THE LAWYER'S MAGAZINE

MARCH 2018

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Letters

FEAR FACTOR
I concur with “Distilling Fear,” January, page 22: “Lawyerly can be scary, but that shouldn’t stop us from being powerful advocates.”

I know that many, if not most, worthwhile endeavors are frightening—with the cause of the fear being that the daunting task has meaning; and hence, it is worth the risk. In the 1960s, I first learned the valuable lesson of distilling fear via participation in sports. I still vividly recall, before the first game of the season, the head coach telling the players that it was “normal to have butterflies in our stomachs; the trick was to make them fly in formation.” Even today, before every stressful task, I remember my coach’s guidance and embrace the challenge to perform my best. As one might expect, I have passed this folksy advice on to my two daughters, who (unlike their mother/my wife) were given the opportunity to acquire this wisdom (like me) firsthand on “the pitch.”

James R. Brewster
Tallahassee, Florida

MILLENNIALS 101
The way almost everyone talks about differences between the generations in “Millennial Stereotypes? These Lawyers Object!” January, page 52, is so utterly devoid of reason it’s astonishing. Of course millennials are different from other generations. I think it is relatively uncontroversial to state that any human is profoundly impacted by the environment in which they are born and develop, To assign fault to an entire generation for being any certain way necessarily contradicts this idea.

Do baby boomers really think that if they had been born in the same environment as millennials they would as a group be significantly different than millennials are? Millennials are different than prior generations—but not because of any divergence in character. The only discussion worth having here is how and why, for better or worse, norms, behavior and tendencies have changed among humans who developed during the age of significant technological advances, and what should be done to adjust to these changes.

Tony Frank
Hoffman Estates, Illinois

I’m well over the hill, having raised two Gen Xers, but something that seems missing from the article is an awareness of the different work style of millennials. Studies show that they tackle problems differently—collaboratively, sharing ideas and approaches—instead of working on problems in their individual silos. I wish the article had addressed this work style, as well as the question of whether this work style is compatible with a profession that highly values client confidentiality. It’s interesting that at least two of the individuals the author highlights do not have clients: They are providing services to lawyers.

Allen R. Bentley
Seattle

TAKING ON BULLFIGHTING
Roughly 450 years ago, Pope St. Pius V reflected on bullfighting and wrote how he wished “these cruel and base spectacles of the devil and not of man” be abolished, forbidding attendance at them under penalty of excommunication. Yet in 2018, the ABA Journal published “Besting the Bull,” January, page 10, glorifying animal cruelty and ignoring the question of why Mr. James B. Pritikin would travel to Spain “once or twice a year to hone his skills as a bullfighter.”

If the bullfights in which he participates are traditional Spanish bullfights in which the bulls are repeatedly stabbed and ultimately killed, part of the answer may be that such events are broadly prohibited in the U.S. Pritikin’s comment that he himself is “not capable” of killing the bull at the end of the match suggests that he is participating in fights in which bulls are subjected to abuse and cruelty and which end with their deaths.

As chairs of the ABA TIPS Animal Law Committee and the ABA International Animal Law Committee, respectively, we expect more from the Journal and its editorial board, and do not expect to see animal cruelty presented as a quirky or fun hobby. We encourage readers to learn more about this barbaric practice and the surrounding legal issues via the Penn State Law Review article “Olé, Olé, Olé, Oh No!” by Angela N. Velez.

Animal cruelty is not entertainment, nor something the ABA should promote to the profession as an acceptable method of obtaining an “adrenaline rush.”

Daina Bray
Nashville, Tennessee
Marcela Stras
Denver

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President’s Message || By Hilarie Bass

Serving the Profession

The ABA fights for lawyers, legal rights and a better system of justice

In meetings with lawyers around the country, a question I often hear is: “What does the ABA do for me?”

My answer every time: More than you realize. Here are some recent examples.

In early January, U.S. Customs and Border Protection issued a revised directive regarding searches of lawyers’ laptops and other electronic devices at borders that adopts several key ABA-requested reforms. The change came in response to the ABA’s meetings and negotiations with senior Department of Homeland Security officials to request revisions of the standards that we viewed as a potential threat to attorney-client privilege. While not all of our proposals were adopted, and more needs to be done, the new directive is a clear improvement over prior policy.

This is just one recent example of our hard work to protect the legal profession. ABA lobbyists continually work to limit regulations and laws that could impede the ability of lawyers to do our jobs or represent our clients. And, like our work on border searches of laptops, we are persistent in challenging rules that undermine the profession’s independence and the lawyer-client relationship.

The ABA was an active participant during the debate in Washington, D.C. regarding the tax package passed last December. Our efforts ensured that law firms would not be forced to use the unfair accrual accounting system—paying tax on phantom income that had yet to be received and might never be paid. At the same time, we ensured law firms were included in the lower tax rates that other professional services received.

The ABA also stands up for lawyers who have devoted themselves to public service. When the Department of Education reneged on its commitments to public service lawyers who had qualified for the Public Service Loan Forgiveness program and were meeting their obligations under the program for years, the ABA sued. The case is still pending in the courts, but the ABA is determined to do its utmost to assist the best and brightest young people who are working for the public good.

The ABA also works hard to uphold the values of our profession. We have recently spoken out to defend the independence of the judiciary when the judicial system and individual judges were disparaged. While criticism of judicial decisions is a constitutionally protected right of every American, we have stressed that judges should not be attacked or diminished by another branch of government just because they do not agree with a ruling.

Ensuring that the federal judiciary is staffed with highly qualified judges benefits everyone in the legal system. For 65 years, the ABA’s independent Standing Committee on the Federal Judiciary has conducted a comprehensive and non-partisan evaluation that rates the qualifications of every federal judicial nominee based on integrity, competence and temperament. By providing this important information to decision-makers, the ABA has helped make the judiciary stronger.

Our system of justice and the health of our profession also depend on an inclusive legal profession. But we know the law is often a challenging place for lawyers of color, disabled lawyers, LGBT lawyers and female lawyers. So, we continue our fight for a truly inclusive profession. In fact, diversity and inclusion is one of the ABA’s four core goals. In 2016, our House of Delegates urged businesses to direct more legal services to diverse attorneys. More than 70 major corporations have signed on to this pledge, including Walmart, Facebook, Microsoft and McDonald’s.

Our recent successes have also included the restoration of funding to the Legal Services Corporation after the current administration proposed the program’s elimination. We brought hundreds of lawyers to Washington to visit their representatives and advocate for the program, which provides legal representation to hundreds of thousands of low-income Americans. We also delivered 20,000 personalized messages on the value of LSC written by a cross-section of Americans. This award-winning grassroots campaign made a huge impact on the members of Congress who received them.

This is just a small sample of the ABA’s recent accomplishments. We have much more work ahead, and we will continually strive to represent our more than 400,000 members, our profession and our justice system. I hope you will join us on this mission.

Follow President Bass on Twitter @ABAPresident or email abapresident@americanbar.org.
IN NEPAL, GENDER VIOLENCE and sex trafficking often go unreported. Survivors usually don’t know their legal rights, and they face community stigma and mistreatment by police in one of the world’s epicenters of human trafficking.

Samrakshak Samuha Nepal, or Sasane for short, is working to change that by empowering sex trafficking survivors through legal training and jobs. Sasane funds paralegal classes to help survivors become financially independent and serve as leaders and legal resources for victims and their community.

The participants are women and girls between the ages of 14 and 25. The paralegals are placed at police stations across Nepal with the goal of increasing access to justice. Their visibility garners the trust of those who traditionally have little confidence in law enforcement.

“The police realized there was an increase in reporting. Women and girls feel safe coming forward,” says Radha Friedman, director of programs for the World Justice Project.

Friedman says many people rescued from sex trafficking were tricked into it. Poor girls and women who thought they were starting a job or getting married were forced into prostitution, often cross-border. Nepal was one of a dozen recipients of a World Justice Project grant in 2014 that helped fund the ongoing program. The WJP was founded in 2006 as a presidential initiative of the American Bar Association and transitioned into an independent nonprofit in 2009. The ABA, which works with the WJP on rule of law issues, provided seed money, and Sasane secured additional funding.

About 45 paralegals graduate from the Nepal program each year. Sasane’s director, Shyam Pokharel, says additional funding is needed to continue and expand the program.

“The sex trafficking survivors are legally empowered,” Pokharel says, “and the legal knowledge has been shared [with] the paralegal’s family, relatives and friends,” compounding the benefits.

Friedman also says Sasane is having a real impact on the communities it serves. She adds that thousands of women have been helped by the paralegals, who assist with filing complaints, providing legal services and rescuing other women from abuse and sex trafficking.

—Cristin Wilson
#MeToo Movement Spurs National Legal Response

Lawyers create defense networks to assist victims

**WHEN WIDESPREAD ALLEGATIONS OF SEXUAL HARASSMENT IN THE ENTERTAINMENT INDUSTRY** broke late last year, lawyers were quick to align with celebrities and women's rights organizations to demand change.

Law professor and attorney Anita Hill, who accused then-U.S. Supreme Court nominee Clarence Thomas of sexual harassment during his 1991 confirmation hearings, is chairing a commission tasked with eliminating sexual harassment in Hollywood.

"There is not a lawyer who practices in this area who has not been deluged with calls. Women are coming forward in record numbers with very strong claims. We all need to work together to harness our collective experience and talents. It's important that lawyers understand that we have a great responsibility at this time in history." —Debra Katz

Along with the president of the National Women's Law Center, Hill met with 150 top-level Hollywood professionals to explore strategies to stop sexual harassment and promote gender equality.

The movement has expanded beyond Hollywood, as activists find ways to support victims across the work spectrum. High-profile attorney Tina Tchen, longtime chief of staff to Michelle Obama, is spearheading the Time's Up Legal Defense Fund, which had raised more than $19.5 million by early February to help victims of sexual assault. Tchen and 300 prominent performers—including Meryl Streep, Shonda Rhimes and Selena Gomez—launched the fund Jan. 1. Their efforts helped turn the 2018 Golden Globes into a spotlight on sexual harassment, with attendees agreeing to wear "Time's Up" pins and dress in black.

The celebrities "provide major leadership," Tchen says. "They want to make a sustainable difference. They have led the charge in donating to the fund, but these women know it's not just
About Hollywood; it's about women in all industries.”

Concerted legal efforts to stop sexual harassment started gaining momentum before the #MeToo movement captured the national dialogue. Shortly after the 2016 presidential election, a group of attorneys helped the NWLC create the Legal Network for Gender Equity, which is now active in all 50 states. Attorneys are on the front lines of recently established hotlines and assistance programs that connect alleged sex assault and harassment victims with lawyers willing to take their cases, on a fee basis or pro bono.

Debra Katz, a plaintiffs employment law attorney with Katz, Marshall & Banks in Washington, D.C., says her caseload of sexual harassment matters has increased at least fourfold in the past few months as women feel more empowered to come forward.

“There is not a lawyer who practices in this area who has not been deluged with calls. Women are coming forward in record numbers with very strong claims,” Katz says. “We all need to work together to harness our collective experience and talents. It’s important that lawyers understand that we have a great responsibility at this time in history.”

Amy Bess, who chairs Vedder Price’s 50-attorney labor and employment practice group in Washington, D.C., agrees that the demand is unprecedented: “All of us are seeing an increase in these claims and with employment misconduct issues across the board.”

Bess defends employers accused of sexual harassment and advises them on how to handle allegations. Today’s world of instant social media can make that complicated.

“No we’re seeing the issue of what to do if the employer knows an employee has posted something on social media claiming that something happened,” she says. “What do you do? Wait until the employee makes a complaint to the employer, or do something when you see the social media post? My advice is to reach out to the employee. It’s better to try to find out what happened and fail than to not try.”

The #MeToo and Time’s Up movements are prompting employers to revisit HR policies and seek legal counsel to advise on best practices for handling sexual harassment claims going forward.

“We are doing a lot of training now and reviewing employers’ HR handbooks,” Bess says, noting there are many changes in the workplace that need to be made across the country. “It will take a while, but all of us [on both sides of the issue] usually agree about what needs to be done.”

—Darlene Ricker
This Native American judge has devoted her legal career to creating remedies that incorporate tribal values.

**THE CHALLENGES FACING LITIGANTS** in Chief Judge Abby Abinanti’s court are great: poverty, geographic isolation, addiction and a legacy of occupation and oppression. Yet there is hope. And success. Abinanti presides over the Yurok Tribal Court in Klamath, California, and her community-based, restorative approach to justice, along with initiatives she helped launch and lead, are improving lives across this remote Northern California reservation. There’s a wellness program to help drug offenders, a community restitution program, and even a program for those accused of domestic violence that has a recidivism rate of zero. Abinanti’s accomplishments have been covered in a documentary film, written about in leading news outlets and, perhaps most impressively, are inspiring new approaches to jurisprudence across the nation.

Tell me a bit about the Yurok tribe, and where do the tribal courts come in?

“Yurok means ‘down river’ in another language. We were called that by other tribes in the area, so that’s where the name came from. We were formally recognized and got our constitution in 1993, and today there are over 6,000 members, making us the largest surviving tribe in the state. We are a village society. We are very tied to salmon, very tied to the Klamath River. We are a world-renewal people; we believe we have a responsibility to protect the earth. We were very fortunate in that we were never removed from our land, so we are still on the land that was always ours. The land is very rugged. For instance, we don’t have electricity yet on the eastern end of the reservation. At times, it has had its difficulties, but it contributed significantly to our ability to survive. We still suffered massacres, indentured servitude, forced removals of kids to go to school; and those are hard to get over, but it’s our responsibility to get over that and move forward. Our judicial system is based on the values of the villages.

Did you always want to be a lawyer?

No, it never occurred to me. I would never have picked it for myself.

How did you end up pursuing a JD?

When I was graduating from college, it was at the time when they were starting to offer the Economic Opportunity Program for kids of color, and there were scholarships for Native Americans to go to law school. There was an advisory group at my college made up of primarily Native women, and they said, “You will go to law school.” It’s very hard to win an argument with old Indian women.

You graduated from the University of New Mexico School of Law at a time when there weren’t many Native American lawyers in the West or nationally. In fact, you were the first Native American woman to pass the California bar exam. Were you ever tempted to go the BigLaw route—to go for the big city and the big paycheck?

I never intended to go anywhere but home. I felt a responsibility to my community. I went to work for the California Indian Legal Services, and eventually I went into private practice. But I still worked for tribes, for Native clients, and I did dependency work before and after the Indian Child Welfare Act. Those were wild times.

In what way?

People weren’t used to seeing Native Americans in court if they weren’t wearing orange jumpsuits. Some lawyers and judges had negative views of Native Americans, and that wasn’t the easiest.

It sounds like you experienced discrimination and harassment. Did that make you mad? Did you ever feel discouraged?

The whole point of being in court was to stand next to people who had no one standing next to them. At least they could have someone with them who cared and understood what they were going through. Someone who knows their families. Sometimes I would get angry, but I would feel like my obligation was to them and not to myself. It’s different if you’re walking down the street and someone is a jerk to you; you have...
different choices. When you’re in court, you don’t have as many options. These people have had enough grief. They don’t need me getting in a fight with someone in the courtroom.

I know you’re active in initiatives to help Native American students go to law school and helping to train people to become tribal court judges. Do you think it’s important that tribal court judges are themselves Native American?

That’s every tribe’s call—what they want to do. It’s helped me. People said, “You can’t be a judge because you know everyone.” I said, “You’ve seen too much TV.” That’s true of their system, but not our system. Before the invasion, who did we turn to to solve problems? Older people in the village. Let’s take that practice and modernize it. We’ll change our practices, but not our values. If your value is harmony, and you want to make this right, then it’s a big plus to know the people. It’s a small community, and I am in the community. And they know I am. I can say to someone, “I heard this, I know it’s true and I don’t like it,” and they know it’s true. It’s like being someone’s aunt: You can get in their face, in the modern vernacular.

Many of the judicial programs you’re involved with rely on outside funding. It’s my understanding that you have to do much of the heavy lifting to get grants and donations, yes?

That’s totally true. Court systems are not designed to make money—they shouldn’t be—so trying to get money in a nation that doesn’t have a financial infrastructure is really, really hard. I spend an inordinate amount of time dreaming up schemes to finding funding. It’s a constant grind. It’s the part of my job I like the least.

What do you do for fun? Do you have hobbies?

I read a lot. I read usually between 80 to 100 books a year. I opened up a used bookstore called the Book Nook because we didn’t have a bookstore on the reservation. We give away children’s books—I go around and collect them, and people donate them—and grown-ups can buy books. We charge $2 for hardback and $1 for paperback. At the Salmon Festival, we had over 200 kids come through and take books. It’s helpful, and the kids love it.

Last question: If you could have three wishes to make your job easier, what would they be?

The ability to put more people in the field, to work with more people and to spend more time with people. The thing that works best for us as a culture is face time. I spend a lot of time one-on-one, and my staff spends a lot of time one-on-one. A lot of what we do is talk about issues like what would be the best for this family? What can we do to help this situation? Can we create a village? Can we meet our responsibilities on a given day? There’s just so much to be done.

