SIDE HUSTLE
THESE LAWYERS BALANCE A FULL-TIME PRACTICE AND A FOR-PAY SIDE PROJECT

NIXON, THE LAWYER
HIS PATH TO THE WHITE HOUSE

BAD ADVICE
'NOTARIOS' WHO MISLEAD IMMIGRANTS

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PLASTICITY OF LEGAL LANGUAGE
Susan Nevelow Mart’s “Results May Vary,” March, page 48, suggests practical lessons concerning pitfalls in legal research, which lawyers and law students ignore at their peril. A major lesson is that words by themselves do not solve problems. They stand for concepts, and one must consider different ways to identify the concept that is crucial to one’s research goal.

I give as examples the varied words and phrases that lawyers and judges use to identify concepts involved in a varied set of tort problems. That set of problems includes injuries occurring beyond the time and place that ordinarily would have been predicted, where the manner of the occurrence of injury was unusual, and where the harm to the plaintiff or her interests is indirect or of a kind that is difficult to calculate.

I have identified locutions that one finds in case law. Illustratively:
• The defendant had “no duty” to the plaintiff.
• The defendant’s conduct or product was not the “proximate cause” of the plaintiff’s injury.
• The defendant was not the “legal cause” of the plaintiff’s injury.
• The defendant’s conduct was “not negligent to the plaintiff.”
• The plaintiff’s injury was “too remote” from the defendant’s conduct to justify recovery.
• The injury was not the “natural and probable consequence” of the defendant’s conduct.
• The injury was not “within the risk” of the defendant’s conduct.

This smorgasbord of language is, to borrow Mart’s language, a “testament to the variability of human problem-solving.” It illustrates the difficulty, just for a torts teacher, of communicating the plasticity of language to students desperate for the single-solving word. And it captures the challenge to lawyers who must dig in many sources for the best precedent.

Marshall S. Shapo
Evanston, Illinois

REFORMING BAIL
Contrary to the impression conveyed by “Battling Bail,” March, page 18, it is not only bondsmen who oppose bail “reform.” Reform, which includes preventive detention, also raises concerns for those devoted to the protection of individual rights and civil liberties. The ABA Journal’s description of New Jersey’s new system does not mention that until 2017, preventive detention was prohibited by the New Jersey Constitution. That constitution was recently amended to allow preventive detention and empower the state legislature to determine the procedures, terms and conditions applicable to pretrial release.

The new availability of preventive detention has led to persistent efforts by prosecutors to broaden the grounds on which release may be denied. In just one example, as the article notes, the state attorney general’s knee-jerk reaction to a homicide allegedly committed by someone released pretrial was to direct prosecutors to seek detention of those charged with firearms possession. While a change in the pretrial release system was necessary to avoid the unjust and counterproductive jailing of people unable to raise even small amounts of bail, it should have been accomplished without the addition of preventive detention, which is the dark side of “reform” in New Jersey and elsewhere.

David B. Harris
Scotch Plains, New Jersey

JUDICIAL RAMBLINGS
William St. Julien Arabin of “The Incoherence of Serjeant Arabin,” March, page 26, was only a circuit judge, so I doubt he heard any capital cases—though cutting off children’s hands for stealing a loaf of bread was probably still relatively common in the 1830s. But the Old Bailey had at that time just become one of the only London criminal courts; it certainly wasn’t what it is today—where only the more important cases are tried. But it only assumed that function in 1856. Hence some of Arabin’s more minor ramblings!

Jonathan Steinberg
New York City

CORRECTIONS
“Pet Threat,” April, page 16, misidentified Chelsea Rider as an attorney. She does hold a JD.

“Imbalance of Power,” April, page 38, should have identified Ilya Somin as being at the Antonin Scalia Law School.

The Journal regrets the errors.

CLARIFICATION
“Results May Vary,” March, page 48, should have noted that the data cited is from a 2015 study by author Susan Nevelow Mart. Algorithms and their results are continually changing, and each of the legal database providers in that study has changed their algorithms since the data was collected. See Casetext’s comment on our article: https://blog.casetext.com/what-a-difference-a-few-years-makes-the-rapid-change-of-legal-search-technology-ce91a60ab73b.
A New Structure for the ABA Staff

With more than 3,500 entities supported by 900 staff and thousands of volunteers, the American Bar Association is an incredibly complex organization. Its current structure of divisions, committees, commissions, task forces, working groups, and other entities can make the ABA extraordinarily difficult to comprehend and costly to manage.

As we face declining dues-paying membership and an increasingly complex marketplace, it's imperative that the ABA transform to better meet the needs of our members, the legal profession, and the public.

One immediate change we can make is the organization of staff. Building on the efforts and guidance of the Board of Governors and other volunteer leaders, I have worked with senior staff to implement a significant staff restructure. This reorganization involves much more than merely moving groups around a chart. The new construct refocuses staff support to the Association through nine Centers based upon our Four Goals.

The Association's Goal I is to serve our members. Three Centers have been developed to help focus on this critical area. The Center for Operations and Finance is principally involved with the operational and financial aspects of the Association, including staff led-functions. The new Center for Member Engagement emphasizes improving interactions with members and potential members through recruitment, retention, communications, and services. The Center for Member Practice Groups is comprised of the ABA's Sections, Divisions, and Forums. This Center presents opportunities for efficiencies, including some consolidation of staff support. It will operate in a streamlined fashion, featuring reduced administrative burdens and processes and emphasizing value-added oversight.

Goal II for the ABA is to improve our profession. Three Centers have been established to advance such efforts. The Center for ABA Policy and Governance directly supports the leadership of the Association, including entities responsible for the creation of ABA policies. The Center also provides support to state, local, and specialty bar associations and the national organizations representing bar association leadership and staff. The Center for Access to Justice and the Profession will maximize collaborative efforts and innovative approaches for the delivery of legal services. Center entities will also work to enhance the public's awareness of the law and the legal profession. The Center for Accreditation and Education provides guidance and approval for a variety of organizations that educate legal professionals.

Goal III of the ABA is to eliminate bias and enhance diversity. The Center for Diversity in the Profession advances this objective and provides the critical support necessary to ensure the Association and the profession represent the rich diversity of our society. ABA's Goal IV is to advance the rule of law around the globe. The Center for Global Programs focuses on this effort. It includes the Center for Human Rights and the Rule of Law Initiative. The Center for Public Interest Law represents those who are underserved by the profession, addressing the legal issues at the root of many problems. This Center also provides the infrastructure for effective legal services and systems, and shares best practices with lawyers and legal services organizations, while providing an additional connection to the ABA.

By structuring the ABA staff around our Four Goals, we will enhance our effectiveness as we serve individual attorneys and the profession overall. This structure also helps us make better decisions about allocating resources. This is an important step in the transformation of the ABA so that it will remain the premier voice of the profession for decades to come.
President’s Message || By Hilarie Bass

Bench Strength

ABA committee diligently and fairly evaluates credentials of federal judicial nominees

The framers of the U.S. Constitution had the wisdom to help protect the independence of the judiciary by providing federal judges with lifetime appointments. Alexander Hamilton, in the Federalist Papers #78, wrote that for the judiciary, “nothing can contribute so much to its firmness and independence as permanency in office.”

