caption. MacDonald’s caption, below, was among more than 100 entries submitted in the *Journal*’s monthly cartoon caption-writing contest.

“It’s right here in Section 12 of the prenup: ‘Romeo to provide the ladder.’ ”  
—Theodore J. MacDonald Jr. of St. Louis

JOIN THE FUN Send us the best caption for the legal-themed cartoon below. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, Feb. 11, with “February Caption Contest” in the subject line. For complete rules, links to past contests and more details, visit ABAJournal.com/contests.

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A Move Toward ‘1 Person, 1 Vote’

An unusual Boston Gazette article in 1812 announced that a monster had been discovered in nearby Essex County. The piece quoted a “Dr. Watergruel,” who deemed it to be a species of salamander and proposed it be named after Massachusetts Gov. Elbridge Gerry.

A drawing of the “salamander” was, in fact, a cartoonist’s depiction of a map of a senatorial district Gerry signed into law on Feb. 11, 1812. The state’s Democratic-Republican legislators had designed the map to enhance their election prospects. Senatorial districts, once confined to county lines, became intentionally amorphous, diluting the support of rival Federalists while consolidating clusters of the ruling party’s likely voters.

The aging Gerry was also a signer of the Declaration of Independence, a proponent of the Bill of Rights and a Democratic-Republican partisan. Though likely unfair to his actual contribution, the article dubbed the monster a “Gerrymander,” forever linking him to a long-standing exercise of political power.

In the two centuries since, the power of state legislatures to apportion political jurisdictions—including congressional districts—has been repeatedly challenged in the courts. Just as often, the courts have been reluctant to enter what they consider a purely political process.

As a result, state legislatures have shown little aversion to “packing” and “cracking,” the same tools of voter concentration and dilution employed in Gerry’s time.

Gerrymandering helped rural populations dominate dense urban centers, and the courts would abide. In 1946, Justice Felix Frankfurter wrote, by entering the “political thicket” of apportionment disputes, courts would be forced to choose one theory of representation over another—a course he thought was constitutionally unwise. “For want of equity,” Colegrove v. Green let stand an Illinois congressional district map in which the largest district served a population eight times that of its smallest.

But by the early 1960s, the civil rights movement began to expose the role of redistricting in the maintenance of racial inequality, and a series of U.S. Supreme Court cases began to address apportionment and gerrymandering as more than purely political.

After 1901, for example, the Tennessee legislature never bothered to redistrict, although the state constitution required it every 10 years. By 1960, the state’s eligible voting population had grown by 325 percent, and its largest state House district was 18 times as populous as its smallest. The resulting case, Baker v. Carr, took two oral arguments and 11 months of deliberation to put Frankfurter in the minority and make redistricting issues justiciable—at least regarding race.

In Georgia, rural control was particularly disparate. Like many Southern states, it was overwhelmingly Democratic at the time; and party primary elections decided, in effect, who would be elected in the fall. But under a “county unit system” created after Reconstruction, primaries were decided not by an overall popular vote but by units earned by winning the vote in each of 159 counties—an overwhelming advantage for rural voters.

Moreover, Georgia’s 10 congressional districts, last apportioned in 1931, were weighted heavily against the state’s urban population. By 1960, the 5th Congressional District centered in Atlanta represented 823,680 residents, more than twice the 349,312 district average.

In Wesberry v. Sanders, decided Feb. 17, 1964, a three-judge federal trial panel rejected a challenge to Georgia’s congressional districts, invoking Frankfurter’s “want of equity” in Colegrove. But the Supreme Court continued in Wesberry to change the rules when gerrymandering was implicated by race. Echoing the phrase that would be used in Reynolds v. Sims four months later, Justice Hugo Black quoted Gerry’s patron James Madison: “Who are to be the electors of the federal representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names more than the humble sons of obscure and unpropitious fortune.”

Black noted: “Readers surely could have fairly taken this to mean ‘one person, one vote.’ ”
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