—Jenny B. Davis
Pay It Forward and Prioritize

By Wanji Walcott

“There is nothing you can’t do!” As the only child of immigrant parents from Guyana, I’ve heard this mantra repeated for as long as I can remember. Growing up in suburban Massachusetts in the ’70s, I recall seeing many successful professionals; however, I didn’t see any who looked like me. Somehow, that didn’t matter so much and only strengthened my resolve. I knew from a young age that I wanted to be a lawyer, and with my parents’ encouragement and positive affirmations, I believed that this was my destiny.

I have since achieved my professional goal of serving as a general counsel and have also been blessed with the opportunity to be a wife and a mother to two amazing daughters. As I reflect upon how I make this all work, I must confess that I don’t have the secret solution; but I have, over time, learned to operate in accordance with the following principles:

1. Carve out time for yourself without guilt. When my children were young and I was early in my career, I dedicated everything I had to my kids and my work. I felt tremendous guilt for wanting to take time for myself. What I have since realized is that I am my best self, both personally and professionally, when I balance responsibilities with time for my own interests. Admittedly, there will be varying amounts of time available to focus on oneself during life’s many stages. However, my advice to all women is find something that interests you—beyond work—and do as much of it as you can. Now that my husband and I are empty nesters, I have more time for exactly that—and for golf—and no guilt.

2. Make time for the important people in your life. At different points in my career I have (shamefully but not intentionally) prioritized my career over my friends and family. While I’m busier than ever with my career, my personal relationships and the time I set aside for family and friends is a top priority. For instance, my annual girls’ trip with school friends is a must. Despite how challenging it can be to break away, this activity really grounds me and helps me reset. Again, find something that interests you, and do as much of it as you can.

3. Have the courage to say no. With so much happening in our busy lives, the only thing we can really control is our own choices, including where we spend our time and energy. I can’t do everything, so I have to be selective in determining what I can accomplish and what I don’t have the bandwidth, energy or interest to commit to. This behavior takes practice to master, but the reward is worth the effort.

4. Be a role model for others. I live my life by the old adage that to whom much is given, much is required. I have had numerous mentors and sponsors throughout my career, and I feel a tremendous responsibility to pay that forward. I strive to serve as a role model for other aspiring women, the young people in my extended family and my own daughters—part of my purpose is to serve in this way.

5. Regularly affirm and reaffirm yourself. I think it’s natural to have periods in your life where you focus on what you’re not doing well. I try to counter those feelings through self-reflection by starting each day with giving thanks and taking some quiet time for meditation. I also keep a small list of wins and accomplishments, which I reflect on when things haven’t necessarily gone as planned. This list boosts my confidence, serves as a reminder of my strengths and positive attributes, and helps combat self-doubt. It’s in these moments that my parents’ mantra rings true: “There is nothing you can’t do!”

Wanji Walcott joined PayPal in 2015 after 20 years in the financial technology and payments industry. She leads PayPal’s global legal team and oversees the company’s daily legal activities. Walcott helped found the global pro-bono program, serves as the executive sponsor of PayPal’s women’s affinity group, and is an advocate for diversity in the workplace.
Bedbug Resurgence Launches New Legal Specialty

Victims bite back against hotel chains, landlords and other defendants

IT’S PROBABLY UNUSUAL FOR PERSONAL injury attorneys to consult with entomologists. But that’s among the changes to Los Angeles-area lawyer Brian Virag’s professional routine in the past seven years since he took his first case on behalf of a plaintiff attacked by bedbugs.

Virag rebranded his practice My Bed Bug Lawyer after being inundated with cases when he learned more about the anxiety, inconvenience, emotional distress and humiliation sufferers experience. Then he began soliciting clients via YouTube.

“I started looking for resources from other attorneys who may be doing this kind of stuff, and there wasn’t anybody,” says Virag, whose competitors now include firms with monikers such as Bed Bug Legal Group and Bed Bug Lawyers. “I saw how traumatized these people were. I resolved that [first] case, and I picked up another one right after that. I said, ‘Let me try to fill the void.’ ”

In 2017, Virag learned the potential value of such cases as he took a steady swarm of them to trial, with verdicts climbing from $104,000 for a case in Bakersfield, California, to $465,600 in Los Angeles, to an October case against Hilton Hotels that resulted in a $546,000 award. Then, in December, Virag won a $3.5 million verdict against Park La Brea Apartments on behalf of 16 plaintiffs, with individual awards ranging from $34,000 to $470,200, despite combined medical costs totaling only about $2,200.

Legal observers say the growth of bedbug lawyers and climbing verdicts fit the pattern of novel personal injury specialties that can become over-run—like mold law a decade ago and the recent proliferation of ride-share injury attorneys.

“It has a certain logic to it,” says Gregory Keating, who specializes in torts and legal philosophy at the University of Southern California’s Gould School of Law. “If there is a general problem, once one plaintiff prevails, there is a blueprint. So there’s a kind of mass production efficiency. And you have to race at least a bit to the courthouse door; eventually, the industry will either fix the problem or go running to some legislature for protection. And there are no big mass torts at the moment.”

Bedbug attacks are indeed a small tort practice, but the cases have struck a chord with juries. The majority of the recent awards Virag has obtained stem from the emotional distress aspect; two of the four recent cases have included punitive damages, but those “weren’t humongous,” Virag says. “Juries are pretty receptive to the concept of people suffering because of bedbug exposure. It’s not just on a daily basis when you’re living with it—it’s on an hourly basis. You wake up, you’ve got bites. You’ve got to go to work. You’re apprehensive of that whole concept because you feel ashamed and humiliated. And then you have to come home and live with it.”

—Ed Finkel

Hearsay

$82 Million

The estimated value of pro bono services by 2017 law grads, who performed more than 3.39 million hours of aid, according to a survey by the Association of American Law Schools. Based on data from 94 of the 205 ABA-accredited law schools, the AALS found recent law grads logged 184 hours of pro bono work on average over the course of their studies. The inaugural survey, with data from 80 schools, found the class of 2016 completed more than 2.2 million hours of pro bono work, valued at $52 million. The services included law school clinics, externships with legal aid providers, student organizations and volunteer opportunities.

Source: law.com (Jan. 5).

Up in Smoke

The crash and burn of Matthew Petersen, President Donald Trump’s nominee to the U.S. District Court for the District of Columbia, during his Senate confirmation hearing highlights what many practitioners say is a growing problem: Fewer cases are going to trial, resulting in fewer attorneys with trial experience. Statistics show the average federal district judge tries about three criminal cases a year, a decline of roughly 40 percent from eight years ago. Federal civil trials are also on the decline, with an average of about 3.7 per judge each year. Politico reports that these numbers may be overstated, with some judges now going two years or longer without a criminal jury trial.

Source: politico.com (Dec. 21).

Benefit of the Bargain

The University of Tulsa, Brigham Young University and the University of Cincinnati made both U.S. News & World Report’s top 100 law schools and Law.com’s top 20 cheapest law schools lists. Law.com compiled the top 20 list utilizing data from the ABA and U.S. News’ ranking system, reporting that tuition at the 20 cheapest schools ranged from $25,254 to $38,904 per year, which is considered a bargain compared to other institutions. The majority of the affordable schools are in the South.

Source: law.com (Dec. 20).
Reckless Requests

Public records laws are meant to shine light on the dark side of government, but they may be abused

By Lorelei Laird

In 2015, a government official in Snohomish County, Washington, received an email from a “Mr. Public Requestor,” seeking all public records of any kind from all county-owned smartphones.

Despite the breadth of this extraordinary request, the anonymity of the person who sent it, and its lack of an obvious purpose, the county couldn’t turn it away. Under Washington’s Public Records Act, none of those factors invalidates such a request. Gage Andrews, then the county’s public records officer, estimated it would take 12,000 hours to download and make the necessary redactions.

But 935 hours into fulfilling that request, the requester canceled without explanation. Because the law doesn’t permit Snohomish County to charge for lost staff time, it was out about $30,000.

Such stories have played out all across Washington in the past decade. According to a 2016 report from the state auditor’s office, the cost of filling public records requests went up 70 percent between 2011 and mid-2015, driven by increases in the number and complexity of requests. They came from companies, nonprofits, law firms, the media and individuals. That’s why the state legislature passed two reform bills last year.

“We just hope that that is at least a deterrent to some of these—I call them vexatious, vindictive requesters,” says state Rep. Terry Nealey, a Republican from eastern Washington who sponsored one of the bills. “That was really the goal of mine all along—was to try to prevent them from gumming up the works.”

Public records laws—state law analogues to the federal Freedom of Information Act—are intended to allow citizens to keep tabs on their governments and can expose
wrongdoing, mismanagement, reckless spending, even scandal. But they also can be abused—and not just in Washington.

After a few people in Florida started to use public records laws to generate quick settlements, the state legislature passed reforms in 2017. And university professors whose research touches on controversial topics such as climate change have been mired in litigation regarding politically motivated records requests.

**QUESTIONABLE MOTIVES**

Some attorneys love freedom of information laws; the Washington auditor’s report says law firms make more Public Records Act requests than the media. But government lawyers might be less enthusiastic. Chuck Thompson, executive director and general counsel of the International Municipal Lawyers Association, says one problem for his members is that many states (including Washington) don’t allow agencies to recover the cost of staff time, which is the bulk of their costs.

Another problem is that the Washington Public Records Act was written in the 1970s. The original law suggested standard charges for the cost of photocopies but did not contemplate electronic copies. As a result, Nealey says, many municipalities simply didn’t charge for electronic copies.

That had bad results. One Seattle man, Tim Clemans, asked in 2015 for all state agencies’ emails, on all subjects and from all dates, via the internet at no charge. His request was denied because it did not specify identifiable records and seemed to be an attempt to change state policy on email. Clemans said his plan was to make an enormous online database of public information or motivate agencies to do that.

Then there are the vexatious requesters. Nealey says some requesters in Washington have written bots—small computer programs—to flood government agencies with requests at inhuman speed. But that doesn’t take a computer programmer.

“A disgruntled [resident] will file multiple requests seeking the same information—but day after day after day,” Thompson says. “Or multiple requests seeking a host of different information. Not necessarily because the resident is interested in the information but is interested in requiring the government to respond.”

Toby Nixon, president of the Washington Coalition for Open Government, gets to know the stories of persistent or vexatious requesters through his advocacy work, as well as his work as a council member for the city of Kirkland. He says there are only a handful. But they’re out there, and they seem to be emotionally motivated.

“They’ll just say, ‘Well, I’m a watchdog, and I’m trying to hold the agency accountable to the public,’”

If you have something you don’t want the public to see, the attorney fees are the only sting that gives you an incentive to comply with the law.”

—Frank LoMonte, Brechner Center for Freedom of Information

he says. “Only a few will admit that ... they really are doing it to punish the agency.”

Risa Lieberwitz, general counsel of the American Association of University Professors, says politics can be a motivation. Professors who work on controversial topics, including law professors, have been hit with requests from both sides of the political spectrum.

The most famous of these requests came from the Energy & Environment Legal Institute, a conservative think tank, seeking the correspondence of professors involved in climate change research. Lieberwitz thinks the institute genuinely wants to see the corres-

From the Florida perspective, the Washington situation is a bit more complicated. Florida legislators sought to address that problem with a reform bill. But originally the bill made attorney fee awards discretionary rather than mandatory. That would have removed any incentive to grant records requests, says Frank LoMonte, director of the Brechner Center for Freedom of Information at the University of Florida.

“If you have something you don’t want the public to see, the attorney fees are the only sting that gives you an incentive to comply with the law,” says LoMonte, an ABA member who is on the Advisory Commission to the Division for Public Education.

Otherwise, the only risk is you might get a judge’s order a few years later.”

So Petersen’s First Amendment Foundation, a regular lobbyist at the Florida legislature, worked with groups of municipalities to revise the bill. As passed, SB 80 makes attorney fee awards mandatory—but only if the requester gives five days’ notice to the agency’s designated records custodian before filing suit. If judges determine that records requests were
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frivolous, they also can award attorney fees to the government agency. Petersen still doesn’t like it, but she says the original “really had the potential to do some serious damage to our right of access in Florida.”

THE COST OF REQUESTS

It took a similar process to modify the Washington law. Nixon of the Washington Coalition for Open Government says there had been several years of attempts to reform the Public Records Act to deal with the growth in vexatious requests. But in the midst of the legislative session, he says, they had always turned into “just a lot of shouting.”

The legislature created a study group, which took about a year to debate and draft two bills. As passed, HB 1595, sponsored by Nealey, says a request for all or substantially all of an agency’s records is not valid; permits agencies to turn down excessive, automatically generated requests; and allows charges for electronic copies, giving agencies a choice between calculating their own fees or using a suggested schedule of fees.

A companion bill by Democrat Joan McBride of Kirkland addresses the issues of clarifications, request logs and training.

Nixon says that negotiations between open government advocates and municipalities were extensive and sometimes contentious. He strongly opposed the idea of letting municipalities charge for staff time, although according to the Washington auditor’s report, this was 98 percent of the cost of records requests.

In this, Nixon says his perspective as a city council member helped him bridge the gap. Ultimately, the study group compromised by charging $1.25 for electronic copies, thinking it might discourage persistent large-scale records requests. If, for example, the requester asks for 10,000 files, it would cost $125.

“At 100 bucks or 200 bucks or something, a requester thinks twice about that,” Nixon says. The purpose of the bill, he adds, “was to come up with some way to make these persistent vexatious requesters think at least a little bit about the cost of what they were asking for.”

Battling Bail

The bail industry is fighting back against reforms that threaten its livelihood

By Jason Tashea

A little more than a year ago, New Jersey all but eliminated cash bail for criminal defendants, except for those charged with certain violent offenses.

Since the reforms took effect Jan. 1, 2017, the county jail population is down 16 percent, says then-attorney general Christopher Porrino, who left office on Jan. 16 when the new governor was sworn in. And preliminary numbers show a 5 percent decrease in violent crime over the year.

The reforms, Porrino says, address two problems: First, that violent repeat offenders were often able to buy their way out of jail; and second, that low-level, nonviolent offenders often languished in jail because they didn’t have the means to post bail.

Now, instead of needing money to attain freedom, which disproportionately punished poor and minority people, defendants are held or released because of their risk to society. “This is one of the best examples of where government can work,” Porrino says.

Determining who is held in jail and released is done, in part, through an algorithm called a risk assessment, a program being challenged by the bail industry, whose financial future is increasingly threatened. Although reformers say risk assessments decrease crime rates, reduce jail populations and increase government savings, the bail bond industry sees a permissive tool that is bad for public safety and an existential threat. (See “Calculating Crime,” ABA Journal, March 2017, page 54.)

“Pretrial assessment represents a quantum step forward over the current subjective—and too often biased—decision-making,” says Cherise Fanno Burdeen, CEO of the Pretrial Justice Institute, a policy group in Rockville, Maryland, and co-chair of the ABA Pretrial Justice Committee.

In the most basic sense, a risk assessment takes a series of factors about an individual facing detention and provides an output, such as the likelihood that the person will show up to court or commit another crime.

While there are numerous risk assessment methods, one of the fastest proliferating tools is the Laura and John Arnold Foundation’s Public Safety Assessment, or PSA, which has been pilot-ed in about 40 jurisdictions, including New Jersey.

Jeff Clayton, executive director of the American Bail Coalition, says risk assessments originally “were one more tool in the toolbox” that a judge could use to set bail. Although he has concerns regarding the underlying research and data that led to the creation of the PSA, he now describes the algorithm as a mechanism “to completely get rid of bail.”

A NATION LOCKED UP

Every year about 12 million Americans are booked into local jails. The Pretrial Justice Institute says about three out of five inmates are awaiting trial, costing taxpayers about $14 billion per year.

For judges, as a paper from the Arnold Foundation notes, the “decision—whether to release or detain a defendant—is far too important to be left to chance.” The foundation determined a data-informed risk assessment was the way to close this subjectivity gap.

Tools such as risk assessments are seen as a complement to implementing bail reform. In their absence, limiting cash bail can have mixed results. In Maryland, for example, a new judicial rule states that money
bail should be used as a last resort. However, this led to only a slight increase of those being released in Baltimore, about 8 percent, and an increase of more than 140 percent of those held pretrial without bond, says Zina Makar, co-director of the Pretrial Justice Clinic at the University of Baltimore law school. She says risk assessment tools—alongside services such as counseling—can improve the decision-making process and give judges the comfort to release people pretrial. But the bail industry isn’t convinced risk assessments work.

RISKY BUSINESS

In New Jersey, the Arnold Foundation is a named defendant, alongside Porrino and then-Gov. Chris Christie, in a wrongful death suit that also seeks to halt the use of the PSA. The complaint alleges that Christian Rodgers, 26, was fatally shot by a man released under the risk assessment regime. He had been arrested on weapons charges before his release.

Rodgers’ mother argued in her complaint that because of the PSA, “throngs of violent criminals were released into the streets of New Jersey’s neighborhoods.” The complaint argues that the PSA’s formula undervalues certain cases that involve the unlawful possession of a firearm. (The case is being backed by Duane Chapman, a reality television personality also known as “Dog the Bounty Hunter” who chases bail skippers across the country.)

After Rodgers’ killing, the attorney general’s office released guidelines, which include the presumption that prosecutors will seek to hold people in pretrial detention on firearm possession charges (among other violent crimes).