But a lifetime appointment comes with the imperative that judges are qualified. That is where the American Bar Association steps in.

Since 1953, the ABA’s Standing Committee on the Federal Judiciary has conducted independent, nonpartisan peer evaluations of the professional qualifications for nominees to the federal bench. The 15-member standing committee is independent of all other ABA activities and is not affected by ABA policies.

In recent months, there has been much public discussion about the role of the committee. Some significant misunderstandings have arisen. So, it might be helpful if I explained what the standing committee is and how it works.

Committee members are appointed for staggered three-year terms by ABA presidents. Each member spends hundreds of pro bono hours per year to provide this vital public service.

Traditionally, other than Supreme Court nominees, the White House has given names to the committee for evaluation before making them public. However, under both George W. Bush and Donald Trump, nominees’ names have been provided to the committee after their public announcement.

Once the committee receives a name, it assigns a committee member to start the evaluation, using the nominee’s responses to a comprehensive questionnaire provided to the Senate Judiciary Committee. The evaluator studies the nominees’ legal writings and speeches and conducts confidential interviews (usually at least 40) with people who have had professional contact with the nominee.

While interviews are confidential to encourage candor, the committee does not use “anonymous” sources. Evaluators know the identity of each person they interview.

Each nominee is also interviewed extensively and is given an opportunity to respond to any negative comments received.

The evaluator then produces a confidential report rating the nominee on specific criteria: integrity, professional competence, and judicial temperament. These benchmarks ensure that each nominee has the proper experience, knowledge of the law and work ethic. Each nominee also must demonstrate courtesy, patience, a commitment to equal justice and an ability to separate personal bias from their rulings.

The evaluator sends their report to the standing committee chair for review. After the chair’s review, the final report is sent to other committee members. If needed, discussions are held. Then each committee member votes for a rating of either “Well Qualified,” “Qualified” or “Not Qualified.” The majority rating is official, but minority votes are noted. The chair votes only if there is a tie.

If a nominee is voted “Not Qualified,” a second evaluator is assigned and a separate evaluation and report are completed. Committee members receive both reports before voting again. For a “Not Qualified” rating, the ABA prepares a written statement for the Senate Judiciary Committee. The committee chair is often asked to testify when a “Not Qualified” rating is given to a nominee.

The results speak to the committee’s fairness and nonpartisan approach. Of the 74 nominees evaluated from this current administration through mid-March, 70 have been rated “Qualified” or “Well Qualified.”

Evaluations for Supreme Court nominees follow the same general procedure, but a higher level of legal scholarship, academic talent and writing ability is expected. Teams of law school professors are enlisted to examine all the nominees’ legal writings.

This year’s committee, under its chair Pam Bresnahan, has done an extraordinary job evaluating the historically high number of nominees. Thanks to their dedication and a lot of long days, the committee continues to provide the decision-makers with the critical information needed to fully assess the nominees’ qualifications.

These judges, with tenure for life, will affect people’s lives, liberty and businesses for a long time. Ensuring they are as qualified as possible is paramount to a well-functioning legal system. The ABA works hard to ensure this occurs.

Follow President Bass on Twitter @ABAPresident or email abapresident@americanbar.org.
Art Behind Bars
Creative programs for inmates help change the narrative

ONE BOOK TALKS ABOUT A FAMILY’S love of dancing. Another is about the energizing freedom of a night on the town. A third explores the devastating loss of a sister to AIDS.

The narratives are different, but each of the works came from the same place: the maximum-security division of Chicago’s Cook County Jail.

For more than a year, teachers from the nonprofit ConTextos have been leading the Authors’ Circle, a memoir-writing class for detainees awaiting trial for violent offenses. Since the program launched in the jail in January 2017, three cohorts (about 65 men total) have participated, spending two hours a day three to four days a week for about four months reading, writing, revising, illustrating through collage and, finally, publishing their stories. The underlying philosophy of the program, which got its start in El Salvador, is that transformational change can happen to people when they reflect on their past experiences, thoughts, beliefs and attitudes—and tell their stories in a manner so that they’ll be heard.

“We talk a lot of the time about their emotions, traumas of the past,” says Lisa Kenner, chief educational officer with ConTextos. “It’s like canned fruits...
and vegetables. Even if we don’t cook it for dinner, it’s on our shelf.”

Kenner adds that the Authors’ Circle isn’t just about writing. It’s about reinforcing the value of every person. She says that by examining the past, authors—many of whom have experienced violence and trauma themselves—can feel empowered to alter their path in the future.

Across the country, creative expression programs in detention centers are blooming and take a variety of forms. In Miami, a program called Exchange for Change facilitates an anonymous writing exchange program that connects people in correctional and court-mandated facilities with students in high schools and universities. Ear Hustle—a podcast produced at California’s San Quentin State Prison by Earlonne Woods and Antwan Williams, both of whom are incarcerated, and artist Nigel Poor—shares stories about what life is like in prison. The organization PEN America runs a Prison Writing Program where mentors critique inmates’ writing by mail. The goal of all of the programs is to validate our shared humanity, create connections and learn from one another.

Anthony Barash, who is chairman of the ConTextos board and the former leader of the American Bar Association Center for Pro Bono, says that for the men in Cook County Jail, the writing program is frequently the first time they’ve been asked to tell their story. It’s had a dramatic impact.

“Over a period of time, relatively short, they begin to understand the consequences of their attitude, of their behavior, of their response. And they learn that they have choices that they can make. And they can, in their own ways, reflect on choices that they’ve made, and they develop the capacity to essentially see and make different choices,” says Barash.

Authors’ Circle participants live together in the same area of the facility during the program. Over time, they begin to trust one another, find commonalities, open up and understand that, even in jail, they’re part of a community, Barash notes. As they make those connections, violent incidents and infractions within their section of the jail have decreased dramatically, he says. That change in attitude and response is something that he hopes will last—not just after the program ends, but for generations.

“My hope is that we develop a critical mass of people who work with our program, who are touched by our program, who in turn go into the community and demonstrate by who they are, what they do and the paths they take, that change can happen. That violent behavior can be mitigated,” Barash says. “That there are choices.”

—Kate Silver

Lisa Kenner says the Authors’ Circle is about more than writing. By examining the past, writers can feel empowered to alter the future.
Oregon Supreme Court Gets First African-American Justice

Law can level the playing field

ADRIENNE NELSON MADE HISTORY this year, becoming the first African-American to be appointed to the Oregon Supreme Court in its 158-year history.

But she’s been a historymaker for quite some time now.

In 1985, Nelson graduated from high school in Gurdon, Arkansas, as the first black valedictorian student since the school integrated after the civil rights movement. But the accomplishment was hard-won.

The school didn’t initially want to recognize her academic excellence because of the color of her skin. Her mother had to sue the school district, putting her career as a teacher in that same district on the line. This early exposure to law leveling the playing field inspired Nelson to pursue a legal career. “That’s what started my interest in the law because I saw the law as a tool to help people,” she says.

Nelson relocated to Oregon after graduating from the University of Texas School of Law in 1993 to be closer to family. She practiced law in Portland for several years before becoming a Multnomah County circuit judge in 2006. Nelson was appointed to Oregon’s highest court by Gov. Kate Brown on Jan. 2.