While the lawsuit is pending, the Arnold Foundation is researching the impact of its risk assessment system and how it can be improved as it is rolled out to other jurisdictions, says Matt Alsdorf, president of Pretrial Advisors and previously vice president of criminal justice at the Arnold Foundation. Although curtailing cash bail is a current topic in the states, the federal system rejected this approach in 1966 and tailored release decisions to the risk posed by the defendant. For Brett Tolman, a former U.S. attorney for Utah, his experience in the federal system bolsters his support of bail reform.

“I got to see how that worked,” Tolman says of the federal risk-based system. He says it was not perfect but thinks the current system is broken and being held hostage by the bail industry.

Not yet to the point of litigation, rules were proposed by the Judiciary Courts of the State of Utah that would move toward a risk-based system and a pilot of the PSA. But the legislature asked the courts to hold off after the industry intervened.

“This hurdle has the potential to be a brutal fight. "If it sounds too good to be true, then probably it is,” said Wayne Carlos, president of the Utah Association of Professional Bondsmen and Agents, during a legislative hearing in September. “What is the real reason why the courts are trying to push this program? Let’s find out before it’s too late.”

Tolman says the bail industry used “misinformation and fear tactics” to get the Utah legislature to intervene after the legislative auditor general called for bail reform and the adoption of a risk assessment tool in 2017.

With a temporary victory for the industry, the courts are in a “wait-and-see sort of approach,” says Geoffrey Fattah, spokesman for the Utah state courts.

To the southeast, New Mexico’s bail reform advocates successfully passed a state constitutional amendment in 2016 to decrease the state’s reliance on cash bail while keeping it as a limited option, says Artie Pepin, director of the Administrative Office of the Courts in Santa Fe.

However, the judiciary’s rulemaking and implementation, which includes a pilot of the PSA in Bernalillo County, was rejected by the bail industry.

The bail bonds association sued the state to halt implementation in 2017, although the case was later dismissed. Blair Dunn, an attorney for the association who was ordered to pay costs and attorney fees for filing frivolous claims, says the association is appealing to the 10th U.S. Circuit Court of Appeals at Denver.

Gerald Madrid, president of the Bail Bond Association of New Mexico, is a plaintiff in the case and is particularly critical of the risk assessment tool. He says it’s too permissive and essentially allows release for everyone, which puts the public’s safety at risk.

It has also hurt his bail bond business, which is based in Albuquerque. Since the reform, he laid off all 10 employees in the Albuquerque office, while his contractors in other parts of the state have scaled back operations. “It’s financially destroyed the bail bond industry in New Mexico,” he says.

Regardless of the hurdles placed by the bail industry, Porrino, the former New Jersey attorney general, is optimistic for the future of similar efforts. “As word starts to get out, I think you end up with a surge nationally to implement reforms a lot like the reforms being implemented here in New Jersey,” he says.
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**Truth in Advertising**

Court to weigh whether law aimed at crisis pregnancy centers violates First Amendment  By Mark Walsh

In 2015, the California legislature enacted a law aimed largely at the field of crisis pregnancy centers—licensed and unlicensed facilities that exist to steer women away from abortion.

The centers have been around for more than 25 years, with many setting up near abortion providers and, critics say, using misleading advertising and promotion to attract women who intend to end pregnancies—but instead counseling them toward giving birth.

California sought to ensure that poor women were aware of the free services available under state auspices and to help women avoid confusion about whether they were receiving care and advice from medical professionals.

“The legislature reviewed evidence about so-called crisis pregnancy centers, finding that they frequently provide women with medically inaccurate information,” said California Attorney General Xavier Becerra in a brief filed with the U.S. Supreme Court in National Institute of Family and Life Advocates v. Becerra, to be argued March 20. “At the same time, some facilities offer services such as pregnancy testing and ultrasound examinations, which can lead women to believe they are receiving treatment in a medical setting.”

**POSTING THE FACTS**

The Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act, known as the Reproductive FACT Act, has two main provisions. One requires certain licensed medical facilities to disclose to women that the state has publicly funded programs providing comprehensive family planning services.

This notice must be provided to clients in a pamphlet, electronically at check-in or on a waiting room sign. It reads: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].”

A second provision of the law addresses unlicensed pregnancy centers, which don’t have a licensed medical provider on staff but may provide services such as pregnancy testing, obstetric ultrasounds and sonograms or prenatal care.

Such unlicensed facilities must post a notice in entrance areas and in advertisements stating that the “facility is not licensed as a medical facility by the state of California and has no licensed medical provider who provides or directly supervises the provision of services.”

The plaintiffs, who include a national group representing such pregnancy centers and several individual centers, argue that the requirement is a form of compelled speech that violates the First Amendment’s free speech clause.

“This case is about compelled speech and ... forcing these centers to provide free advertising for abortion,” says lawyer Kevin H. Theriot of the Alliance Defending Freedom in Scottsdale, Arizona, which is representing the National Institute of Family and Life Advocates and two of its member centers.

NIFLA, based in Fredericksburg, Virginia, supports more than 1,400 nonprofit pregnancy centers nationwide and over 130 in California. Most, if not all, of the centers are owned by people with religious-based objections to abortion.

In California, some NIFLA members are licensed medical providers, and they provide health services such as pregnancy testing, prenatal vitamins, ultrasound examinations, medical referrals and STD testing. Such centers must provide the notice about the availability of free family planning services, including the mention of abortion.

Many centers, though, are unlicensed facilities that provide non-medical services such as pregnancy test kits that women administer themselves; emotional support; spiritual resources; preparation for parenting; and free provision of such items as maternity and baby clothing, baby food and formula, diapers, strollers and nursery furniture. But they also may provide services such as sonograms and ultrasounds.

“For us, the essence of this case is about First Amendment rights,” says Anne O’Connor, NIFLA’s vice president of legal affairs. “Americans should not be forced by the government to promote a message that conflicts with our beliefs.”

The challengers contend that the Reproductive FACT Act was targeted to cover the 200 or so crisis pregnancy centers in California and does not impose the requirement on facilities that provide abortions. Indeed, licensed medical facilities...
that participate in Medi-Cal, the state Medicaid program, and Family PACT, which offers comprehensive family planning to low-income people and covers abortion services, don't have to provide the notice.

A federal district court denied a preliminary injunction to block the Reproductive FACT Act requirements, and a panel of the 9th U.S. Circuit Court of Appeals at San Francisco affirmed.

The 9th Circuit panel held that the notice required of licensed providers could be regulated under its professional speech doctrine, which applies intermediate constitutional scrutiny to a regulation of speech between professionals and their clients in a professional relationship. (While several federal circuit courts have recognized such a doctrine, the Supreme Court has not.)

California has a substantial interest in ensuring that women are aware of state-sponsored "medical services relevant to pregnancy," the court said. The notice for licensed centers is narrowly drawn to achieve that interest because it requires facilities merely to inform clients "of the existence of publicly funded family planning services" and does not "encourage, suggest or imply that women should use those state-funded services."

The notice required of unlicensed facilities would meet any level of First Amendment scrutiny, the appeals court held. The provision "helps ensure that women ... are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations' applicable to medical professionals.

The lower courts also upheld the provisions against the centers' free-exercise-clause claims based on their religious beliefs. The Supreme Court took up the challengers' appeal but limited it to the First Amendment free speech claim.

A MESSAGE IN 13 LANGUAGES

The challengers say the requirements make it difficult for the pregnancy centers to advertise. The Reproductive FACT Act requires every ad to include the notice for either licensed or unlicensed centers, and it must be provided in multiple languages—as many as 13, depending how many "threshold languages" are recognized by the state as spoken in a particular county.

"That makes it impossible to do a billboard," Theriot says. "Certainly, it prohibits a Google ad."

Critics of the crisis pregnancy centers argue they have long used misleading advertising to lure pregnant women and provide inaccurate information once those women are inside the centers.

"They aren't transparent about the services they actually provide," says Adrienne Kimmell, vice president of communications and strategic research at NARAL Pro-Choice America, a Washington, D.C.-based abortion-rights advocacy group. "There is an intentional deception there."

Priscilla Smith, a clinical lecturer at Yale Law School and senior fellow at the school’s Program for the Study of Reproductive Justice, also says many of the centers’ "modus operandi is to use either false advertising or, at the very least, very vague advertising to make people think that they are medical clinics offering abortion."

Theriot of the Alliance Defending Freedom and O'Conner of NIFLA strongly dispute those assertions.

There is no information in the record of this case that the pregnancy centers have used deceptive tactics, Theriot says. "That is something that is a longtime accusation that is just not based on fact," he says.

O'Conner says, "Pregnancy centers help women. They provide a safe space and empower them."

They point to a January ruling by the 4th Circuit at Richmond, Virginia. This ruling struck down an ordinance adopted in Baltimore that sought to require unlicensed pregnancy centers to provide a notice to clients that they do not provide or make referrals for abortion or birth control services.

The 4th Circuit said in that case that despite seven years of litigation and a 1,295-page record, "the city does not identify a single example of a woman who entered the Greater Baltimore Center's waiting room under the misimpression that she could obtain an abortion there."

Like most of the high-profile cases of the current Supreme Court term, President Donald J. Trump's administration has gotten involved. Despite the administration's strong anti-abortion stance, it sides with the pregnancy centers only for half a loaf.

"Licensed clinics have a strong interest in refraining from speech that advertises third-party services they find morally repugnant," wrote U.S. Solicitor General Noel J. Francisco in the federal government's brief.

"California has not substantiated any particularized interest in having licensed clinics themselves disseminate the notice."

The state may not require the pregnancy centers to serve as billboards for the state's comprehensive reproductive health services, Francisco said.

By contrast, the notice required of unlicensed centers to disclose that they do not provide medical services should be upheld, the administration said.

"It merely requires service providers to disclose an accurate, uncontroversial fact about their own services: That they are not provided by a state-licensed medical professional," Francisco wrote. "The state has a strong interest in ensuring that women know whether services such as ultrasounds and sonograms are provided by licensed medical professionals."
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A Confidentiality Exception
Opinion says ‘generally known’ info may be treated differently
By David L. Hudson Jr.

Confidentiality is one of the cornerstone concepts of professional responsibility. An attorney’s duty of confidentiality extends beyond current clients and applies to former clients.

Under ABA Model Rule 1.9(c)(1), a lawyer cannot use information related to the representation of a former client to disadvantage that client without their informed consent, unless the information has become “generally known.”

Rule 1.9(c) provides: “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.”

This exception in Rule 1.9(c)(1) has been the subject of some debate. It is not defined in the ABA Model Rules of Professional Conduct. Now, the ABA Standing Committee on Ethics and Professional Responsibility has provided guidance on the meaning of the exception in Formal Opinion 479.

Courts have held that information is not generally known just because it’s a public record or in a court filing. The information must be within the understanding and knowledge of the general public.

Opinion 479 says information is generally known if “(a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client’s industry, profession or trade.”

A SENSIBLE DEFINITION
Nancy J. Moore, a professor at the Boston University School of Law, says the definition is “useful and sensible.”

“There currently is no definition of the term generally known in either the text or comment of Rule 1.9. Given that it is not obvious when information has become generally known, some definition is clearly useful,” Moore says.

When does information become widely recognized? The opinion says information can become widely recognized through “traditional media sources, such as newspapers, magazines, radio or television; through publication on internet websites; or through social media.”

“I agree that this definition makes sense, though I don’t think it necessarily resolves what is generally known in every instance,” says Renee N. Knake, who teaches legal ethics at the University of Houston Law Center and recently co-wrote Professional Responsibility: A Contemporary Approach. “Inevitably gray areas will arise, but I do think that the opinion offers helpful guidance as to what may constitute ‘generally known.’”

She says questions remain as to what “minimum threshold of publications” are necessary to establish that the information is generally known.

“What about other sources, such as a public survey or opinion poll?” she says. Regarding wide recognition in the former client’s industry or profession, Knake asks whether it is...
“possible to rely as well on expert opinions.”

Further, “information that is publicly available is not necessarily generally known,” the opinion reads. “Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).”

“The opinion is striving to achieve a balance here,” Knake says. “Defining ‘generally known’ to include any public record would address the gray area problem, but it doesn’t sufficiently protect the sort of information contemplated under the umbrella of confidentiality afforded by Model Rule 1.9.”

Model Rule 1.9(c)(2) prohibits a lawyer from “revealing information about a former client,” Knake says. “The difference between ‘reveal’ versus ‘use’ is significant, and the lawyer may only use a public record that has otherwise been revealed by another source and spread widely.”

Moore of the Boston University law school agrees with the opinion’s reasoning. “In the absence of knowing the client’s confidential information, it would not necessarily occur to a member of the public to conduct a search to discover the public record,” she says. “In addition, information contained in public records is not always easily or inexpensively obtainable, particular when a FOIA request is required.”

Opinion 479 is also in accord with a number of state bar ethics opinions. For example, a 2017 opinion from the New York State Bar Association Committee on Professional Ethics says: “Information is not ‘generally known’ simply because it is in the public domain or available in a public file.”

Further, the ABA opinion adds that “for information to be generally known, it must previously have been revealed by some source other than the lawyer or the lawyer’s agents.”

GRAY AND VAGUE


“The entire rule is a mess,” Cicchini says. “How are we to know what is widely recognized by members of the public? Must we take a survey? Can we rely on our own gut feeling? Will the opinions of a few members of the community be sufficient? And who are we to decide what is the relevant geographic area? This is far too vague.”

In his law review article, Cicchini wrote that several courts have come up with a vague definition of what is generally known. “Courts often define generally known information in vague terminology, such as information ‘within the basic understanding and knowledge of the public,’ ” he wrote. Rule 1.9 in general “is an absurdly broad rule that perpetually bans attorney speech for all purposes and with regard to all information, including information in the public domain.”

However, Moore says there must be some gray area in interpreting what is generally known information for the purposes of Rule 1.9(c)(1). “The definition contained in this ethics opinion reduces the extent of uncertainty in the current rule and does so in a manner that provides a necessary protection for former clients,” she says. “If there is doubt whether the adopted definition applies, then good lawyers will likely err on the side of avoiding use of the former client’s confidential information.”
At least twice a century or so, our profession should be reminded of perhaps the most incoherent judge in the history of the English-speaking world: William St. Julien Arabin. This Dickensian character was most notably memorialized 50 years ago in Sir Robert Megarry’s little book, *Arabinesque-at-Law*, which is both funny and sad—sad especially when you’re reminded that Arabin issued non sequiturs from the trial bench for some 15 years.

Serjeant Arabin, as he was known, served in the 1820s and 1830s as a criminal judge in the Old Bailey, the central criminal court of England and Wales. In those days, the law reports were made by young barristers, and Arabin’s pronouncements were taken down at various times by 16 different ones. By far the most prolific among these was Henry Blencowe Churchill, the son of a solicitor in Oxfordshire, who wrote that he was “responsible for the strict verbal accuracy” of his reports.

Churchill’s claim of accuracy is credible. Arabin’s obituary in the London Times (1841) called the judge “an original, absent, eccentric man, not wanting in mother wit, but very much lacking the faculty of expressing himself rationally.” One of his colleagues, Serjeant Ballantine, described him as a “shrewd, quaint little man” who “enunciated absurdities with most perfect innocence.”

I’ve often wondered whether modern psychology or psychiatry could diagnose the mental impairment that caused Arabin’s bizarre combination of irrational dogmatism and confused ideas. Perhaps. But I imagine you’d prefer some examples.

Here are a few of the judge’s obscure aphorisms:

• “No man is fit to be a cheesemonger who cannot guess the length of a street.”

• “A man with a cold is not fit to try a lady’s shoes on.”

• “Thieves are more likely to live in the best neighborhoods than in the worst.”

• “Interrupting and robbing are the same thing.”

• “What passes at the moment is the best evidence of what the mind feels at the instant.”

• “What passes in the presence of one prisoner is evidence against the other prisoner, if they are both in the same indictment.”

**IN HIS OWN DEFENSE**

Arabin often proclaimed his own intelligence coherently enough (these are from different cases):

• “I know what’s what.”

• “I never forget anything.”

• “I am not a fool.”

• “My judicial eye never deceives me.”

Despite his trumpeted mental prowess, Arabin acknowledged certain physical frailties. In one case, when counsel complained that the courtroom was drafty, Arabin declared: “Yes. When I sit here, I fancy myself on the top of Mount Breeze; and the first thing I do every morning of the session is to go to the mirror and see if my eyes have not been blown out of my head.” It’s hard to imagine that onlookers kept a straight face.

Arabin typically made snap judgments. In one case, a man named Buckley was one of two defendants charged with stealing a handkerchief. Buckley asked a witness whether he’d seen him with the handkerchief. Upon conviction of both defendants, Arabin said to Buckley: “The moment I heard your question, I knew that you were both practiced thieves—common pickpockets.”

Arabin claimed for himself almost supernatural powers in judging: “I can try this case in five minutes; and it will take any other judge, whoever he may be, two hours.” He once said to a witness: “Now, mind: We sit here day after day, year after year, hour after hour, and we can see through a case in a moment.”

No fan of stare decisis, as you might imagine, Arabin was unmoved by precedents. When counsel offered to cite cases in support of his position, Arabin declared: “I don’t care anything for any cases whatever.”

He was partial to quick trials, sometimes suggesting that both trial and execution could take place within five
In one case, he said to a witness: “You must remember—and if you don’t remember, you ought to know—that nothing whatever that is said in a prisoner’s absence against him can be used in evidence under any circumstance whatever, if he was not present when it was said; and if he was, any man might be convicted and hanged in five minutes.”

Sometimes Arabin attributed clairvoyance to everyone in the courtroom. Here, he was questioning a police officer:

*The court:* “Tell us what you know about this.”

*Witness:* “On the day in question, I was walking along Hoxton New Town, on duty . . . .”

*The court* (interrupting): “What’s the use of telling us what everybody knows?”

In another case, Arabin became indignant at what his own clairvoyance told him.

*The court* (to witness): “Did you ever buy a horse from the prisoner?”

*Witness:* “No.”

*The court:* “Then did you not pay him a 5-pound note for that horse?”

*Defense counsel:* “I am about to submit . . . .”

*The court:* “I cannot hear you. I know what you are about to say, and it is so monstrous and preposterous . . . .”

**UNFILTERED BIAS**

Arabin’s biases were outrageous—and often transparent. He once admonished a jury: “One woman is worth 20 men for a witness any day.” Yet he would turn around and berate female witnesses in shocking ways. To one who didn’t talk loudly enough, he said: “You come here in false wigs. If you can’t speak out, I’ll take off your bonnet; if that won’t do, you shall take your cap off; and if you don’t speak out then, I’ll take your hair off.” And to another: “If you don’t speak out, I’ll take off your bonnet; and you’ll never get a husband.”

In a case involving the theft of pigs, a defense witness was approaching the stand when Arabin said: “Now, young woman, for you are a young woman and have a child in your arms; if I catch you tripping, I will put you where the prisoner is. I have given you warning kindly: You had better say you know nothing about this matter.”

Some of his prejudices were geographic. In one case, he announced to the jury at the outset: “This case is from Uxbridge. I won’t say a word, as can anyone doubt the prisoner’s guilt?”

In a different case from that locale, he declared: “I assure you, gentlemen of the jury, people from Uxbridge will steal the very teeth out of your mouth as you walk through the streets. I know it from experience.”

Sometimes Arabin seemed to be confused by the sound association of words. Think of beer-guzzling here: “Prisoner at the bar, I have no doubt of your guilt; you go into a public house and break bulk, and drink beer; and that’s what in law is called embezzlement.”

His lucidity was hardly improved when he was giving jury instructions. Imagine being on a jury hearing this charge: “If this is a concerted story, cadit quaeistio, as I often say. But the witness makes no bones of it and swears positively to him. For there is a clerk with a crutch in his master’s employ. He is quite clear, and he is a great fool. For he left his cart, and he swears positively to him, and he does not come here to commit perjury. Have you any doubt about it? None! Now, what honest man could have any object in turning a horse’s head round the corner of a street? I have no opinion on the subject. The case is with you, and I shall only say that the law will not allow that to be done fraudulently which it does not sanction with violence.”

Not surprisingly, given the evidence you’ve already seen, Arabin was the all-time champion of judicial illogic:

- “If ever there was a case of clearer evidence than this of persons acting together, this case is that case.”
- “I cannot suggest a doubt: She goes into a shop, and looks at several things, and purchases nothing; that always indicates some guilt.”
- “Prisoner, I will give you a chance of redeeming a character that you have irretrievably lost.”
- “My good man, hold your tongue and answer the question.”

How do you sum up Sergeant Arabin? Fortunately, he did it himself, with what looks in retrospect to be a fully accurate and coherent claim: “I’ll be bound there is not such a court in the universe as this—not in the kingdom, and the whole British Empire.”

**Bryan A. Garner**

Bryan A. Garner, the president of Dallas-based LawProse Inc., is the editor-in-chief of Black’s Law Dictionary and the author of more than 20 books—most recently Nino and Me: My Unusual Friendship with Justice Antonin Scalia.
Voices in My Head
Learning to quiet the inner critic and its impossible demands

By Jeena Cho

Who do you think you are? Stop talking. You’re making a fool of yourself. You’re not really going to wear that to court, are you? You’re screwing this up! You’re not good enough. They should just take away your bar license.

Do these thoughts sound familiar? Each of us has a critical inner voice—the inner critic. The inner critic pushes us to be perfect, to meet an impossible standard. Rarely does our performance match the ideal perfect standards demanded by the inner critic.

When I reflect back, so much of my life has been governed by the inner critic. I had to prove I was worthy of belonging and love. I had to prove I wasn’t a failure. Yet no matter how much I achieved, the inner critic was never satisfied. I didn’t know how to pause, to savor, to appreciate the small and big accomplishments of my life.

I remember having overwhelming anxiety at my law school graduation ceremony because I didn’t know for certain where I’d work. “You’re such a loser. Graduating from law school and without a job,” the inner critic chided.

The voice of the inner critic is often not based in fact or reality. Yet the voices can be very compelling. In cognitive behavioral therapy, these thoughts are known as thinking errors or distorted thinking. Learning about these common thought patterns and working with them has been hugely helpful in reducing stress, anxiety and depression.

Here are some of the most common thinking errors, adapted from a document from the College of Charleston’s counseling and substance abuse services:

- **Catastrophizing:** Imagining the worst-case scenario and blowing it out of proportion. For example, thinking if you don’t land this client, you’ll never make partner, and then you’ll live an unhappy and dissatisfied life.

- **Jumping to conclusions:** Making a judgment without evidence to verify the conclusion, such as thinking the opposing counsel is refusing to stipulate to an extension just to be difficult.

- **Personalization:** Attributing an external event to yourself without causal relationship. For example, your partner seems distracted, and you assume it’s because she is angry with you.

- **Overgeneralization:** Generalizing based on a few limited occurrences, such as thinking you gave a terrible presentation because of the few negative feedback comments while ignoring the dozens of positive comments and praise.

- **Black-and-white thinking:** Categorizing things into one of two extremes without recognizing the possibilities of gray, such as thinking you’re either a brilliant lawyer or a terrible one.

- **Labeling:** Attaching a label to yourself, such as when you feel anxious before a hearing and then label yourself as “always anxious.”

- **Emotional reasoning:** Thinking because you feel a certain way, it must be true. “I feel like the judge was upset with me; therefore she must be angry with me.”

- **“Should” statements:** Motivat-
ing yourself with shoulds and shouldn’ts, as if you had to be whipped and punished before you could be expected to do anything. This leads to guilt. One example: “I should be exercising more, spending more time with my family and billing more.”

Disqualifying the positive: Dismissing positive experiences or accomplishments by insisting they don’t count. For example, you win a difficult case and tell yourself, “I just got lucky.”

Unproductive and unhelpful thoughts: Problematic thoughts that do not contain logical thinking errors. These thoughts may be true, or they may be value statements that are neither true nor false. However, dwelling on them makes you feel more anxious and may interfere with your performance. “The judge might ask me a question that I don’t know the answer to.”

WORKING WITH THE INNER CRITIC

By starting to recognize and naming these thought patterns, we can begin to work with the inner critic. Also, we can engage in deliberate practices to relax the thinking mind and see thoughts for what they are—simply a passing mental phenomenon.

In cognitive behavioral therapy, you learn to challenge thoughts. Think of it like putting the inner critic on the witness stand and cross-examining it. How do you know that thought is true? What evidence do you have that the thought is true? What if the opposite were true? Is there another interpretation of the situation?

Having a hobby is also a wonderful way to rewire the brain. Hobbies can be a way of unplugging from the demands of work, engaging your creativity and finding calm. We can use hobbies as a way to examine the inner narrative.

Lauren Rad, a lawyer at Ferguson Case Orr Paterson in Ventura, California, who learned to knit as a 1L at Harvard Law School just as final exams approached, says, “Learning to knit, making mistakes while knitting and fixing those mistakes is a way to learn that mistakes in other areas of life are usually fixable, too.

“As you become more comfortable making and fixing mistakes, the inner critic is less able to convince you that you’re stupid for making one, or that a single mistake is the end of the world because you know from experience that’s not true.”

MINDFULNESS MATTERS

Through mindfulness practice, we can learn to take a friendlier stance toward ourselves. We also can see that these thoughts are just old mental conditioning, and we can start to see patterns: When X happens, I always think Y. When A happens, I always do B. This way of understanding ourselves and our thoughts can be sanity preserving.
Cyberthreats 101
A primer on how lawyers and firms are getting breached and the biggest risks they face

By Mary Ellen Egan
LAST MARCH, ATTORNEY JEFFREY WICKS WAS BEING held at digital gunpoint. Wicks—head of a small firm handling criminal defense and civil and family law cases in Rochester, New York—was being extorted by cybercriminals who were holding his firm’s data for ransom.

Wicks had apparently opened an email attachment that locked down his computer and his firm’s network. The data was encrypted, and the hackers were demanding 20 bitcoins in return for the decryption keys to unlock the firm’s files. At that time, one bitcoin was worth about $1,200, meaning the cybercriminals were demanding about $24,000 for the safe return of Wicks’ data. (At press time, the bitcoin value was more than $11,000.)

After a few rounds of negotiations, Wicks ended up paying $5,000 for the network’s data. (He refused to pay for the locked data on his computer and lost two years’ worth of information.) He also had to spend $10,000 in IT fees and $5,000 for new equipment. Thanks to the foresight of his office manager, who had insisted that the firm have cybersecurity insurance, the $20,000 was covered by the insurance company.

Cyberattacks are on the rise, both in the number of incidents and the costs associated with the attacks. According to the ABA’s 2017 Legal Technology Survey Report, 22 percent of responding firms had been breached—an increase of 8 percentage points from the previous year’s survey.

According to the ABA report, about 27 percent of firms with two to nine attorneys reported experiencing some sort of security breach, while 35 percent of firms with 10 to 49 lawyers and about one-quarter with 500 or more lawyers had suffered such an incident. In 2016, the FBI estimated that cybercrimes were on pace to be a $1 billion source of income to criminals for that year.

Law firms of all sizes are attractive targets, given the type and the amount of data they collect. “Law firms are the crown jewels,” says John Reed Stark, a former chief of the Securities and Exchange Commission’s Office of Internet Enforcement. “They have valuable confidential information on things like mergers and acquisitions and intellectual property,” he says. In 2016, Cravath, Swaine & Moore and Weil Gotshal & Manges were hacked by foreign nationals who used the stolen data for insider trading schemes that netted them more than $4 million.

Regardless of the size of the firm or the type of data they collect, cyber hackers use the same modus operandi for gaining access to firms.

PHISHING

The biggest threat is phishing, says Mark Rasch, a lawyer and former computer crimes prosecutor based in the Washington, D.C., metro area. “It’s the No. 1, No. 2 and No. 3 threat for law firms.”

In a phishing attack, emails with infected attachments are sent to large groups of individuals to get their passwords or gain access to their computers and networks. In most instances, the emails are generated by bots—a network of computers controlled by a bot master that gives it directions—and are looking to randomly attack individuals.

In a spear phishing attack, cybercriminals have identified an individual or a group of individuals to attack. For lawyers such as Wicks, the emails often look like they come from a client or another trusted party.

A whale phishing attack happens when the email is made to look like it comes from a managing partner or other senior executives. In one instance, says Jody Westby, CEO of Global Cyber Risk, hackers posing as a CEO sent a request for 1099s and W2 files to employees in a human resources department. Unfortunately, the files were sent and personal data was stolen by the hackers. “Before you respond, you have to ask yourself if it’s unusual for you to receive a direct email from a high-level executive,” she says. “If it’s an unusual request, report it to IT.”

Sharon Nelson, president of Sensei Enterprises, a digital forensics and cybersecurity company, says hackers have gotten smarter and more sophisticated in their attempts. “You used to see misspellings and poor grammar,” she says. “But now they hire English speakers and do their research on LinkedIn. They’ll know things like Andrew, the CEO, goes by Andy.”

Nelson also says the cybercriminal may phish both firms involved in a lawsuit. In one instance, one firm knew it was under attack but didn’t tell the other side. The uninformed firm received a fake email that changed the wiring instructions for a settlement, and it unwittingly paid settlement money to cybercriminals.

MALWARE

Malicious software, dubbed malware, is any type of virus or worm that infects a user’s computer. Some of the most common forms are Trojan horses, spyware and ransomware.

Last year, global firm DLA Piper’s network was infected by the WannaCry ransomware. The firm shut down its network as a precaution after its advanced warning system detected suspicious activity. In a
Malware, short for malicious software, is any type of virus or worm that infects a user’s computer. Some of the most common forms are Trojan horses, spyware and ransomware.

statement at the time, the firm said no client data had been breached.

Stark says the company files of a ransomware victim are rarely exfiltrated by hackers. Instead, as with Wicks, the hacker threatens the key will be destroyed or will expire, rendering the kidnapped files forever inaccessible. In many cases, the ransom email is accompanied by a digital clock that counts the minutes and seconds from the deadline—usually 72 hours. When the timer expires, the ransom demand usually goes up until the victim pays. If the victim doesn’t, the data is permanently locked and unrecoverable.

Although only a fraction of ransomware attacks are reported to federal authorities, a report by the Department of Justice says, on average, more than 4,000 ransomware attacks have occurred daily since Jan. 1, 2016. This is a 300 percent increase over the 1,000 attacks per day in 2015.

DENIAL OF SERVICE

In a denial-of-service attack, hackers will flood a website with high levels of traffic, causing the internal and external networks to go down. This type of attack is fairly unusual for law firms, Rasch says. “Firms aren’t time sensitive, unlike an organization like a hospital, which is sensitive to temporary shutdowns,” he says.

“Denial-of-service attacks are inconvenient but don’t have a big business impact for firms,” Westby says.

WEB JACKING

Web jacking happens when a cybercriminal creates a clone of a legitimate website to trick users into giving the hackers access to their computers.

“It can be a ruse to infect your computer or can be used as part of a ruse to create a legitimacy for another request, thereby allowing the hackers to then log your key strokes and access your passwords,” Stark says.

Web jacking also can take the form of a drive-by campaign, Westby says. “You go to a bank website, for instance, and you log in into the jacked site, and the hackers download a virus that infects your computer.”

There’s a quick way to determine whether a site has been hijacked. If you look at the site’s homepage, it should have a green padlock at the beginning of the URL, indicating that the site is secure. If the padlock is red, it’s a fake site.

WI-FI CONNECTIONS

Lawyers, who are an extremely mobile bunch, are vulnerable to attack if they use unsecured Wi-Fi connections, says Nelson of Sensei Enterprises.

“No use the hotel’s network,” she says. “Lawyers should be using a virtual private network or a secure mobile hot spot.”

She also cautions attorneys to make sure they update their software on a regular basis. “Older versions or outdated software makes it easy for the bad guys to get in,” she says.

INSIDE THREATS

Although a lot of breaches are due to human error—clicking on bad emails, not updating software regularly—some are caused by disgruntled employees or employees seeking to enrich themselves by selling a firm’s data or using it for themselves. “Firms can have bad stayers or bad leavers,” Stark says. “In the old days, they would slash the boss’s tires. Today, they steal information or infect the firm’s network with malware.”

In February 2016, a former Fox Rothschild partner was found guilty of insider trading after he bought stock in a client before it merged with another company and later sold the stock for a $75,000 profit. In 2015, Dimitry Braverman, a former senior systems engineer at Wilson Sonsini Goodrich & Rosati, was sentenced to two years in prison after using the firm’s computer system to make illegal trades.

Vendors or contractors who have access to a firm’s database also can pose a risk. “Law firms use a lot of third parties for things like the cloud, e-discovery, billing and research,” Rasch says. “If I’m a contractor and I know what you’re searching for on LexisNexis, I can figure out your strategy.”

Westby of Global Cyber Risk concurs. “Large volumes of email data and e-discovery put firms at a greater risk,” she says. She cites a case she worked on where a firm had given an entire email server to an e-discovery firm to analyze, and one of the employees walked off with all the email data.

Although cyberthreats are constantly evolving, firms can take a number of defensive measures to thwart cybercriminals. Such actions include encrypting emails, backing up data on a separate drive, banning employees from using thumb drives, and regularly updating software. Wicks can attest to the success of adopting some of these measures.

“We got hacked about a month after the first attack, but this time we didn’t lose our information because we now have a more sophisticated backup system and server,” he says.
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A New Era

Companies and their lawyers are bracing for a wide-ranging EU data-privacy law that takes effect in May by Jason Tashea

The General Data Protection Regulation “is without a doubt, the biggest, most wide-impacting regulation in the area of data protection in the history of the world,” says Joshua Lenon, lawyer in residence at Clio, a practice management software company in Vancouver, British Columbia. The regulation goes into effect on May 25.

Over the past two years, the Clio team has conducted a top-to-bottom review of its products to be compliant with the GDPR, which affects the collection, storage, transfer and deletion of personal data. Clio’s process tweaked “client-facing” features on the platform, revamped its privacy policy, and updated contractual relationships with vendors.

All Clio’s customers throughout the world, regardless of whether they reside in the EU, will have access to these heightened privacy protections. That’s because, Lenon says, Clio sees the GDPR as the new floor for data privacy worldwide.

Clio is not alone. With the May deadline looming, companies big and small are turning to their lawyers for guidance as they seek to comply with the new regulations. Additionally, European regulators, called data-protection authorities, are preparing for the post-GDPR era, in which they expect their enforcement authority to be significantly strengthened and expanded.