As she transitions to her new role, Justice Nelson wants to continue to address issues that are important to all Oregonians. She says she believes the most important ones are those that people don’t feel entirely comfortable talking about.

“There are so many issues that are going on in our society right now, and I would say that the biggest issue isn’t a legal issue,” Nelson says. “Rather, I believe civility and the ability to have conversations around hard topics is most critical for our country.”

The access-to-justice gap is another critical issue for Justice Nelson. She has held “listening sessions” at various community locations, allowing residents to share their experiences and concerns about the justice system.

“The goal was twofold,” Nelson explains. “It was to acknowledge that there was a gap between the perception of justice for people who came before us and my colleagues, as well as to figure out—once we identify that—where do we go from there to educate each other.”

After those sessions concluded last year, they evolved into Court Connect, a collaborative effort between the Multnomah Bar Foundation and the county circuit court to make the new county courthouse not only accessible but welcoming to and inclusive of all members of the community.

Nelson believes she owes her success in the legal field to the inspiration she finds in people from all walks of life. And she says she hopes to continue to uphold the law as an equalizer that gives voice to people and issues that otherwise may not have support.

“People won’t always remember what you said or what you did, but they’ll remember how you made them feel, and I think that’s very important and something I try to live by,” Nelson says. —Gerardo Alvarez

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10 QUESTIONS

**War and Remembrance**

Lawyer’s memoir of growing up Jewish in Japan during WWII may be headed for the big screen

SUDDENLY, EVERYONE IS INTERESTED in Isaac “Ike” Shapiro’s childhood. It’s easy to see why. His parents, Jewish émigrés from Russia, were living in Berlin when Adolf Hitler began his rise to power. Sensing danger, they fled, eventually settling where they thought their young family would be safe: Japan. That changed on Dec. 7, 1941. And Shapiro detailed his unique experience during World War II—including how he became a U.S. Marine Corps translator at age 14 and eventually moved to the United States—in a self-published book almost 10 years ago. He also became a citizen, veteran and lawyer, ultimately learning to speak four different languages.

Last year, an agent discovered Shapiro’s memoir, called *Edokko: Growing Up a Foreigner in Wartime Japan*. Then they worked together to re-edit, update and re-issue it in both print and Kindle editions and also as an audiobook, read by Shapiro. There’s even a screenplay set to be shopped around to Hollywood studios. That means Shapiro, who turned 87 in January, now finds himself juggling his position as of counsel in the New York City office of Skadden, Arps, Slate, Meagher & Flom with book promo events and interview requests from NPR and other outlets.

Congratualtions on the renewed excitement surrounding your book! How does it feel? I didn’t think the book would have a second life, especially commercially, so it’s very exciting. My grandchildren have even been reading it. They’re quite interested in learning about our family’s background, and that’s something that ordinarily doesn’t interest grandchildren.

Your parents fled Europe in the 1920s for China and later Japan. Was Japan a welcoming place for Jewish people? Oh, very much so. They showed no hostility whatsoever. My parents were musicians, so they were very welcome. My father was a cellist and also a composer and a conductor; my mother was a pianist. They helped to start the first opera-class symphony orchestra in Tokyo.

What was it like to be in Tokyo when the Japanese bombed Pearl Harbor? It was a total surprise. I was almost 11, and I remember going to school and seeing people listening to the radio and hearing the announcement. The average Japanese who lived in our neighborhood were very sad about it. They did not welcome the war at all.

I realize that your family was not American, but as non-Japanese, did things change following Pearl Harbor? Did your family ever experience any discrimination? No, the Japanese divided foreigners into three categories: There were allies and there were enemies, and the enemies were arrested and sent back or exchanged. Then there was the category of people who were stateless. There were a lot of Russians in this category. They had come from Russia after the revolution and had lost their nationality, becoming stateless. All of our official paperwork listed us as stateless, and the Japanese respected that.

How did your family survive the war? We survived thanks to food rationing and working with our neighbors. When the B-29s began to bomb the cities, things became very rough, especially with the fire bombings of Tokyo during early 1945. The fire engines had no gasoline, so we would put out the fires using water pumps operated by two people. In March...
1945, almost our entire neighborhood was wiped out.

**How did you connect with the U.S. military?**

It was late August 1945, and I knew the American troops were landing. I wanted to see it, so I literally ran away from home. I told my parents I was going out to buy some food, and I went down to Yokohama. As I was going home, American naval officers picked me up off the street and took me to their ship. I became acquainted with a Marine colonel, and he took an interest in me and hired me to be a translator and a driver in Yokosuka at the naval air base, which he commanded. When he was leaving in 1946, he asked if I wanted to come to the United States. He and his wife didn’t have any children, so I went to live with them in Hawaii.

**You had the opportunity to visit Hiroshima with a group of Navy officers. What was that like?**

It was horrifying. I’ve been there since the city was rebuilt, and you wouldn’t know what happened, but in 1945, it was an absolute graveyard.

**You became an American citizen in 1951. As someone who had been stateless, what did that mean to you?**

It meant an awful lot. I was in the Army, and I went in my uniform to the court in Alexandria, Virginia, and stood in line and applied. I delayed being sent to Korea until I could become a citizen. I was in Korea for the first half of 1952, before I went to law school. I was in the Army Corps of Engineers in the intelligence unit, looking for enemy mines and booby traps, and we removed them when we found them.

**Did your experiences living in a war zone prepare you for the dangers you faced in Korea?**

Yes, I was 21, so I didn’t realize how dangerous it was, but I was much more used to being physically at risk than the average kid.

**You’ve built a distinguished career in international litigation and arbitration, specializing in privatization and international arbitration between business interests in the former Soviet Union and in Eastern and Central Europe. You’ve practiced law in Tokyo and spent a decade in practice in Paris. How did you keep up with so many different laws and languages, and did you enjoy the challenge?**

I just learned as I went along! I liked what I was doing—being a lawyer has been a very satisfying profession. I worked for two really wonderful law firms and spent 30 years at each place. I couldn’t think of a better life.

—Jenny B. Davis
Opening Statements

MAKING IT WORK

Life, Lemons and Lemonade

Making It Work is a column in partnership with the Working Mother Best Law Firms for Women initiative in which lawyers share how they manage both life’s challenges and work’s demands. Visit workingmother.com for more.

By Akira Heshiki

Last summer my mom was diagnosed with Alzheimer’s. I am the only child of immigrant parents. Suddenly there are extra doctor appointments to attend, extra calls and check-ins, long sessions of dementia-related drama, and new unwanted guests in my home: guilt and fear that I am not doing enough to help care for the person who has always cared for me.

Three years ago, my then-husband and I separated. I had to figure out how to live by myself after 16 years of marriage. So many details—mortgage, taxes, school lunch accounts and, worst of all, the cable company. (My name is still spelled wrong on the bill. I have let that go after three valiant but failed attempts at justice.)

Five years ago, my second daughter was born—adding to what felt like an already hectic and crowded schedule of working full time and raising my then-5-year-old, who was adjusting to no longer being the center of the universe.