The GDPR replaces a 1995 EU directive with old and new provisions that cover topics as diverse as a right to be forgotten and an individual’s ability to confront automated decision-making systems.

For those previously compliant with European privacy law, the GDPR should not be a big concern, says Linda Priebe, a partner at Culhane Meadows in Washington, D.C. However, she adds, “a lot of folks were caught asleep at the switch.”

Racing Toward Compliance

Even with a two-year compliance period, a 2017 survey by the International Association of Privacy Professionals, a nonprofit industry group, reported that about 60 percent of firms that think the GDPR applies to them “will be only partially compliant by the deadline.”

Priebe says the GDPR applies to “any entity that has customers, employees or potential customers in the EU” or the European Economic Area. With 99 articles, the breadth and depth of the regulation is immense.

In the United States, companies have struggled to adequately inform users of what data is collected and how it is used. Under the GDPR, a company must gain a user’s consent to collect their data through “a clear, affirmative act that is freely given, specific and informed,” Priebe says.

In one example, the Dutch Data Protection Authority stated Microsoft Windows 10 was noncompliant because the operating system didn’t “clearly inform users about the type of data it uses,” which meant “people cannot provide valid consent.” Microsoft challenged some aspects of the complaint but resolved “to cooperate with the DPA to find appropriate solutions,” according to the company blog.

Compliance can come at a cost, says Lokke Moerel, senior of counsel at Morrison & Foerster in Berlin. For example, businesses must create a register of their data-processing activities, but this step alone “takes much more time than they anticipated” and is not feasible for many, she says.
Further, some companies will need a data-protection officer, business-level leadership that oversees GDPR compliance. Others will require new technology, which will cost some Fortune 500 companies up to $1 million, according to a report by the law firm Paul Hastings. Failure to comply could be devastating—a company could be fined up to 4 percent of its global annual revenue.

To understand the potential impact, consider the 2014 and 2015 hacks on Hilton Worldwide, which exposed the credit-card information of 350,000-plus customers. Because of the breach, New York Attorney General Eric Schneiderman fined it $700,000—about $2 per record. In 2015, the hotel chain reported $11.2 billion in revenue worldwide. Under the GDPR, the fine for the same breach could be as much as $448 million, or $1,280 per record.

As companies race toward compliance, data-protection authorities are ramping up.

In late 2016, many of Germany’s state-level officials sent surveys to 500 companies to collect information about international data-transfer practices. In December 2017, French regulators threatened to sanction WhatsApp for its data-sharing agreement with Facebook. And U.K. authorities launched an investigation into Uber after it was reported that the company covered up a 2016 breach that affected 57 million people. This all primes the pump for May 25.

As far as what to expect from authorities then, Moerel at MoFo says regulators could take various directions. And regardless of direction, expect them to act forcefully. “The data-protection authorities will need to make a statement,” she says. ■

Keeping Time
New tools that help lawyers track billable hours have re-ignited a debate: Should lawyers move toward nonhourly fee arrangements?

By Danielle Braff

BILLABLE HOURS ARE A THING OF THE PAST FOR JUSTIN LOVELY. IT TURNS OUT THE billable-hours system cost him a lot of valuable time.

“Having to manually input the time for a specific task and then compiling and reviewing at the end of the month took too much time,” says Lovely, a personal injury and DUI attorney in Myrtle Beach, South Carolina. “Also, double-checking to see if the billing was correct or if an attorney or staff member failed to bill for work performed just simply takes time.”

It took 30 minutes to an hour per file when Lovely took into account drafting the bill and associated letters. So for the majority of his clients, he moved to a flat fee and contingency fee structure.

However, new software and cloud-based services have made it much easier for lawyers to keep track of billable hours. For example, Ping, which has won awards for its billable-hours innovation, works in the background and allows users to automatically track and bill their hours, while Amazon’s Alexa tracks time through voice commands. And other tools are providing attorneys with various methods to track their time faster and easier if they choose to continue doing it.

Yet big companies such as Microsoft recently announced they will no longer bill outside lawyers by the hour, pushing the field to a crossroads: Grab hold of the new technology and continue with billable hours or move onto another fee structure.

A DIFFERENT MODEL
The traditional billable model is broken, says attorney C. Stinson Mundy, founder of Linden Legal Strategies in Richmond, Virginia. Mundy used the billable-hours model when she was at her previous
firm. But when she founded her own law firm more than 1½ years ago, she switched to a flat fee. Mundy is about to roll out a subscription billing model, which would allow her clients to reach out to her more often without worrying about getting charged for every email.

“The advancements in technology may help firms be more accountable in their billing and take some of the stress out of recording time. But most law firms are reluctant to embrace technology and are cautious about anything cloud-based, so I can see the legal world being slow to adopt the tech,” she adds.

Not only are lawyers slow to adopt the technology; many have continued to stick with the traditional billable-hours model.

A 2017 study by Aderant reported that an average of 20 percent of law firm client accounts were structured under alternative fee arrangements. Reasons attorneys gave for not switching to an AFA included estimating the time it takes to complete legal work and structuring the AFAs profitably, according to the study.

But the firms are experimenting with the concept. According to a 2016 report by Altman Weil, 97 percent of firms bill at least some of their work on an alternative basis rather than at an hourly rate.

Nevertheless, it’s been difficult for some attorneys to let go of billable hours.

**STILL IN STYLE**

Umera Ali, a partner at Michelman & Robinson’s Chicago office, says she’s wary of flat fees for specialized work. Most of the time it’s too difficult to estimate how long it will take for the project. Sometimes, something will take 20 hours instead of 10.

“There are two options available: Either to do only 10 hours of work, which means that the work is not of good quality, or the lawyer writes off the time he actually spends doing the work,” says Ali, explaining that this also works in reverse, when it takes less time than expected.

“The only real measure of skilled work is billable hours,” she says.

However, some attorneys are using both methods.

Laura Winston, a partner at Kim Winston in its Yonkers, New York, office, says her firm uses billable hours for some services and flat fees for others.

Preparation of patent or trademark applications, for example, lends itself to flat fee billing. Other services, such as preparing legal arguments that may include spending time on research, are better suited for billable hours, Winston says.

“The billable hour will never go away completely because it’s very reliable,” Winston says.

Winston is taking advantage of the new technology when she does her hourly billing, using a web-based legal tracking and billing program called TimeSolv. It’s designed for lawyers, so the interface is easy to use in terms of creating the records for new clients and tracking time. It also includes a built-in timer.

According to Winston, she can generate an invoice in a matter of a few clicks and can include task codes with TimeSolv. She can also do electronic billing and edit the invoices quickly.

Previously, when Winston was using QuickBooks, it wasn’t as efficient, she says. But now she saves time and money. It’s a total lawyer hack. ■
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During the first season of the HBO series *Silicon Valley*, a main character waiting for his ride home is stunned when a car pulls up and the driver’s seat is completely empty—except for a few metal boxes with wires and cords that connect who knows what to who knows where. He gives his home address to the voice-activated system controlling the car, then sits back for a smooth, safe, uneventful ride.

That is, until a computer override kicks in. The car takes a detour to the docks, where it enters a shipping container so it can be ferried to a billionaire’s self-made island in the middle of nowhere. Several days later, the passenger makes it back home, but all he has is a story he’ll look back on and a hard-earned life lesson: Don’t get into cars with strange robots.

This episode underscores several important issues that relate to increased reliance on robotics, artificial intelligence and automation: As robots, computers and software become more ubiquitous in our everyday lives, performing tasks that used to be the sole province of humans, it’s fair to wonder whether the laws and regulations designed to protect those
humans are sufficient or whether new laws are necessary.

It’s also a question that surrounds what has become known as the internet of things, an ever-growing collection of products connected to computer systems and the wireless web. Like cash machines, credit-card readers and PCs, those links can provide portals allowing unauthorized people to hack into systems and cause no end of mischief and mayhem.

“The machines are here, but the law isn’t,” says Ed Walters, CEO at Fastcase. “We need to start figuring how to start regulating robots right now. This isn’t science fiction; this is science present.”

NO NEW THING

Driverless cars have existed, in some form, for decades. Going back to the 1920s, automotive manufacturers have worked on or created several different types of cars that are controlled by something other than a driver. Likewise, the American legal system has long contemplated automated vehicles.

In 1991, Congress passed a wide-ranging transportation bill that included a provision calling for the “development of a completely automated highway and vehicle system” with testing scheduled to commence—in 1997.

In the ensuing decades, car manufacturers began to provide features that did not require a driver or operator, including automatic parallel parking, smart brakes and collision-avoidance systems.

Then in 2009, Google announced it would develop a fully autonomous self-driving car and began testing its vehicles the following year. By 2015, Google had started testing its Waymo cars in urban areas, including Mountain View, California, and Austin, Texas.

In the meantime, other manufacturers were getting in on the act. Uber partnered with Carnegie Mellon University to deploy self-driving cars in Pittsburgh. Ford, Mercedes-Benz, General Motors, Toyota, Nissan, Hyundai and others have announced plans to develop their own versions. In 2014, Tesla introduced an autopilot function in its cars, and company CEO Elon Musk predicted that by 2019 humans would be able to sleep through an entire car trip without anyone having to stay awake and operate the steering wheel.

Indeed, falling asleep at the wheel and other crash-causing human activity have been among the biggest drivers of the push to cede autonomy over driving to computers. According to the National Highway Traffic Safety Administration, from 1995 to 2015, there was an average of about 35,000 fatal car crashes each year. The NHTSA also revealed in a 2015 study that drivers were at fault for about 94 percent of all car crashes from 2005 to 2007.

“We’ve made roads better and made cars safer,” says Damien Riehl, vice president at Stroz Friedberg, a data-breach incident-response company. “But people are still drinking and driving, and there are still inexperienced people driving, texting and not paying attention. I’m afraid of robot cars, but I’m terrified of human drivers.”

Andrew Arruda, CEO at Ross Intelligence, says safety isn’t the sole benefit that autonomous cars provide. “Driverless cars will save millions of lives, prevent millions of pounds of carbon emissions, and give trillions of hours of time back to the human race,” he says.

According to Arruda, it’s typical for people to resist new technology, only to adopt it and then take it for granted. “There was also resistance when automatic elevators came to market,” he says.

There will be other benefits. Martin Tully, co-chair of Akerman’s data law practice, says gigantic parking structures will become obsolete when people
no longer have to park in close proximity to their location. Simply put, the commuter accustomed to driving to the train station and parking in the lot all day either can direct the car to go home and power down or instruct it to pick up other passengers.

"Meanwhile, if you look at zoning laws, typically you need to have so many parking spaces per unit," Tully says. "Those numbers are coming down because of driverless cars and ride-sharing. That's already happening."

**PLAYING CATCH-UP**

But the rapid development of autonomous cars has caught legislators asleep at the wheel.

"The technology is ahead of the law in many areas," Bernard Lu, senior staff counsel at the California Department of Motor Vehicles, told the *New York Times* in 2010, right after Google began to test its driverless cars. "If you look at the vehicle code, there are dozens of laws pertaining to the driver of a vehicle, and they all presume to have a human being operating the vehicle."

Since then, more than 40 states and the District of Columbia have introduced laws addressing autonomous vehicles, according to the National Conference of State Legislatures, with about half those states passing some sort of law that relates to driverless cars.

Some of the laws and executive orders—including those in Utah, Washington and Massachusetts—only cover testing and other early-stage matters, including information gathering and establishing proposed standards. Other states, including New York and Connecticut, have been unwilling to give complete control to robots and have imposed restrictions, including requiring a driver on standby behind the steering wheel at all times.

On the other hand, there’s Michigan—the mother of American car culture. The state made waves in late 2016 for enacting what many commentators called a sweeping and highly permissive set of laws that relate to driverless cars. For example, automated cars don’t have to have a human operator behind the wheel to access public roads in the state.

"One of the main issues for us was whether or not we should know everything that’s going on in the car," says Kirk Steudle, director of the Michigan Department of Transportation.

He says an early version of the legislation kept getting bogged down in complex details. Additionally, Steudle says, he was concerned that having an overly cumbersome law would make it difficult to adapt to changes in technology.

The state decided to go for a more open-ended, less restrictive set of laws based on the premise that manufacturers and tech companies would abide by the NHTSA’s Federal Automated Vehicles Policy.
In September 2016, the NHTSA, with the Department of Transportation, released a series of guidelines for best practices in developing, deploying and testing driverless cars, as well as a model state policy and a list of current and potential regulations. The guidelines were updated one year later, with the safety regulations simplified from a 15-point assessment to 12 points, according to Forbes. Another major update is planned for this year.

“Our basic premise is to stay out of the car,” Steudle says. “Let’s step back and let NHTSA do its job. When your car is certified to be able to go out on the road in the U.S., then it’s OK for Michigan.”

To that end, he is excited about the possibilities that autonomous vehicles present. In the spring, the University of Michigan plans to use driverless shuttles to take up to 15 students to and from class. Additionally, the state has approved a plan for driverless trucks to platoon while on public highways. Under current state law, large trucks have to stay at least 500 feet away from one another. With driverless technology, trucks can drive closer together, accelerating and braking at the same time as the lead vehicle, allowing them to save fuel and move faster.

“We’ve been doing testing with the U.S. Army on Interstate 69,” Steudle says. “If a trucking company wants to do this, they have to send us a plan and we’ll either approve it or not.”

According to Steudle, areas in which the state’s laws are silent—including liability, insurance and cybersecurity standards—will be dealt with later. “The important thing is that we put a framework in place to enable things to move forward,” he says.

EVOLVING LAW

Cybersecurity, insurance and liability are obviously important issues that have to be resolved, Steudle says. But if Michigan legislators had waited to include them in the bills, they’d still be waiting for the finished law.

To that end, he says, the state created the Michigan Council on Future Mobility to address issues arising from the driverless car industry—with a mandate to come up with specific recommendations by March 31 of every year. The council consists of people from the automobile technology, insurance and legal sectors, Steudle says.

Besides the aforementioned areas, they will consider how to apply the technology to help the elderly and people who have disabilities. They’ll also consider how to train students at technical schools to fix and maintain autonomous vehicles, he says.

Similarly, California has relied on a framework of letting experts come up with rules and regulations on issues related to driverless cars following passage of its statute in 2012. Home state to many Silicon Valley companies developing...
automated cars, California’s law tasked the state’s Department of Motor Vehicles to create rules and regulations concerning the testing and deployment of said vehicles. The officials had hoped to have them approved by the end of 2017. At press time, they were still being considered and awaiting approval by the end of February.

The state seems content to defer some issues. On liability, Brian Soublet, deputy director and chief counsel at the California DMV, says it will be for the state courts to decide. “I don’t think you can lay out those intangibles in advance,” Soublet says. “Is it a design defect if the car runs a red light and there’s an accident? Is it on the owner? I think those are issues that will play out in court.”

As for cybersecurity, the California DMV’s proposed rules obligate manufacturers to meet industry best practices and for cars to be able to detect, respond and alert the operator about cyberattacks and other breaches, giving the operator a chance to override automated technology. “The industry has best practices, and cybersecurity is something car manufacturers and the government are taking seriously,” Soublet says. “You want to make sure that, at the very least, they are following some form of regime to address the standards could be all over the map. Walters of Fastcase, however, thinks legislators are not focusing on areas where they should. “It’s not surprising that there’s a lot of action,” Walters says. “My concern is it’s the wrong action.” He says that while companies like Google, Tesla and GM convey a certain standard of quality, as more companies get into this space, the standards could be all over the map.

“GOING THE WRONG WAY?”

Shamla Naidoo, global chief information security officer at IBM, has nothing but praise for Michigan’s framework. Calling on other states to look to Michigan as a model, Naidoo says the state has a vested interest in ensuring that car manufacturers build cars correctly, and that they are compliant with the law the moment they leave the lot. Additionally, she says, the state has existing laws relating to hacking and liability that can easily be applied to autonomous cars.

“I don’t know how many other states have such laws,” Naidoo says. “They cover pretty much the entire range of driverless cars. It’s very clear to me that this state has thought things through pretty well. It’s very valuable to have that kind of framework for all states.” —Shamla Naidoo

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Some states are standing in a legal gray area. Pennsylvania, for example, is a training ground for Uber’s collaboration with Carnegie Mellon to deploy autonomous vehicles throughout Pittsburgh. At press time, Pennsylvania did not have a statute that speaks to the legality of driverless cars.

However, Roger Cohen, policy director at the Commonwealth of Pennsylvania Department of Transportation, says the state has long operated under the assumption that autonomous cars are allowed on public roadways—as long as a human driver is at the steering wheel ready to take over. PennDOT has taken the lead in promulgating policies relating to autonomous vehicles with the goal of their formal adoption into law.

“That policy was deemed to be a more effective tool for the public oversight of testing operations because of its ability to be flexible and nimble and rapid in responding to what are fast-moving, unpredictable, hard-to-anticipate new developments,” Cohen says.

As with Michigan, Cohen says time is of the essence, adding that although Pennsylvania’s regulatory structure has an important purpose, it generally takes one to two years to process feedback and review the rules. “That was deemed to be ineffective for emerging technology,” Cohen says.

Instead, PennDOT has been freed up to develop policies while collaborating with a wealth of stakeholders—including academics, sister agencies, lawyers, technology companies and members of the automotive industry. Cohen says bills are pending in both state legislative houses, and he is optimistic that they’ll be passed.

“When it comes to car accidents, we must drive down the death rate toward zero, which is our goal,” Cohen says. “We have a technology that gives us our best chance to do that. I think there are real issues concerning data ownership, data privacy and cybersecurity. But there’s every reason to be optimistic.”

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“It’s hard to imagine that state officials would have the expertise to regulate something as technical as cybersecurity for autonomous cars, at least not yet,” he says. “It’s a delicate balance. I wouldn’t want to see 51 different standards for cybersecurity; on the other hand, we could benefit from states creating best practices on security.”

Riehl of risk management company Stroz Friedberg agrees, adding he hasn’t seen any laws that address the security of software relating to automated vehicles. “The difficulty is that we don’t even know what the biggest risks are, much less how to protect against those risks,” Riehl says. “The law could be obsolete before the ink is even dry.”

LIABILITY IN THE FAST LANE

Arruda of Ross Intelligence says cybersecurity is no more and no less of a problem for self-driving cars than it is for any other industry that relies on networks and computers.

“Of course, there should be standards, and I will be surprised if the government isn’t already working on them,” he says. “Cybersecurity will always be a threat. It is par for the course. It’s a constant battle between white hat and black hat programmers. It will never disappear as long as we have computers, but I don’t think anyone wants to go back to a time before them.”

When it comes to liability, meanwhile, the law seems unsettled. Perhaps that’s because lawyers, car manufacturers and designers aren’t sure who is at fault when an autonomous vehicle crashes.

Mask of Tesla made headlines in October 2016 when he declared his company would not be liable if one of its driverless cars got into a crash. When a Florida driver died that May while using the autopilot function, Tesla and investigators maintained that the driver was at fault because he was warned by the system several times to put his hands back on the steering wheel.

In September, however, the National Transportation Safety Board announced “the combined effects of human error and the lack of sufficient system safeguards resulted in a fatal collision that should not have happened.” A Tesla spokeswoman said the company would “evaluate [the NTSB’s] recommendations as we continue to evolve our technology.”

Volvo, on the other hand, said it would accept liability for its autonomous vehicles.

A 2016 RAND Corp. study predicted a manufacturer’s liability would increase with personal liability decreasing. This might stifle innovation, the study argued, so some states might move to limit a manufacturer’s liability or shield it from lawsuits. Michigan maintains that manufacturers can’t be sued if a third party modified its driverless car without the manufacturer’s permission.

Melinda Giftos, managing partner at the Madison, Wisconsin, office of Husch Blackwell and co-leader of the firm’s internet of things group, says it’s difficult to foresee a standard in which drivers in fully automated cars and manufacturers would share liability.

The following month, the Senate’s Transportation Committee approved a bipartisan bill that would allow states to retain jurisdiction over traditional responsibilities, including insurance and registration; manufacturers to deploy a limited number of vehicles that do not currently meet auto standards; and the federal government to prohibit states from passing certain rules relating to autonomous vehicles. In September, the full House approved the bill on a voice vote.

The following month, the Senate’s Committee on Commerce, Science and Transportation approved a bipartisan bill that would waive traditional automobile regulations, such as those governing a steering wheel or brake pedals, in the interest of speeding up deployment of driverless cars. The bill, which has not been taken up by the full Senate, does not apply to trucks or buses.

NOT JUST CARS

Outside transportation, automation could play a larger role in our everyday
The International Bar Association has estimated that about one-third of graduate-level jobs around the world eventually will be performed by robots.

“ar the process of the division of labor and the more single working or process steps can be described in detail, the sooner employees can be replaced by intelligent algorithms,” the IBA wrote in its April 2017 report. “Individual jobs will disappear completely, and new types of jobs will come into being.” The report predicted that the use of machines will obviate the need for outsourcing or offshoring, and production costs will decrease.

The IBA reported that governments would have to decide whether and how to protect human workers. One possible way is for the government to step in and declare certain sectors to be off-limits to robots, such as child care or certain types of weapons systems. Governments might also “introduce a kind of ‘human quota’ in any sector,” and decide “whether it intends to introduce a ‘made by humans’ label or tax the use of machines.”

Tully of Akerman says many areas of the law will require updating and changing. For example, artificial intelligence already can make predictions about a wide variety of things, including suggesting routes on GPS devices; recommending music, movies and books based on individuals’ likes and dislikes; and evaluating the strength of a potential lawsuit. As predictive tools start to make decisions regarding hiring and firing, Tully predicts there will be a uptick in discrimination lawsuits.

“Whether or not these suits are successful will depend on what the law says, as well as what kinds of data the AI is looking at,” Tully says. “When things change that rapidly, we tend to relate things back to what we’re familiar with.”

The legal industry, meanwhile, has fought a skirmish with do-it-yourself legal services providers such as LegalZoom and Rocket Lawyer, accusing them of unauthorized practice of law. Tully predicts the increased use of legal chatbots will lead to yet another theater in the ongoing war. “There will always be a contingency that doesn’t want technology,” he says.

Meanwhile, Stephen Reynolds, a partner at Ice Miller in its Indianapolis office, says there is an existing federal framework for regulating the internet of things. For example, companies or individuals using big data and machines to make decisions about credit worthiness, employment or housing still have to comply with federal anti-discrimination laws.

As for the myriad smart devices, appliances, services and goods, Reynolds argues that the Federal Trade Commission has broad authority to regulate these devices, and there might not be a need for additional legislation.

Giftos of Husch Blackwell thinks manufacturers can take a cue from their counterparts in the medical-device industry. Smart medical devices such as Google’s smart contact lenses that can measure glucose levels through a user’s tears and smartwatches used to monitor people who have sleep apnea have access to tons of confidential health information that they are required by law to protect.

“Medical industry is definitely developing products that are more secure,” Giftos says. “They have to be more secure—that’s the nature of their industry. So they have the right framework in place. It’s the same with the financial industry.”

Dominique Shelton, a partner at Alston & Bird’s Los Angeles office, thinks the private sector in general has an overriding incentive to secure its data. “There’s already a focus from companies on privacy and cybersecurity in light of everything we’ve read in the news,” says Shelton, adding that international companies have newly enacted laws, such as China’s cybersecurity law and the European Union’s General Data Protection Regulation with which to comply. “When a company experiences catastrophic data loss, it leads to CEOs resigning. As such, they are already incentivized to have this conversation about privacy and cybersecurity.”

But Walters argues that there has to be more clarity in terms of what information smart devices track and what they share. “Smart speaker systems such as Google Home and Amazon Alexa or Echo, in particular, should disclose what they share,” he says. “In addition, we need stronger Fourth Amendment protections for information gathered by these devices.”

This issue has already reared its head, as prosecutors in Arkansas tried to retrieve information from an Amazon Echo found near a dead body. Amazon refused to turn over the data, citing privacy concerns. The defendant, James Bates, eventually relinquished the information (and the case was dismissed in November).

Walters says under the third-party doctrine, there’s no protection of personal information when shared with third parties. “People would be surprised to know that information picked up and shared by these devices might be obtained without a search warrant,” he says. “With more sensors and more people trading off privacy for convenience, we’ll need a different kind of Fourth Amendment to keep people ‘secure in their persons, houses, papers and effects.’”
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Results May Vary

Which database a researcher uses makes a difference

BY SUSAN NEVELOW MART
WHEN A LAWYER SEARCHES IN A LEGAL DATABASE, THAT SINGLE SEARCH BOX IS LIKE A LURE: Put in your search terms and rely on the excellence of the search algorithms to catch the right fish.

At first glance, the various legal research databases seem similar. For instance, they all promote their natural language searching, so when the keywords go into the search box, researchers expect relevant results. The lawyer would also expect the results to be somewhat similar no matter which legal database a lawyer uses. After all, the algorithms are all trying to solve the same problem: translating a specific query into relevant results.

The reality is much different. In a comparison of six legal databases—Casetext, Fastcase, Google Scholar, Lexis Advance, Ravel and Westlaw—when researchers entered the identical search in the same jurisdictional database of reported cases, there was hardly any overlap in the top 10 cases returned in the results. Only 7 percent of the cases were in all six databases, and 40 percent of the cases each database returned in the results set were unique to that database. It turns out that when you give six groups of humans the same problem to solve, the results are a testament to the variability of human problem-solving. If your starting point for research is a keyword search, the divergent results in each of these six databases will frame the rest of your research in a very different way.

SEEING IS BELIEVING

It is easy to forget that the algorithms returning search results are completely human constructs. Those humans made choices about how the algorithms will work. And those choices become the biases and assumptions that are built into research systems. Bias for algorithms simply means a preference in a computer system. While researchers don’t know the choices the humans made, we can know the variables that are at work in creating legal research algorithms.

Search grammar: Which terms are automatically stemmed (returned to their root form) and which are not, which synonyms are automatically added, which legal phrases are recognized without quotation marks, how numbers are treated, and how the number of word occurrences in a document determine results—these are examples of search grammar.

Term count: If your search has six words and only five words are in a document, the algorithm can be set to include or exclude the five-term document.

Proximity: The algorithm is preset to determine how close search terms have to be to each other to be returned in the top results.

Machine learning: The programmers decide whether to include instructions that allow the algorithm to “learn” from the data in the database and make predictions.

Prioritization: Relevance ranking is one form of prioritizing that emphasizes certain things at the expense of others. U.S. Supreme Court cases, newer cases or well-cited cases may get a relevance boost.

Network analysis: The extent to which the algorithm uses citation analysis to find and order results is a human choice.

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Classification and content analysis: Database providers with full classification systems and access to secondary sources to mine may be programming their algorithms to utilize that value-added content.

Filtering: Decisions about what content to include and exclude from a database affect results. These decisions may be based on copyright or other access issues. Once these decisions have been made and the code has been implemented, legal researchers don’t know how those human choices are affecting search results. But the choices matter to what a researcher sees in the results set. Code is law, as Lawrence Lessig famously said in his 1999 book, Code and Other Laws of Cyberspace.

HOW ALGORITHMS WORK
I originally noticed that when I compared a single search in more than one database, the results varied widely. I used these one-off comparisons to illustrate to my students that algorithms differ, and that over-reliance on keyword searching might not be the best search strategy.

I also noticed that if I ran the same search a year later, the results still varied widely and different cases turned up in the results. One would expect new cases to show up, but older cases turned up as well. Algorithms are fluid, not static. Since one-off searches do not prove that much, I thought it would be interesting to run the experiment on a larger scale and see what happened. I crafted 50 different searches and had law student research assistants look at the top 10 results.

How unique are the search results? When you search in most databases, there is no way to determine what documents are actually in the database and which documents are excluded. In legal databases, jurisdictional and coverage limits allow you to know exactly which set of documents is being searched. If one searches a database of reported cases in the 6th U.S. Circuit Court of Appeals at Cincinnati, every database provider has the same documents, plus or minus a few cases from 1925 to 1933.

Computer scientists would expect some variability in search algorithms, even if lawyers do not have the same expectations. Here, however, each vendor’s group working on the research algorithm has an identical goal: to translate the words describing legal concepts into relevant documents. One of the hypotheses of the study was that, as the number of searches expanded, the overall results returned by the algorithms from each database provider would be similar. The top 10 cases ought to be somewhat similar. That hypothesis did not turn out to be true, as shown in the chart above, “Percentage of Unique Cases by Database.”

The blue bar at the top shows the percentage of unique cases in each database. An average of 40 percent of the cases in the top 10 results are unique to one database. Nearly 25 percent of the cases only show up in two of the databases. The numbers drop quickly after that, and only 7 percent of the cases show up in five or six of the databases. When the comparison was limited to the two oldest database providers, Lexis Advance and Westlaw, there was only 28 percent overlap. That means that 72 percent of the top 10 cases are unique to each provider.

Starting with a keyword search is just one way to frame a research problem. Legal research is a process that has always required redundancy in searching. The rise of algorithms has not changed that. Researchers need to use multiple searches, of multiple types, in multiple resources. But if a researcher starts with a keyword search, each legal database provider is going to offer a different set of results and, therefore, a different frame for the
next steps in the research process. This means that where you start your search matters.

**RESEARCHERS WANT RELEVANT RESULTS**

The searches for the study each incorporated known legal concepts. The searches were the kind that a lawyer with any expertise in the area could easily translate into a recognizable legal issue. Here is an example of the kind of search used in the study: *criminal sentence enhancement findings by jury required* (the search was limited to the reported cases in the 6th Circuit).

Lawyers with subject expertise would know that the search is about the constitutionality of increasing the penalty for a crime when the jury did not make a specific finding about the facts that enhanced the penalty. This background statement was given to the RA who ran the search in each of the six legal databases and read the resulting top 10 cases from each database to see whether the cases were relevant or not. This translation—from the human putting in keywords that represent a legal problem to the documents the human-created algorithm determines are responsive—is at the heart of all human/computer legal research interaction. The study tested how the humans creating the algorithms tried to implement that translation. The decision to limit the results to the top 10 was based in part on the assumption that returning relevant results at the top is the goal of every team creating a legal research algorithm, a view that database provider ads and FAQs support. And modern researchers tend to look at the top results and then move on.

The RAs were given a framework for relevance determinations based on the background statement and on explicit instructions for determining relevance: A case was relevant, in our example, if it discussed situations where juries did (or did not) make sufficient factual determinations to support an enhancement of the sentence in a criminal case. If a case was in any way related to determining the contours of the role of the jury, it would be marked as “would definitely be saved for further review” or “would probably be saved for further review.” This study does not say that the cases that are “relevant” are necessarily the best cases, just that they are cases playing some “cognitive role in the structuring of a legal argument,” as Stuart Sutton put it in *The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis*. This is a broad and subjective view of relevance that should resonate with all attorneys who have created mental models of an area of the law.

See the next chart, at the top of this page, “Percentage of Relevant Results in the Top 10,” which illustrates relevance in each of our six legal databases.

What is striking about this chart is how many results are *not* relevant. Even within 10 cases, not all of the results relate to the search terms. Westlaw (67 percent relevance) and Lexis Advance (57 percent relevance) performed the best. For Casetext, Fastcase, Google Scholar and Ravel (now owned by Lexis), an average of about 40 percent of the results
were relevant. In terms of each database provider offering a different view of the same corpus of cases, how many of those relevant results were unique?

The final chart, above, “Percentage of Relevant and Unique Cases,” reflects how each database provider offers cases that are both unique and relevant in the top 10 results. Westlaw offers the highest percentage of such cases, at just over 33 percent. Lexis Advance has nearly 20 percent unique and relevant cases. Casetext, Fastcase, Google Scholar and Ravel have an average of 12 percent of relevant and unique cases. Of course, you don’t have to do the same search in all six databases to find all the relevant cases. All the cases are in all of the databases, and multiple searches may bring those unique and relevant results to the top.

The takeaway is that lazy searching will leave relevant results buried; if an important case is the 57th result from just one search, a researcher is not going to find it. Algorithms are just not going to do the heavy lifting in legal research. At least not yet.

OTHER DATA FROM THE STUDY

The study also looked at the age of cases that were returned in each search. Overall, the oldest cases dominated Google Scholar’s results. Almost 20 percent of the results from Google Scholar were from 1921 to 1978. The highest percentage (about 67 percent) of newer cases were returned by Fastcase and Westlaw. Ravel and Lexis Advance had an average of 56 percent newer cases.

Another area of diversity was the number of cases each database returned. The median number of cases returned in response to the same search varied from 1,000 for Lexis Advance to 70 for Fastcase. Casetext, Ravel and Westlaw each returned 180 results at the 50th percentile and Google Scholar returned 180. Each algorithm is set to determine what is responsive to the same search terms in vastly different ways.

For the most part, these algorithms are black boxes—you can see the input and the output. What happens in the middle is unknown, and users have no idea how the results are generated. While legal database providers tend to view their algorithms as trade secrets, they do give some hints in their promotional materials about how the algorithms work. A more detailed discussion of those materials (and other concepts in this article) is available in “The Algorithm as a Human Artifact: Implications for Legal (Re)Search” in the Law Library Journal.

We need a frank discussion with database providers about what it means for a researcher to search in their databases and how researchers can become better searchers. Knowing that should not violate any trade secrets. Discussing algorithmic accountability with database providers can work, though proactive responses would be better. For example, I asked Lexis Advance
about jurisdictional searching and they released a FAQ on the topic. No trade secrets were revealed, and researchers now have a better understanding of how to effectively search in Lexis Advance. Fastcase has responded to the discussions about algorithmic accountability by releasing an advanced search feature that lets the researcher adjust the relevance ranking for a specific search to privilege the attributes that researcher wants to emphasize. Algorithmic accountability is now open for discussion. Providing the kind of algorithmic accountability that enables researchers to create better searches should be a market imperative for all database providers, so please demand accountability.

As a matter of empirical fact, we now know some things about using legal databases that researchers had suspected but could not prove. We know that Westlaw and Lexis Advance return more relevant and unique results. These databases have an edge: They’ve had decades to refine their strategies. Both have a large base of user information. Each has a detailed but different classification system and different sets of secondary sources. Recall that only 28 percent of the cases from Lexis Advance and Westlaw appear in both databases. It may not be so surprising that the results from Lexis and Westlaw are so different, as those results may differ in ways that conform to the respective worldviews encapsulated in their classification systems and the secondary sources their algorithms mine to return results.