Life’s challenges go on. Of course, not all are equally tragic. But the hard challenges always seem to throw me off balance and make the task of going to the office for another “normal day” feel like an impossibility.

Sometimes, on the hard days, when I come to the office feeling overwhelmed by the needs of children, parents, boyfriend, water-cooler small talk feels like I am acting in a farcical comedy that doesn’t acknowledge the realities of no sleep, limited time and too many irons in the fire.

On those days, it is hard to concentrate even on trivial conversation, much less work, while my thoughts are drawn elsewhere to more pressing matters demanding my attention and draining my emotions.

On other days, the work of reviewing a brief or counseling a client is a welcome respite from “real life.” I am grateful for the distraction and an opportunity to feel normal. As I work through each of these life events, I find myself yearning to get back to the mundane—to feel the luxury of having my biggest concern be “what shall we eat for dinner” instead of “oh, my mom is calling ... again ... for the third time in the last half-hour, without remembering that she has called before.”

During the hard times, I want to remember how it feels without the constant knot in my stomach. I yearn for the luxury of spending time, say, painting my nails for the sheer enjoyment of it and not as an enabling mechanism to take a break for escape or avoidance. I want to “get through this part” with the hope that, once this chapter ends, the struggles will be over. Unfortunately, that’s not how life works.

Instead, life continues to bring new and different chapters. In the moments of calm, I can look ahead to the challenges yet to come.

What wisdom would I share for others who are also struggling at “making it work”? I think back to all the things and people that allowed me to do so even when I felt like I was barely functioning.

The thing I appreciate most is kindness. The kindness of others makes some of my most difficult times bearable. Sometimes I feel kindness in those who spend time with me not talking about my problems so I can keep it together during the day.

Other times the opposite is true. Sometimes I need to talk about the hard things with someone kind enough to listen. By opening up about my divorce I discovered a secret club of fellow divorcees I never knew existed: a club with funny jokes (talk of their “was-bands” and “out-laws”) and affirmation and hope. Those conversations with my fellow sisters in the semi-secret divorcee sorority were, at times, a healing salve.

By recognizing my humanity and being open to the kindness of others, I have discovered that I have a tribe of people who care for me. They are willing to drive me home when I am exhausted, pick up my kids if I am running late, or sit with my mom so my dad and I can spend a moment alone.

I am still learning to ask for help and be gracious and accept it when it is offered. I am still learning to let go of things like shame. Too often I cling to the pretense that I can do it all and be everything, and that anything less is shameful.

I am still learning that work-life balance is not a fixed equilibrium but a shifting of priorities. Last week it was working all night and feeding the kids Taco Bell, but next week it may be a shift of priorities to Mom, and only Mom—and that’s OK. That’s real life, and that to me, is the only way we make it work.

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Hearsay

45%

LOSING PROPOSITION
Law professors often lose when they sue over employment matters such as not getting hired, tenure denials or pay disputes, according to an article by Robert Jarvis in the latest issue of the Albany Law Review. Jarvis, a professor at Nova Southeastern University’s Shepard Broad College of Law, wrote that three issues are at the root of these lawsuits: dissatisfaction with, and professional jealousy of, faculty colleagues; disagreements with, and distrust of, administrators; and feeling that others are receiving better, and undeserved, treatment. In what appears to be the first study of its kind, Jarvis also found that law professor suits are far more common in recent years.


Say What?
The United States Citizenship and Immigration Services has changed its mission statement, dropping a phrase saying the U.S. is devoted to securing “America’s promise as a nation of immigrants.” The federal agency that grants visas and citizenship now refers to itself as an organization that “administers the nation’s lawful immigration system.” The new mission statement also eliminates use of the word customers in referring to visa applicants. In a letter to employees, the agency’s director, L. Francis Cissna, said the changes were a “straightforward statement [that] clearly defines the agency’s role in our country’s lawful immigration system and the commitment we have to the American people.”

Source: usatoday.com (Feb. 23).

Opening Statements

... is the percentage difference in rates that partners at the largest law firms are able to charge compared with slightly smaller firms. According to CounselLink, LexisNexis’ legal pricing data service, partners at bigger law firms are able to get away with ever-higher hourly billing rates compared with their smaller-firm counterparts. CounselLink analyzed 2017 partner billing rates at firms with 750 or more lawyers and compared them with firms of 501 to 750 lawyers. The study found that the gap between the two groups widened by 11 percentage points over 2016. And beyond raising rates by a larger margin, the largest firms also have the largest share of the highest-priced work.

Source: law.com (March 1).

$6.75 Million
The amount awarded to a group of street artists for the destruction of graffiti. The “aerosol art” gallery at the center of the lawsuit had been curated at a group of abandoned warehouses in Queens and had become a tourist destination. The street artists sued after the building was whitewashed by the property owner—10 months before the structures were demolished. U.S. District Judge Frederic Block found that 45 of the 49 works at issue in the lawsuit were art worthy of protection under the Visual Artists Rights Act of 1990, and that the artists had suffered financial loss and harm to their reputations.

Source: law.com (Feb. 13).
Full Disclosure

New York considers changing discovery rules that often leave defense lawyers in the dark

By Wendy Davis

In August 2015, soon after Terrell Gills was arraigned on charges that he robbed a Dunkin’ Donuts in New York City, his defense attorney went online to seek more details about the case.

Through a Google search about the robbery, attorney Maria Martinez uncovered a news item about a Dunkin’ Donuts bandit suspected of robbing three of the franchise’s locations. All three incidents happened in Queens during the last week of May 2015. Gills, 34 at the time, had been charged in one.

In the 18 months following Gills’ arraignment, lawyer Martinez from the Legal Aid Society repeatedly asked the prosecutor for information about the other two robberies. Gills was held at Rikers Island that entire time, unable to post the $10,000 bail.

Finally, in February 2017, four days before the case was slated for trial, the prosecutor submitted reports from the detectives who arrested Gills. Those reports revealed that a different person had been arrested for the other two robberies. The prosecutor then disclosed that the other suspect had pleaded guilty in January 2016 and was serving a nine-year sentence.

The next day, Martinez, along with co-counsel Jenny Cheung and a paralegal, drove about 80 miles to the Downstate Correctional Facility in Fishkill to meet with the person responsible for the other two robberies. Martinez showed that suspect videos of the other two incidents, which she had subpoenaed from the stores. He then confessed to also committing the third robbery.

Even with that information, Martinez couldn’t get the prosecutor to drop the charges. Instead, the case went to trial, where Martinez argued that Gills had been wrongly identified. She says the initial reports described the robber as 6 feet tall and about 200 pounds. Gills was 5-foot-6 and 120 pounds when arrested. A jury acquitted him after a few hours of deliberations.

Martinez says had she known earlier someone else had been prosecuted for the other two robberies, her client almost certainly would have gotten out of jail sooner. She says she would have used the information about the other defendant to apply for Gills to be released on his...
own recognizance pending trial and would have filed motions seeking pretrial dismissal of the case.

“We really go into these cases blindfolded,” Martinez says, adding that her client unnecessarily spent 18 months away from his young daughter and was unable to work. “The jury didn’t fail him, but the criminal justice system failed him.”

Gills, now 37 and living in Binghamton, plans to sue the New York Police Department and the Queens County District Attorney’s Office. The Queens district attorney did not respond to questions about the Gills case.