This raises questions about two types of viewpoint discrimination that are worth exploring. The first is one familiar to all researchers: Authorial viewpoints are a form of viewpoint discrimination. Attorneys and librarians have always preferred, budgets allowing, to have more than one authorial viewpoint represented in their legal resources. What held true on the treatise level now holds true on the database level, and the differing worldviews of each database provider can be seen as a positive good.

The second kind of viewpoint discrimination results from the 19th-century viewpoint explicitly imported into Westlaw through its Key Number classification system and re-created in Lexis in its own classification system. Scholars have often pointed out that older and more established legal topics (think of contract rescission) fare better in these systems. Newer topics (which have changed over time, from civil rights in the 1960s and ’70s to cybersecurity today) are harder to fit into the existing schemes. So it is possible that searches in more established areas of the law will be more successful in these older databases.

If one is searching for solutions to legal problems in emerging areas of the law, it would be worthwhile to try the newer databases and see what their 40 percent of unique cases have to offer. The newer databases also offer new forms of serendipity: “summaries from subsequent cases” and the “black letter law” filters in Casetext, as well as citation visualizations in Ravel and Fastcase, are examples of new ways of adding value to the research process.

A FEW LAST WORDS

Researchers should take away a few key things from the study:

• Every algorithm is different.
• Every database has a point of view.
• The variability in search results requires researchers to go beyond keyword searching.
• Keyword searching is just one way to enter a research universe.
• Redundancy in searching is still of paramount importance.
• Terms and connectors searching is still a necessary research skill.
• Researchers need to demand algorithmic accountability. We are the market, and we can influence the product.

Algorithms are the black boxes that human researchers are navigating. Humans created those black box algorithms. We need better communication between these two sets of humans to facilitate access to the rich information residing in legal databases.

Susan Nevelow Mart is an associate professor and the director of the law library at the University of Colorado Law School in Boulder.
The practice of health law is professionally challenging and demands dedication. We recognize the firms and attorneys below for answering this call to professionalism, for engaging the challenging health law issues of the day, and for their efforts to address healthcare clients’ complex problems.

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5. Dinsmore & Shohl LLP (tied)
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BLOCKCHAIN-BASED INITIAL COIN OFFERINGS ARE ALL THE RAGE, BUT THE LEGAL TERRAIN IS UNCERTAIN

By Jason Tashea
Your phone, your browser and, increasingly, your household appliances create immense data from their use. Now, your clothes are in on the game, too.

Loomia, a Brooklyn-based textile company, creates smart fabric with multifunctional purposes. The fabric can change temperature, work as an interface by sensing touch and light up to aid visibility.

The company also uses its smart fabric to capture important data about the wearer, such as how often she wears an article of clothing and under what conditions.

“In the apparel industry, there is really no data once the product leaves the store,” says CEO Janett Liriano. Companies have few ways of knowing whether buyers use or even like their products. It is also difficult to gauge demand, which leads to serious inventory issues and creates hundreds of billions of dollars in apparel waste every year.

She wants to empower users to sell the data created by their fabric. Rather than the company selling personal information to willing bidders, Liriano, formerly a master electrician at the Lincoln Center, wants to build a network using blockchain, the technology behind cryptocurrencies such as bitcoin. This will allow users to track the ownership, sale and trade of their data in a public and secure way.
To accomplish all this, Liriano is using a new fundraising vehicle that is gaining popularity and raising big dollars. The initial coin offering, or token generation event (Liriano’s preferred term), allows accredited investors to bankroll the creation of a blockchain that will repay them in “coins” or “tokens” that can be used on the network or traded for other cryptocurrencies. Unlike an IPO, or initial public offering, an ICO does not confer equity in the company.

As of late January, the company was in the accredited investor phase, and Liriano had not announced a firm launch date for her network, Loomia Tile.

Loomia’s new data marketplace was part of the meteoric rise of ICOs last year. However, this novel approach brings with it many unanswered legal questions. While some see the ICO as a creative and legitimate means to raise funds, others view this digital gold rush as risky and ripe for scams.

In either case, attorneys, companies and regulators are attempting to apply existing law to rein in bad actors, provide guidance and promote a growing technology.

According to Coinschedule, an ICO information aggregator, in the 11 months preceding December 2017, more than 200 ICOs raised $3.9 billion in funds, a 39-fold increase over the same period in 2016.

Some have raised stunning numbers. Bancor, a blockchain network liquidity market for tokens, raised $153 million in three hours. Status, a private messaging app, raised $90 million; and Filecoin, a blockchain-based storage network, raised an all-time ICO record of $257 million.

Even the established communications app Kik, a tech “unicorn” valued at $1 billion, raised nearly $100 million during its 2017 ICO after it failed to raise revenue through advertising and brand partnerships.

**DIFFERENT STANDARDS**

Liriano says Loomia was made financially stable through sales contracts and some venture capital, so the choice to launch a token was part technical and...
part practical.

“When you’re making a data application, there’s a choice you’re going to make” between storing the data yourself or using a decentralized, cloud-based method, she says. To her, blockchain’s decentralized nature was a meaningful way to address data security and storage issues.

Beyond the technical components, she says the venture capital world has a bias against funding female and minority founders. By contrast, “the blockchain space is about the ability to execute and deliverables,” she says. Liriano and the company’s founder, Madison Maxey, are women of color.

To understand Liriano’s technical interest in launching a token, it helps to get a grasp of its constituent parts: blockchain and cryptocurrency. A blockchain is a public, distributed ledger that is replicated and hosted on numerous computers, creating thousands of digital carbon copies that give the system credibility and oversight needed to create a secure public list of an asset.

That list can describe things such as identification, contracts or cryptocurrencies, which are scarce, virtual assets represented on a blockchain. The most well-known cryptocurrency, bitcoin, has captured headlines for its bubblelike valuation, climbing to nearly $20,000 last year only to fall over 40 percent in January. Beyond being a stand-in for money, other tokens and coins are used for their utility, like smart contracts on the Ethereum network.

Due to its flexible application, federal agencies define cryptocurrency differently. The Internal Revenue Service sees it as property. The Commodity Futures Trading Commission defines it as a commodity. The Department of Treasury’s Financial Crimes Enforcement Network calls it “convertible virtual currency,” and the Securities and Exchange Commission says that, in some cases, a token is a security.

No regulator has defined cryptocurrency as fiat currency, the money minted by governments.

Peter Van Valkenburgh, research director at the cryptocurrency think tank Coin Center, says this melange of definitions may seem confusing, if not contradictory, but it is not.

He explains that blockchain, bitcoin and Ethereum should be thought of like the internet. “The internet never got classified as one thing, but the use of the internet could trigger different laws and agencies,” he says.

**UNCHARTED WATERS**

As regulator interest in cryptocurrency grows, so do the legal questions surrounding it. With an ICO, the most pressing question is whether it is a security.

“There’s a growing recognition that these tokens look an awful lot like a security,” says J. Gray Sasser, a member of Frost, Brown and Todd in Nashville, Tennessee. However, he says, without more clarity from the SEC, it is hard to know.

While firmly a 21st-century issue, practitioners look to a 1946 U.S. Supreme Court case for guidance. SEC v. W. J. Howey Co. created a four-factor test to determine when an agreement is a security or “investment contract” under the Securities Act of 1933. Justice Frank Murphy wrote for the court that an agreement is a security when there is an investment of money, a common enterprise, an expectation of profit, and the expectation of profit is solely from the work of other people. Failing to meet just one of those factors means the agreement is not a security.

Broadly, ICOs manifest themselves in three ways. The first is an unambiguous security that sells a token as an investment in the future prosperity of a company; these are often called “securities tokens.” Delaware amended its General Corporation Law to allow for blockchain shares in 2017.

The second, called a token generating event or token sale, allows for buyers to purchase “utility” tokens that will allow access to a blockchain network, like a ticket. While the token’s value may fluctuate, Van Valkenburgh says this type of token is more analogous to a commodity such as gold than a security.

The third manifestation looks like a mix of the first two. Starting with a “direct token presale,” accredited investors can fund the creation of a blockchain network with the expectation that the investor will receive tokens that allow network access or provide a service, like Loomia’s clothing-data marketplace. Depending on structure, many say this is a security, at least until it is not.

That is the argument being made by proponents of the “simple agreement for future tokens” contract, or SAFT. Marco Santori, a partner at Cooley in New York City for over a year, was advising clients that ICOs are “risky and there’s no safe way to do it,” but there are ways to mitigate the risk, including SAFTs. On Feb. 6, Santori announced he was leaving Cooley to become president of the bitcoin-services company Blockchain.

In its simplest form, a SAFT is an investment contract or a security. By investing in a preoperational network, the contract “provides investors with the right to fully functional tokens” after the network is complete, explained Santori in a

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**INITIAL COIN OFFERINGS ARE “RISKY AND THERE’S NO SAFE WAY TO DO IT,” BUT A SIMPLE AGREEMENT FOR FUTURE TOKENS CONTRACT CAN MITIGATE THE RISK.**

– Marco Santori
2017 white paper with colleagues at Cooley and Protocol Labs, a company that completed a $205 million ICO.

However, once the utility tokens are issued “the investors’ rights in the SAFT automatically convert into a right to delivery of the tokens,” which, according to Santori and his colleagues, means there is a “very strong argument” that they are not securities.

The caveat to this approach is that “no court, regulator or taxing authority has yet interpreted the SAFT framework.” In short, the SAFT is a reaction to the lack of clarity and a gamble that the SEC and courts will determine utility tokens are not securities in this context.

HELP WANTED

Such unresolved, fundamental issues have created new business opportunities for attorneys.

Sasser in Nashville says his firm, which accepts bitcoin as payment, got involved in 2016 because people were talking “about blockchain as solutions” to the local health care sector’s issues around payment systems and health care data.

Today, the firm’s blockchain and digital currency team, which Sasser co-chairs, has about 20 lawyers working in it; five are full time. Pulling from numerous practice areas, it employs a team approach because launching a token raises so many issues so quickly. He says: “It’s almost impossible for a single person to keep up with the … pace of change.”

Regulators are also working to keep up.

In the second half of 2017 alone, the SEC’s leadership, including chairman Jay Clayton, gave at least three public remarks regarding ICOs or tokens as securities. The agency also published three ICO-related investor alerts and a lengthy report, known as the DAO report, discussing the potential securities violations committed by the sale and use of tokens on the now-defunct DAO platform—a stateless, decentralized investor-directed venture capital fund.

Current SEC employees declined to be interviewed on the record, and the agency has not made public statements about SAFTs. However, the documents and public comments show that the SEC will enforce current law as it pertains to ICOs while intending to promote the legitimate use of the technology.

Wesley Bricker, the SEC’s chief accountant, during a speech in Washington, D.C., last fall, said “The [DAO] report makes clear that the federal securities laws apply to those who offer and sell securities in the U.S., regardless of whether the issuing entity is a traditional company or a decentralized autonomous organization, whether those securities are purchased using U.S. dollars or virtual currencies, or whether they are distributed in certificated form or through distributed ledger technology.”

The commission has filed numerous actions and trading suspensions related to ICOs. In one example, the SEC’s new cyber unit brought an emergency action against PlexCorps, a Canadian business promising a huge payoff with its ICO. Not registered as a security with the SEC, the company raised $15 million between August and December 2017. A federal judge froze the parties’ assets pending trial.

While acknowledging the opportunity for fraud, Paul Atkins, a former commissioner and co-chair of the industry-led Token Alliance, an education and policy initiative, says, “We see lots of scams coming out of any new technology, but that doesn’t mean the whole thing is corrupt.”

That seems to reflect the sentiments of Clayton, the SEC chairman, when he said during a public address last November that “the commission will continue to seek clarity for investors on how tokens are listed on these exchanges … and what protections are in place for market integrity and investor protection” but made no mention of curtailing the legitimate use of ICOs.

While the SEC takes action on this issue, some in business say it is not enough.

“What most everyone in the industry wants is more and more clarity from the regulators on what’s allowed and not allowed,” says Eiland Glover, chief executive officer of Kowala, which had a token presale to build an “autonomously
A BIT ABOUT INITIAL COIN OFFERINGS
By now, most people have heard of bitcoin, which as of this writing was publicly trading at over $11,000 a token. There are other popular cryptocurrencies, as well.

"I don't know if we're going to get it," he adds.

Due to the plethora of legal issues raised by ICOs, Glover says, it took a lot of planning and research to put Kowala's token sale together. "You want to be compliant, but you lack clarity," he laments.

CRIMINAL CONCERNS

It is unclear what guidance, if any, will come next from U.S. regulators. Jeff Bandman, founding director of LabCFTC at the Commodities Future Trading Commission and now a private consultant, says an effective job will balance regulation and innovation.

In Congress, lawmakers seem to be focused on criminal elements that are attracted to the pseudo-anonymity provided by the technology. Two bills were introduced in 2017, but have not moved from committee, regarding cryptocurrency's use in money laundering and funding of terrorism.

A bipartisan coalition in Congress interested in growing the technology created the Blockchain Caucus, which will study the technology but take a hands-off regulatory approach, according to its website.

Organizations such as the Chamber of Digital Commerce, which houses the Token Alliance, are looking to inform the ongoing public policy debates around ICOs and other cryptocurrency issues.

"Regulation brings some measure of clarity. But if it's not appropriately crafted, it can be harmful."

—Amy Davine Kim

"REGULATION BRINGS SOME MEASURE OF CLARITY. BUT IF IT'S NOT APPROPRIATELY CRAFTED, IT CAN BE HARMFUL."

—Amy Davine Kim
THE BITLICENSE REGULATORY SYSTEM “TURNED NEW YORK INTO A BACKWATER OF FINANCIAL INNOVATION.”
— Jon of ShapeShift

Switzerland-based virtual currency exchange. The company would not release employees’ last names due to security protocol.

Indeed, Liriano at Loomia was wary of New York investors when launching their ICO, and Glover at Kowala avoided the state. Similarly, they both avoided Chinese accredited investors after the country banned ICOs in the fall of 2017. The New York Department of Financial Services and Benjamin Lawsky, then-superintendent of the agency, did not respond to multiple interview requests.

Beyond domestic laws, ICOs must also navigate a country-by-country patchwork of rules, regulations and bans. Joining China, South Korea also banned ICOs. Switzerland and the Cayman Islands, among others, are actively promoting their laws as advantageous to ICOs and blockchain startups.

Somewhere in the middle are countries creating “regulatory sandboxes” to balance consumer protection and the growth of the technology. These incubators allow for “some regulatory flexibility so companies can test a new idea that is closely supervised and mitigate risk of harm to consumers,” says Bandman.

He says the LabCFTC makes it “easier for innovators to engage with” the agency where each side learns from the other.

The SEC does not currently have anything branded as a sandbox, but companies can apply for exemptions to certain regulations or reach out to the agency for guidance through fintech@sec.gov.

While the regulatory landscape will continue to evolve, Liriano at Loomia thinks the impact of ICOs has already left “some of the core assumptions of how money is moved … challenged and changed.”

She thinks the ICO will become a tool for startups, much like a bank loan or venture capital. And, as with other well-worn fundraising mechanisms, investors will pick and choose whether and how to invest in ICOs. To Liriano, a ban does not seem likely.

“There are certain things that you can’t go back from,” she says.
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Raising Up New Voices
The ABA supports greater freedom of expression for student journalists
By David L. Hudson Jr.

The New Voices movement, which seeks the passage of state laws providing greater free-expression protections for student journalists at both the high school and college levels, now has the support of the American Bar Association.

In August, the ABA House of Delegates endorsed a resolution that “urges all state, local, territorial and tribal legislative bodies to enact statutes and school districts to adopt” policies that safeguard student journalists from censorship.

The resolution also would protect school advisers from retaliation for defending student journalists. It emphasizes that “criticism of government policies or programs, or the discussion of issues of social or political controversy, is protected speech in journalist media, regardless of the medium’s school affiliation or sponsorship.”

“It seemed a natural fit to ask the American Bar Association to take a stand in support of this basic constitutional freedom and the educational value to students that goes with it,” says Stephen Wermiel, co-chair of the First Amendment Committee in the ABA’s Section of Civil Rights and Social Justice and a constitutional law professor at American University’s Washington College of Law.

“The validation of the ABA is incredibly meaningful because it broadens the coalition coming together to say that protecting journalism in schools is a matter of civic urgency,” says Frank LoMonte, director of the Brechner Center for Freedom of Information at the University of Florida.

“We’ve already had enthusiastic buy-in from the Society of Professional Journalists, the American Society of News Editors and others knowledgeable about the teaching and ethical practice of journalism,” LoMonte says.

“To have the most authoritative voice of America’s legal community joining that chorus makes it clear that censorship is not a ‘journalism problem’ but a fundamental concern for all those who care about human rights and informed civic participation.”

HAZELWOOD’S SHADOW
The New Voices movement started as a brainchild of LoMonte’s during his time as executive director of the Washington, D.C.-based Student Press Law Center, where he worked from 2008 to 2017. New Voices emphasizes the need for such statutory protections in light of the U.S. Supreme Court’s 30-year-old decision in Hazelwood School District v. Kuhlmeier.