**THE ‘BLINDFOLD LAW’**

New York’s current laws allow prosecutors to withhold key evidence, including witness names, police paperwork and prior statements by witnesses, until immediately before the prosecutor delivers an opening statement. Only three other states—Louisiana, South Carolina and Wyoming—have equally restrictive discovery laws.

Advocates have dubbed New York’s discovery scheme the “blindfold law,” arguing that the lack of information requires defense counsel to prepare for trial, or advise clients about plea bargains, without ever seeing the evidence.

The law, in effect since 1980, means that defense counsel could be required to select a jury before viewing police reports. In practice, not every prosecutor in New York withholds material until the last minute. In Brooklyn, for example, prosecutors tend to make information available to the defense early on. But prosecutors in many other jurisdictions hold on to material until late in the process.

Defense lawyers in the state say the delay hampers their ability to prepare for trial and engage in plea negotiations. “What we need are police reports and witness statements, so I can sit down with my clients and say you’re screwed or say we’ve got a defense here,” says John Wallenstein, immediate-past president of the New York State Association of Criminal Defense Lawyers.

Now, after years of requests from the defense bar, efforts are underway to change the state’s law. In November, Janet DiFiore, chief judge of New York’s highest court, directed all trial judges to order prosecutors to disclose favorable evidence to the defense at least 30 days before felony trials and 15 days before misdemeanor trials.

DiFiore’s order also requires prosecutors to take steps to learn about favorable information and to confer with the police and review their files. The order specifically applies to material that could be used to impeach prosecution witnesses—such as prior inconsistent statements—as well as information that could lead to a reduction in charges or sentencing. It also includes information that could implicate someone other than the defendant in the crime.

The order, which grew out of a recommendation by a state task force and the Innocence Project, gives new teeth to the U.S. Supreme Court decision in *Brady v. Maryland* —a 1963 case establishing that prosecutors must disclose favorable evidence to the defense. In the years since, prosecutors have often interpreted that mandate differently from the defense bar.

One of the key areas of contention centers on the definition of what type of favorable evidence must be disclosed. Some prosecutors argue that they only inform the defense about favorable evidence if it’s also material to the case.

But whether evidence is material can be a judgment call—one that defense lawyers say prosecutors shouldn’t be making.

“Prosecutors should be disclosing all favorable evidence, whether they believe it’s material or not,” says Barry Scheck, co-director of the Innocence Project.

“Prosecutors see the world through their theory of the case,” says lawyer Scott Levy of the Bronx Defenders, who is special counsel to the organization’s criminal defense practice. “Every defense attorney will tell you that some-thing a prosecutor doesn’t consider exculpatory is very exculpatory.”

**RESPONSIBILITY, ACCOUNTABILITY**

DiFiore’s directive, which took effect Jan. 1, also paves the way for judges to hold prosecutors in contempt if they fail to submit favorable evidence. Scheck says that prospect is critical to reform.

Currently, convictions can be vacated if information emerges later that the police or prosecutor failed to disclose key material. In New York, 94 out of 243 exonerations in the National Registry of Exonerations since 1989 involved cases in which prosecutors withheld exculpatory material, according to Sam Gross, registry founder and a law professor at the University of Michigan.

That kind of post-conviction relief is critical for individual defendants but won’t necessarily lead to systemic change. “What will clean up the system is if prosecutors themselves are obligated to find favorable evidence and disclose it, and police officers will be sanctioned—or certainly sued—if they fail to disclose it,” Scheck says.

Currently, it’s extremely rare for judges to hold prosecutors in contempt for failing to comply with their *Brady* obligations. But in one notable Texas case, a judge did so five years ago in response to the high-profile exoneration of Michael Morton.

Morton spent about 25 years in prison after he was convicted of murdering his wife. In that case, the prosecutor withheld a piece of physical evidence containing DNA that cleared Morton of the murder. In 2013, the prosecutor in the case was charged with criminal contempt. He pleaded guilty, agreed to a 10-day jail sentence and gave up his law license. The following year, Texas liberalized its discovery law.

Separate from DiFiore’s order, New York Gov. Andrew Cuomo proposed revising the state’s criminal procedure law to require prosecutors to disclose some material as early as 15 days after arraignment.

But Cuomo’s proposal also creates a controversial new “right of redaction,” which would allow prosecutors
to withhold evidence from the defense in a host of circumstances. They include whether police are conducting a continuing investigation or whether disclosing evidence could endanger witnesses.

Defense attorneys say Cuomo’s proposed right of redaction is far too broad, allowing prosecutors too much leeway in determining what to disclose. “The governor’s proposal as it currently stands is very, very problematic,” says defense lawyer Marvin Schechter, a past president of the New York State Association of Criminal Defense Lawyers. “It probably represents several steps back.”

**THE SHIELD APPROACH**

Prosecutors counter that it’s sometimes necessary to withhold material to shield complainants and other witnesses.

“We want to make sure we’re protecting our victims,” says Scott McNamara, Oneida County district attorney and president of the District Attorneys Association of the State of New York. Cuomo’s proposal “took into consideration our concerns when it comes to witness intimidation or witness elimination in some cases.”

McNamara adds that the concern is particularly acute in cases involving drug conspiracies, gangs and homicides. He once handled a case in which a witness to a murder fled the country immediately after her identity was disclosed in discovery. “Someone told her they were going to kill her if she didn’t get out of town,” McNamara says.

But defense attorneys argue that widespread witness intimidation doesn’t happen in states with more liberal discovery rules. “The argument about witness intimidation is based on a false premise that witness intimidation is rampant,” says Levy of the Bronx Defenders.

Scheck of the Innocence Project adds that the “parade of horribles” feared by prosecutors hasn’t happened in other states that require early disclosure of police reports and witness statements. “We know that you can have open discovery and the sky doesn’t fall,” he says.

### Talk Isn’t Cheap

**Appeals court decision stymies attempts to regulate the high price of prison phone calls**

By Lorelei Laird

Hidden among the corporate reports and bureaucratic reports in Federal Communications Commission docket No. 12-375 are letters from prison inmates and their families, pleading for relief from high phone rates. Amsani Yusli, whose testimony was submitted in 2015 by the Campaign for Prison Phone Justice, wrote that one 20-minute call per day from her husband cost $130.20 per month.

“This amount translates to groceries for the month,” she wrote. “When you don’t have much, you have to choose between feeding your kids ... and allowing your kids to know their father.”

After 14 years of such pleas, the FCC in 2015 made a rule capping rates for in-state prison phone calls. But the affected telecommunications companies sued—and in June 2017, the U.S. Court of Appeals for the District of Columbia Circuit handed them a victory in Global Tel-Link v. FCC. The court said the FCC overstepped its statutory authority when it regulated in-state calls, and that the way it set the rates was “hard to fathom.”

To make matters more interesting, the court reached that conclusion without help from the FCC. Six days before oral arguments, the agency abandoned parts of its own defense, conceding oral argument time to a class of inmates and their families who’d intervened in the case. Advocates for prisoners say that unusual circumstance helped undermine the FCC’s case.

As a result, they say, about two decades of efforts to address high inmate calling rates are back to square one.

“Prisoners and their families are getting ripped off, plain and simple,” says Andrew Schwartzman, an attorney for the intervenors and the Benton Foundation senior counsel at the Georgetown University Law Center’s Institute for Public Representation.

**LEGITIMATE COSTS**

Opinions differ on why inmate calling rates are so much higher than those in the free world. The prison telecoms and their corrections agency clients say it’s because extra costs such as monitoring phone calls are associated with serving prisons.

But inmate advocates say the real driver of costs is “site commissions,” an industry practice in which telecoms pay a percentage of their revenues to corrections agencies. These range from 20 to 88 percent of revenues, and their size influences the agencies’ choice of contractor.

In exchange, the telecom gets a monopoly within the prison, which allows it to recoup its profits with high rates. Inmates and the people they call have no other choice, so they either pay those rates or forgo phone calls.

Paul Wright, executive director of the Human Rights Defense Center, says that’s bad for society. He cites studies showing that maintaining contact with loved ones on the outside helps prisoners stay out of trouble once they’re released.

“The people running the prisons and jails ... know all this, and they just make the decision to take the kickback money and run with it—and public safety and sound public policy be damned,” says Wright, a former jailhouse lawyer.

The FCC cited that research when it capped calling rates. The agency intentionally set those caps too low to account for site commissions, saying they’re not a cost of providing phone calls. Rather, they’re “location
for the prison telecom companies, declined to comment for this article. But Schwartzman says this point of view ignores past FCC decisions. “Historically, if somebody paid the owner of a 7-Eleven to place a pay phone in the store, the rent that was paid to the owner of the 7-Eleven was considered part of the profit of the phone call,” Schwartzman says. “That’s the way the FCC has historically viewed it, and the court didn’t accept that.” The court was less flabbergasted, but no more favorable, about the FCC’s authority regarding intrastate calling. Over a dissent by Judge Cornelia Pillard, it found that the “fairly” language in Section 276 doesn’t give the FCC clear authority to ensure fairness to consumers. Petro of Drinker Biddle says this ignores about two decades of FCC jurisprudence on fairness, a term of art from the Communications Act of 1934’s requirement that rates be “just, fair and reasonable.” After the 1996 act, he says, the FCC spent a lot of time interpreting the disputed section and decided that fair means “fair for both parties to the transaction.” But Mithun Mansinghani, the Oklahoma solicitor general and author of an amicus brief supporting the telecom companies’ position, says some of the same cases support the narrower, providers-only interpretation of the statute’s call for fairness. He notes that the 1996 act gave the FCC nine months to implement its fairness mandate. But it took more than 15 years for the commission to apply it to inmate calling rates. “In implementing the statute, they never thought that what they were trying to do was prevent excessive compensation to pay phone providers,” Mansinghani says. “This was something that was just dreamed up a couple of years ago.”

DEFERENCE DISPUTE

Under normal circumstances, a federal appeals court confronted with an ambiguous statute might defer to the expertise of the federal agency whose job it is to make rules based on that statute. That’s Chevron deference, an established principle of administrative law. But because the FCC abandoned its own defense on the question of how to interpret fairly, the District of Columbia Circuit found that Chevron deference didn’t apply. The intervenors argued, when petitioning for en banc review, that this wasn’t warranted because the FCC never formally changed its position.

The majority quickly issued a clarification saying it would have decided the same way using Chevron deference, and the full District of Columbia Circuit denied a rehearing. But the issue might come up again. The intervenors appear to be planning a petition for a writ of certiorari.

The campaign to lower prison calling rates is alive in other areas. Certain issues were remanded to the FCC, which could set off another round of litigation about new rules. At least two class action lawsuits about the high cost of calls from prison are pending.

Although the current Congress is unlikely to give the FCC more regulatory authority, activists may look to state legislatures, which can ban site commissions—and have, in at least eight states. Wright of the Human Rights Defense Center thinks public opinion would support that if the issue were more widely understood.

“We’re talking about 25 or 35 cents a minute, $15 for a 10-minute call,” he says. “No one [else] in America pays anything remotely close to that.”
With about two months left in the U.S. Supreme Court's current term, speculation about a retirement from the bench is shifting into overdrive—if it weren't there already.

Justice Anthony M. Kennedy, who is 81 and marked 30 years on the high court in February, has been the main subject of the retirement rumors, which also were rampant a year ago in the first months of President Donald Trump's administration. The rumors went unfulfilled as Kennedy decided to stay on at least one more term.

Justice Ruth Bader Ginsburg is older—she turned 85 on March 15—but is known for her antipathy toward Trump and has made it clear in multiple public appearances this year that she has no intention of retiring as long as she can perform the job of justice "full steam." Justice Stephen G. Breyer turns 80 in August, but like Ginsburg was nominated by President Bill Clinton, a Democrat. As part of the court's liberal bloc on many issues, he seems to be disinclined to retire imminently.

Kennedy, meanwhile, is known to have some desire to step down and enjoy some golden years, perhaps to devote to interests such as improving civics education in the schools. He was nominated by President Ronald Reagan in 1987 after the defeat of Robert H. Bork and the withdrawal of Douglas Ginsburg for the seat of Justice Lewis F. Powell Jr. Kennedy joined the high court on Feb. 18, 1988, an anniversary recently acknowledged from the bench by Chief Justice John G. Roberts Jr.

There is no shortage of settings in which the retirement question is being watched with keen interest—the White House, Senate and the chambers of the federal appeals court judges who make up most spots on the official and unofficial short lists for filling a high court vacancy.

Another place where Supreme Court retirements are being studied is in the ivory tower. The retirement decisions or nondecisions by the justices have been studied by a surprising number of political scientists and other researchers.

"It's a subject of perpetual interest, and it will be as long as we have a powerful Supreme Court full of elderly justices," says Ross M. Stolzenberg, a professor of sociology at the University of Chicago who has written or co-authored two studies about justices' departures from the court. This includes not just by retirement but by death; Stolzenberg also has studied the justices' mortality rates after retirement.

‘WISHFUL THINKING’

If Kennedy decides to retire under Trump, he would be following a long tradition of justices consciously leaving the court under a president of the same party who appointed them.

A more complicated question is whether justices also seek to time their retirements with political or ideological goals in mind—and whether they have been successful.

The conclusion of the most recent study is that justices have not been all that successful in bringing about an ideologically like-minded successor—a new member of the court who shares their judicial or political outlook.

"Justices' political retirement goals have often turned out to be wishful thinking," wrote Christine Kexel Chabot, a scholar in residence at the Loyola University Chicago School of Law, in Do Justices Time Their Retirements Politically?—published in draft form in February.

"Some justices found that they were relatively far removed from ideologies of party leaders (and potential successors) by the time they retired, and justices who timed their retirements politically had limited success in obtaining like-minded replacements."

Chabot pointed out that since 1954, when justices first received the option under federal law to retire at full salary at age 65 and with 15 years of service, 22 justices have retired and two died in office: Chief Justice William H. Rehnquist in 2005 and Justice Antonin Scalia in 2016.

The retirement formula changed in 1984 to reduce the minimum requirement of service to 10 years, as long as the judge's age and years of service totaled 80.