The 1988 case gave high school principals strong authority to censor school-sponsored student speech. In Hazelwood, the court reasoned that...
school officials could regulate such school-sponsored speech if they had a legitimate pedagogical reason.

Because most student newspapers were considered school-sponsored rather than student-initiated speech, the Hazelwood standard proved to be a bulwark for those seeking to exercise greater censorial authority over young journalists.

“The Supreme Court essentially took the rights of students away and left them the impression that they can’t be trusted or encouraged to do high-quality work without having a thumb on them watching every move they make,” says Cathy M. (Kuhlmeier) Frey, one of three student litigants in the Hazelwood case. Frey now speaks at conferences in support of student rights and the New Voices movement.

“While one might argue that even one instance of censorship is one too many, there have been many cases in which Hazelwood has been used to support administrative censorial actions,” says University of Kansas journalism professor Genelle I. Belmas. “It is difficult to quantify not only the number of censorial events that have taken place under Hazelwood’s purview but, even more so, the number of students who have self-censored out of fear of official action.”

STATE ACTION

For years, there was only a handful of states that had passed so-called Hazelwood statutes. These laws typically allow school officials to censor student journalists or other students only if they can show that the student speech will cause a substantial disruption of school activities or constitutes defamation or invasion of privacy. This “substantial disruption standard” comes from the Supreme Court’s earlier decision in Tinker v. Des Moines Independent Community School District (1969), which protected the right of several students to wear black armbands to school to protest the Vietnam War.

Now, according to the SPLC, 13 states had passed such legislation as of press time: Arkansas, California, Colorado, Illinois, Iowa, Kansas, Maryland, Massachusetts, Nevada, North Dakota, Oregon, Rhode Island and Vermont, though efforts are underway in at least a dozen others.

Many of these states had Hazelwood statutes specifically addressing censorship in high schools, the majority of which passed in the late 1980s or ‘90s. However, the problem of censorship remained, and it spread to college and university campuses.

“There was a burst of reform activity ... immediately following the Hazelwood decision, as advocates went state to state trying to correct the injustice the Supreme Court had done, but the momentum largely stalled after a round of defeats left people demoralized,” explains LoMonte. “What re-energized the movement was a small group of students and educators in North Dakota, led by journalism professor Steven Listopad, who got [them] together as part of a class project and created what became the New Voices of North Dakota Act.”

A class of Listopad’s at the University of Jamestown, where he taught for 11 years, decided to draft proposed legislation as their class project. “They interviewed experts from around the country and found there were many incidents of censorship in the state,” he says.

In 2015, Listopad and his students saw their work come to fruition. The North Dakota legislature passed the John Wall New Voices Act, named after a former state representative and celebrated high school journalism teacher who taught Listopad and who died in 2014. Last April, North Dakota strengthened its existing legislation by adding a provision that protects student advisers.

BACK TO TINKER

“We want to get back to where the Tinker standard is the norm for high school journalists,” says Listopad, who now teaches at Henderson State University in Arkadelphia, Arkansas. “The Hazelwood standard ripped the Tinker standard away for student journalists.”

Plaintiff Mary Beth Tinker says she fully supports the New Voices movement.

“New Voices is a very exciting
Your ABA

development for student journalists, and for all of us who value the free press and the voices of youth,” says Tinker, a retired nurse who continues the free speech advocacy she began as a 13-year-old wearing a black armband to eighth grade. “I am so happy to be a part of the effort and look forward to the day when New Voices legislation is passed by every state of the country, and eventually in Congress.”

ADVOCATING FOR ADVISERS

Another aspect of the current New Voices proposals is specific protection of student newspaper advisers from retaliation.

Frey explains that the Hazelwood ruling had an unfortunate effect on those who advise student journalists—it “puts the advisers in a challenging spot of how to direct the students to write good-quality journalistic stories, but also not jeopardize their jobs,” she says.

“The New Voices legislation also prevents schools and universities from retaliating against an adviser for teaching student journalists about documents and how to pursue investigative stories,” explains Syracuse University journalism professor Cheryl L. Reed, who faced trouble at Northern Michigan University when her students began making freedom of information requests.

“Previously, student journalists at the school newspaper had rarely used the Freedom of Information Act to access documents,” Reed says. “When they began requesting contracts and trustee travel receipts, the university held me responsible for these stories, which the students pursued on their own.”

Frey believes the New Voices Act is vital to re-establishing important freedoms for students, in addition to helping them to think critically and write responsibly as journalists.

“Our youth are educated and have important thoughts and views that they should be allowed to share. New Voices can help right the wrongs that the U.S. Supreme Court made so many years ago,” Frey says. “Student voices need to be protected and respected.”

CHANGING

Former prosecutor advocates for criminal justice reform as deputy director of the ACLU of Florida

By Jill Werner

Melba Pearson approaches criminal justice issues with the eye of a prosecutor and the heart of a civil liberties activist. With one foot firmly planted in each camp, she enjoys the push and pull of working toward justice from many angles.

Pearson had been an assistant state attorney in Miami-Dade County for more than 15 years. So when she was surprised to receive a job offer in 2016 from Howard Simon, executive director of the American Civil Liberties Union of Florida.

He was looking for a deputy director. She described herself as “the queen of black prosecutors.” It turns out that was what Simon wanted: a person who could speak out on criminal justice with authority. She took the job.

The change in careers has been fascinating, Pearson says.

WORKING FOR REFORM

In her ACLU work, Pearson focuses on women and minority communities, particularly in issues that involve criminal justice reform. The country’s crackdown on crime resulted in mass incarceration, which has created “a lost generation that you’re never going to recover,” she says.

The problem, as she sees it, is that America embraced imprisonment but stopped investing in rehabilitation.

As a prosecutor, Pearson used to advocate for requiring that a person earn a GED in prison or undergo drug treatment as part of sentencing. Unfortunately, those were the first things to go when the government made budget cuts, she says.

“We’ve gotten so far afield from that,” Pearson says. “You know, 83 percent of those sentenced to prison get out. How do you want them to come out?”

Through the ACLU, Pearson is advocating for an update of crime thresholds to reduce the number of people sentenced to prison.

For example, theft of an item with a value of at least $300 is considered a felony in Florida and carries a sentence of up to five years in prison. Pearson recommends a “cost of living increase” to $1,000 for a felony charge.

She also advocates for reform in her role as co-chair of the ABA Criminal Justice Section’s Prosecution Function Committee. The group provides input on resolutions being prepared for the ABA’s House of Delegates and develops CLE programming. In June, Pearson will present a CLE event on how to avoid violating the new law.
Your ABA

 COURSE
on the Path to Justice

“Thats not who we are as Americans,” she says. “Our Constitution values privacy and the individual.”

ROLE MODELS AND LEGACIES

For Pearson, the ABA provides an opportunity to enrich her career through discussions that involve diverse opinions and interaction with people she admires. One of her modern-day heroes is a former chair of the Criminal Justice Section, Judge Bernice B. Donald of the 6th U.S. Circuit Court of Appeals at Cincinnati.

That’s not who we are as Americans,” she says. “Our Constitution values privacy and the individual.”

Pearson points to the use of drones to prevent robberies in Miami-Dade County. She appreciates how they can detect perpetrators in an active robbery but says drone surveillance appears to be concentrated in minority communities.

“She’s so chill,” Pearson says. “You’d never know the miles she’s traveled.”

But Pearson wasn’t always involved on a national scale. Years ago, when she contemplated moving from her role as a prosecutor to that of judge, the feedback she received was that she had to be more involved in professional circles. She decided to join the National Black Prosecutors Association and eventually led the organization as its president from 2014 to 2016.

Doors have opened for me when it was appropriate,” Pearson says.

She visited the Obama White House twice and attended the swearing-in of Loretta Lynch as attorney general of the United States. As president of the NBPA, Pearson presented the association’s Presidential Award of Excellence to Lynch in 2015.

“It’s a rare occasion to present something to your role model,” she says.

Pearson credits her family with helping her become the outspoken leader she is today. A native of New York state, she has lived in Miami for about 20 years.

“My parents raised me to care about civil rights issues and to be mindful of others’ struggles,” she says. “Mom was the ultimate strong woman—so respected in her field.”

Her mother, Merle Pearson, was a pharmacist and a matriarch figure to her work colleagues, Pearson says. When she died in 2012, friends and co-workers created a video tribute to her life.

“It made me think about what legacy I want to leave,” she says. “I want people to say that I fought tirelessly for justice, I helped everyone I could and, at the end of the day, I was a good person.”

As she starts her second year as deputy director of the ACLU of Florida, Pearson describes herself as “being on the front side of Mount Everest.” She says she has a lot of learning still ahead of her.

But it’s a journey of joy. Pearson counsels others to never stop learning, to seek out mentors along the way, and to remember to give back.

“Somebody helped you get where you are,” she says. “You didn’t get there on your own. Just remember that somebody needs your help to get to where they want to be.”

PHOTOGRAPH COURTESY OF MELIA PEARSON

program at the association’s 2018 Paris Sessions on surveillance and terrorism, including how to balance public safety and privacy rights.

“I look at it through a very funky lens,” she says. “I know the importance of surveillance, but I’ve seen how there can be disparity in how it can be applied.”

Pearson points to the use of drones to prevent robberies in Miami-Dade County. She appreciates how they can detect perpetrators in an active robbery but says drone surveillance appears to be concentrated in minority communities.

“Thats not who we are as Americans,” she says. “Our Constitution values privacy and the individual.”
Less Taxing
Final version of federal legislation reflects ABA victories on key issues
By Rhonda McMillion

The tax overhaul package signed into law in late December by President Donald Trump includes key provisions advocated by the ABA that benefit lawyers and law firms.

The Tax Cuts and Jobs Act of 2017 marked the first major reform of the nation’s tax system in more than 30 years. The sweeping new law lowers the corporate tax rate from 35 to 21 percent and cuts income tax rates for most individuals while also eliminating or reducing many existing corporate and individual deductions.

The ABA was particularly interested in the passage of the following provisions:

Pass-through entities. These entities—businesses such as sole proprietorships, partnerships, LLCs and S corporations—do not pay federal income tax directly but instead pass profits through to the owners of the businesses who report that income on their individual tax returns. Under the new law, individual owners of pass-through entities—including law firms and other professional services businesses—may deduct 20 percent of the “qualified business income” they receive from the entities.

The deduction phases out, however, for owners of most professional services businesses (including law firms) that earn more than $315,000 for married taxpayers filing jointly or $157,000 for single taxpayers. Nevertheless, many high-income law firm partners may still receive substantial tax reductions because the law also lowers the top individual income tax rate from 39.6 to 37 percent. It also increases income thresholds for taxpayers in the highest income brackets.

The new tax law follows the Senate approach for pass-through entities that the ABA supported in a Dec. 13 letter to the House-Senate conference.

Mandatory accrual accounting for law firms. The ABA opposed such provisions, previously under consideration, because they would have required many law firms to switch from cash to accrual accounting and, as a result, pay taxes on their work in progress, accounts receivables and other “phantom income” long before it is received from clients.

The ABA worked with 30 state and local bar associations, dozens of law firms and other coalition allies for over four years to protect the legal profession from the severe financial hardships that would have resulted had these provisions been enacted.

Ending the deduction of litigation expenses. Consistent with ABA policy opposing legislation requiring law firms to switch from cash to accrual accounting, Congress dropped a provision contained in an earlier version of the bill that would have eliminated the current ability of plaintiffs lawyers with contingency fee cases in the 9th U.S. Circuit Court of Appeals at San Francisco to deduct their litigation-related expenses at the time they are incurred.

Bass celebrated the ABA achievements in an email to ABA members.

“The American Bar Association won hard-fought victories on key issues affecting the legal profession,” she wrote, and “while not all ABA recommendations were incorporated into the final legislation, these issues were favorable for lawyers and law firms.”

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.
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NOTICE BY THE SECRETARY REGARDING BOARD OF GOVERNORS VACANCY
The death of Joe B. Whisler of Kansas City, Missouri, a member of the Board of Governors from District 9, has created a vacancy for the 2015-2018 term. Pursuant to Section 7.4 of the Constitution, the unexpired term for this vacancy position shall be filled by an eligible member of the Association selected by the members of the House of Delegates in the district in which the vacancy exists. Nominees must be accredited to the following states of District 9: Missouri, Montana and Wisconsin.
Nominations may be made by mail or email to the Office of the Secretary, c/o Leticia Spencer, American Bar Association, 321 N. Clark St., Chicago, IL 60654; or 312-988-5160, leticia.spencer@americanbar.org. Nominations must be received by Friday, March 30, 5 p.m. CT.
Mary L. Smith, ABA Secretary

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

GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE
The ABA President will appoint one Goal III Minority Member-at-Large, one Goal III Woman Member-at-Large and one LGBT 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.

DELEGATE-AT-LARGE ELECTION
Pursuant to Section 6.5 of the ABA Constitution, six Delegates-at-Large to the House of Delegates will be elected at the 2018 Annual Meeting for three-year terms beginning with the adjournment of that meeting and ending with the adjournment of the 2021 Annual Meeting. Candidates are to be nominated by written petition. The deadline for petitions is Wednesday, May 16. For rules and procedures, go to ambar.org/largeelection.

DELEGATE-AT-LARGE ELECTION (VACANCY)
Due to the nomination of Carole L. Worthington for the Goal III Woman Member-at-Large on the Nominating Committee, a Delegate-at-Large vacancy will exist. To fill the vacancy, one Delegate-at-Large to the House of Delegates will be elected at the 2018 Annual Meeting for a one-year term beginning with the adjournment of that meeting and ending with the adjournment of the 2019 Annual Meeting. Candidates are to be nominated by written petition. The deadline for petitions is Wednesday, May 16. For rules and procedures, go to ambar.org/largevacancyelection.
CONGRATULATIONS to Paul M. Hauge of Newark, New Jersey, for garnering the most online votes for his cartoon caption. Hauge’s caption, below, was among about 100 entries submitted in the Journal’s monthly cartoon caption-writing contest.

“Call me old-fashioned, but I can remember when reading the mood of a jury required some skill.”
—Paul M. Hauge of Newark, New Jersey

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, March 11, with “March Caption Contest” in the subject line.

For complete rules, links to past contests and more details, visit ABAJournal.com/contests.
Authorities Quarantine ‘Typhoid Mary’ Mallon

In late August 1906, while vacationing in a sprawling rented home in Oyster Bay on Long Island, the family of New York City banker Charles Henry Warren was stricken with typhoid fever. Including the Warrens and their servants, 11 people occupied the house; and between Aug. 27 and Sept. 3, six came down with the disease.

Typhoid fever, a particularly virulent form of salmonella, was not uncommon. In 1906, New York City reported 3,467 cases and 639 deaths. But this case, occurring in a well-to-do environment like Oyster Bay, was cause for alarm. When health officials could not determine the source, the owner of the house employed an epidemiologist to investigate.

George A. Soper was at first mystified, finding nothing that earlier investigations might have missed. When potential sources—the well, cesspool, bathroom and food supplies—turned up clean, he began to examine the family and staff.

His focus rested on Mary Mallon, a cook hired through an agency for the vacation stay. An Irish immigrant, Mallon was known for hard work, stubbornness, hearty cooking and peach ice cream. She was not known for fastidious hygiene, and Soper became convinced that the dessert, made fresh with unclean hands, was the likely source of the outbreak.

With help from the employment agency, he discovered other families who had hired Mallon and experienced typhoid—the earliest in 1900 in Mamaroneck; the latest in a house on Park Avenue in Manhattan. There were seven such families, including that of New York lawyer Coleman Drayton, who had paid Mallon a $50 bonus for her care of his household while they coped with typhoid.

By the time Soper met Mallon on Park Avenue, two people—including her employer’s daughter—had taken ill. Soper told Mallon that she was likely a typhoid carrier, a host for the bacteria who could infect others without herself becoming ill. When Soper offered to help her in exchange for blood, urine and fecal samples, she came after him with a carving fork. Several more attempts at reason drew similar disdain. When police and health officers showed up to detain her, she climbed through a kitchen window, vaulted a fence and was finally found in a closet at a nearby house.

Mallon was taken to Willard Parker Hospital, where her various specimens tested positive for Bacillus typhosus, probably lurking in her gallbladder. When Soper told her that if she allowed its removal she would be free to leave, Mallon simply glared at him, refusing to speak.

After months without cooperation, Mallon was taken on March 20, 1907, to Riverside Hospital on North Brother Island, situated in the East River between the Bronx and Rikers Island. There, she lived in isolation.

A writ of habeas corpus filed after two years of quarantine was denied, despite her never having been charged with a crime. But after nearly three years in custody, she released on her promise not to handle food for others, to follow a few simple hygiene rules, and to report to the health department every three months. Instead, she fled and worked under assumed names in the kitchens of hotels and inns, a restaurant and even a sanatorium. She was found and rearrested in 1915 at the Sloane Maternity Hospital. As a worker in the kitchen there, she was jokingly known to the staff as “Typhoid Mary.” She was identified by Soper when a physician sought his help after another outbreak.

Mallon was returned to her solitude on North Brother Island, where she lived until her death on Nov. 11, 1938. Though granted unaccompanied releases periodically, she never again fled.

There was no formal investigation, but over 15 years, “Typhoid Mary” Mallon was linked by Soper to 53 cases of the disease, including three deaths.
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