Chabot analyzed recent departures from the court as well as justices who have passed up the opportunity to retire under a politically and ideologically compatible president late in their tenure.

The best example of that is Ginsburg, who spurned calls from various quarters—law professors and others—to retire during President Barack Obama's tenure to help ensure her seat would be filled by another progressive.

Ginsburg has suggested publicly that, given Republican control of the Senate during six of the eight years of Obama's presidency, there was little guarantee that the president could have won confirmation of a liberal
nominee, and thus it was “misguided” to think that she should retire.

Chabot noted in her paper that Ginsburg was far from alone. Eight other justices with extended tenure similarly declined to retire during her study period. “These justices were unwilling to give up a powerful and prestigious position, despite the risk that health would force an ill-timed, involuntary retirement later on,” Chabot said in her paper.

Although many justices have sought to retire under a president of the same party as the one who nominated them, that hasn’t always meant retiring under a president of ideological compatibility. Thus, Justice Byron R. White, a nominee of President John F. Kennedy who grew increasingly conservative during his 31-year tenure, nevertheless expressed a preference to retire under another Democrat, and he did so soon after Clinton took office in 1993.

Meanwhile, Justice David H. Souter, nominated by President George H.W. Bush in 1990, turned out to be more liberal than many Republicans were happy with. He retired soon after Obama took office in 2009.

LOOKING FOR IMMortality

Still, a 2010 study of a large sample of retirements by Supreme Court justices from 1789 through 2006 reported that when the current president was of the same party as the president who nominated the justice, and the president was in the first two years of his term, that justice was about 2.6 times more likely to retire than when these two conditions were not met. “From the judges’ perspective, they’re looking for their immortality,” says Stolzenberg of the University of Chicago, who co-authored the study with James Lindgren, a professor at the Northwestern University Pritzker School of Law. “They want to be influential after they’re dead.”

The distinctive feature of Chabot’s paper is examining justices’ retirement decisions in terms of their desire to bring about like-minded successors—and to analyze the question of whether they time their retirements politically.

She said political scientists have recently developed more sophisticated ideological measures, called “common space scores.” For politicians such as the president, these scores are drawn from a variety of sources. For justices, they are derived from votes in nonunanimous cases.

Of the 22 justices who retired since 1954, about half of them were for health reasons, Chabot said. Of the other half, some retirements were not politically timed, with several justices at the ideological center of the court not having the chance to retire during an ideologically compatible atmosphere at all.

Chabot concluded that political timing has not dominated justices’ retirement decisions in the modern era, despite prominent examples to the contrary. When justices have sought to guarantee a like-minded successor, the efforts have been mixed. The two most recent justices to retire—Souter in 2009 and Justice John Paul Stevens in 2010—managed to bring about like-minded successors, respectively, in Justices Sonia Sotomayor and Elena Kagan.

But Justice Sandra Day O’Connor retired in 2006 under President George W. Bush, who is a Republican like the president who appointed her, Reagan; although her successor, Justice Samuel A. Alito Jr., was appointed by Bush, he has been much more conservative than O’Connor on a number of issues.

SOMEONE LIKE GORSUCH

Chabot tells the ABA Journal that it is much too early to try to calculate an ideological common-space score for Trump. “The best evidence of the type of justice Trump would appoint is the one he did appoint,” she says, referring to the nomination and confirmation last year of Justice Neil M. Gorsuch. In his tenure so far, Gorsuch has been viewed as at least as conservative as Scalia, whom he succeeded.

If Kennedy decides to retire, “he should expect to be replaced by someone who votes like Justice Gorsuch,” Chabot says.

That puts Kennedy in a tenuous position in terms of timing his retirement to achieve a like-minded successor. Because of his distinctive place at the center of the court—a liberal voting record on issues including LGBTQ rights and race discrimination, conservative on many criminal matters—Kennedy’s retirement “is likely to offer limited political returns,” Chabot said in her paper.

“There is no reason,” Chabot added, “to expect the Republican-controlled White House and Senate to appoint a successor who will perpetuate Kennedy’s voting record.”
More than 40 years ago, short story writer and novelist John Cheever said to his creative writing classes that he told stories because it is easier to change the shape of the world than it is to change one person’s mind. I was a student in his class, and the line stuck with me. Cheever was a brilliant and insightful teacher imbued with a belief in the transformative power of storytelling. But, at that time, I didn’t understand what he meant. Today, I have a better understanding of what he was getting at. Curiously, I have learned about the power of storytelling through the practice and teaching of the law.

Civil rights attorney, writer and law professor Bryan Stevenson intuitively comprehends Cheever’s wisdom. Whether at trial or in an appellate courtroom, writing his own superb autobiographical nonfiction, the best-selling Just Mercy, or in his efforts to evoke and acknowledge the historical narratives of the black experience and our legacy of racial injustice in America through the work of the Equal Justice Initiative, Stevenson employs well-told stories to change the shape of the world.

Of course, Cheever wrote fictional narratives to reveal hidden dimensions of the social landscape of privileged upper classes in America during the 20th century. Stevenson, on the other hand, tells factually accurate and legally meticulous stories. But Stevenson’s stories reveal an equally hidden shadow world inhabited by the poor and disempowered within our society, who are often trapped within our criminal justice system. Both storytellers reveal discrepancies between how we act as a society, contrasted with idealizations of who we are and how we imagine ourselves to be.

In very different ways, both Cheever and Stevenson are prophetic artists and teachers, telling “truthful” stories of a different sort because, often, it is easier to change the shape of the world than it is to change one person’s mind.

CIVIL RIGHTS AND THE PUBLIC IMAGINATION

Stevenson is an updated, 21st-century model of the civil rights attorney as a transformational storyteller. His roots hark back to the great civil rights litigation attorneys of earlier generations: from Charles Hamilton Houston to Thurgood Marshall to Jack Greenberg to Julius Chambers and on to Anthony Amsterdam. These mythic litigators went from courtroom to courtroom arguing trial and appellate cases, interpreting the meaning of our Constitution, arguing for social justice, executing planned socially transformative litigation strategies. And yes, like Stevenson, all sought to be prophetic storytellers, calling on people to be true to whom they are supposed to be and what they might become.

Earlier planned litigation strategies (such as campaigns for school desegregation and for the abolition of capital punishment) took place primarily within the court system, employing legal argumentation as the mechanism for social change. Much of Stevenson’s practice takes place within the courtroom of the public imagination, via the amplifications of media. Stevenson understands that, in our particular time, stories that capture the popular imagination and gain cultural traction profoundly influence the law and may affect outcomes in specific legal cases.

I urge readers to watch Stevenson’s superb 23-minute TED Talk: “We Need to Talk About an Injustice.” Stevenson explores complex and controversial themes, such as exploitation and racism in our history and systemic injustice within our current-day criminal justice system. Yet his presentation captures the imagination of his privileged audience without pandering to it. Stevenson never lectures or argues at the audience. But he never softens his own beliefs, never turns his heartfelt passion into mush. His performance is pitch-perfect and provides an eloquent model of how a gifted litigation attorney employs storytelling skills to empower an audience with a meticulous lawyerlike argument.

TALKING POINTS

Stevenson’s TED Talk has been analyzed in several recent books. It is used as a model for opening statements in Shane Read’s Turning Points at Trial. And it is analyzed as a prototype of effective salesmanship in Carmine Gallo’s The Storyteller’s Secret. Why are Gallo’s observations on sales “pitches” relevant for lawyers? Obviously, because litigation attorneys are also salespeople of a sort, trying to move our audiences to action and to close our deals with favorable verdicts and outcomes.

There are many lessons for lawyers in Stevenson’s performance. First, there is the stylistic quality of his “voice.” Stevenson is understated, self-effacing, yet passionately engaged with his material. He speaks without notes and appears psychologically naked; there is nothing between him and his audience. He seems as if he is in a dialogue with his audience.

In a lawyerlike way, Stevenson also strategically employs
compelling statistics and information to make his argument. He realizes that less is more and distills supporting materials. For example, illustrating the severity of our criminal punishments and our practice of mass incarceration, he says: “Well, I’ve been trying to say something about our criminal justice system. This country is very different today than it was 40 years ago. In 1972, there were 300,000 people in jails and prisons. Today, there are 2.3 million. The United States now has the highest rate of incarceration in the world. We have 7 million people on probation and parole.”

Revealing systemic errors in guilty verdicts in capital cases, he declares: “The death penalty in America is defined by error. For every nine people who’ve been executed, we’ve actually identified one innocent person who’s been exonerated and released from death row.” He continues by arguing that race is often determinant of sentencing, especially in death penalty cases in some states where “you’re 11 times more likely to get the death penalty if the victim is white than if the victim is black; 22 more likely to get it if the defendant is black and the victim is white.”

But Stevenson’s presentation is never pedantic; just the opposite. It is compelling and entertaining, punctuated by the audience’s laughter. His presentation is filled with well-placed notes of hope, suggesting the possibility of redemption—both for his clients and for us all.

How does Stevenson achieve this result? He builds upon a secular version of a biblical theme forged for the TED Talk audience: We are all interconnected. And “we will ultimately not be judged by our technology, our design, our intellect or our reason.”

“Ultimately,” he says, “you judge the character of a society not by how they treat the rich and the powerful and the privileged but how they treat the poor, the condemned, the incarcerated. Because it’s in that nexus that we actually begin to understand truly profound things about who we are.” Stevenson is not just talking about correcting injustice here; he is talking about the redemptive power of forgiveness, compassion and mercy.

How does Stevenson expose the flaws in the criminal justice system while simultaneously calling forth the better angels of his audience, compressing all of his material into less than 30 minutes? He uses stories, of course.

THE 3 WISE TALES

“We Need to Talk About an Injustice” employs the spine of three carefully selected autobiographical ministories. These stories are akin to secular parables—teaching stories. Each episode features Stevenson as the primary character who learns a vital life lesson from a wiser and older person. Each story is imbued with gentle humor and irony, and each is beautifully delivered. Stevenson receives wisdom and is transformed, and the audience goes along with him.

The first story is about Stevenson as a young boy who learns from his grandmother about the transformative power of love to shape identity and provide the resolve that defines the arc of his professional life.

The second story is a lesson about the nature of struggle, commitment and community that Stevenson learns from Rosa Parks and two elderly civil rights leaders over a lunch in Atlanta. The third is about integrity and resistance, and the long arc of the struggle against oppression—wisdom Stevenson receives from an elderly court janitor when he argues a motion titled: “Motion to try my poor, 14-year-old, black, male client like a privileged, white, 75-year-old corporate executive.” The privileged TED Talk audience laughs heartily and stays with him throughout; he has them in the palm of his hand.

My own takeaway from Stevenson’s masterful performance is that we can twine diverse strands into a persuasive argument that appeals to our better natures when, like Stevenson, we are willing to take risks, employ stories, use humor purposefully and practice to perfection our storytelling deliveries.

And, oh yes, also when we learn to trust and follow the guidance of our own courageous and imaginative hearts in the service of forces that are sometimes much larger and more powerful than we are. ■

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.
Client Consent Is Key

Lawyers have an enhanced duty of confidentiality when engaging in public commentary

By David L. Hudson Jr.

Lawyers should be mindful of the duty of confidentiality when they engage in public commentary, including blogs, website postings, tweets, informational videos, webinars, podcasts and other more traditional formats, according to a formal ethics opinion from the ABA Standing Committee on Ethics and Professional Responsibility released in March.

Formal Opinion 480 explains that lawyers communicating about legal topics in public commentary must comply with the ABA Model Rules of Professional Conduct, including Rule 1.6(a), which says: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”

WHEN THE DUTY APPLIES

This duty of confidentiality is broad and includes all information related to the representation, not just what’s learned directly from the client. The reach of this rule is much broader than the attorney-client privilege or the work product doctrine.

“The committee acknowledges that new technologies ‘have altered how lawyers communicate and ’may raise unexpected practical questions,’” says Ellen Murphy, who teaches professional responsibility at the Wake Forest University School of Law. “It is these practical questions on which guidance is needed.”

The opinion places significance on the fact that the duty of confidentiality applies even to information “contained in a public document or record.” The opinion explains that “the duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.”

“The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client’s informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a),” the opinion continues.

Some legal experts agree with the opinion’s emphasis on describing the broad nature of a lawyer’s duty to protect confidential client information.

“An attorney’s duty of confidentiality to his client is a foundational component of the attorney-client relationship,” says Kelly Rains Jesson, an attorney in Charlotte, North Carolina, who co-authored a Campbell Law Review article cited in the ABA ethics opinion.

“As the opinion advises, there is no doubt that attorneys need to be cautious about violating Rule 1.6 on social media when posting about a case without client consent, no matter the nature of or source of the information,” Jesson adds.

“The lawyer’s overriding obligation is to say and do nothing to harm the client’s interests, defined broadly to include the client’s case outcome, the client’s reputation-based concerns, and the client’s desire for privacy,” says ethics expert Lara Bazelon, who teaches at the University of San Francisco School of Law.

Bazelon says this duty of confidentiality is important enough that, as the opinion says, it should apply even to client information gleaned from a public record or court document.

“On the surface, it sounds nonsensical—why should a lawyer be sanctioned for talking about information that everyone knows already?” Bazelon says. “But a lawyer isn’t an objective public commentator or an ordinary member of the public. A lawyer is her client’s advocate, and in that role she must elevate the client’s interests above all else. If the client does not want the lawyer to talk about the case, even information that is already in the public domain, she should refrain from doing so.”

However, Murphy thinks the ABA’s rule on confidential information is too broad. “While this opinion accurately analyzes the current Model Rules, I find the rules much too broad in defining confidential client information,” she says. “The ABA has been clear that information related to the client representation, even if in the public record, is confidential client information and cannot be revealed absent consent or some other exception. This is an overly broad prohibition.”

FREE SPEECH CONSIDERATIONS

The opinion acknowledges what it terms “First Amendment considerations” but emphasizes that
lawyers’ free speech rights are often limited when they act in their representational capacities. While the First Amendment provides broad protections for citizens to criticize government, attorneys sometimes must temper their speech when criticizing judges or the justice system.

Furthermore, the ethics opinion stresses that the duty of confidentiality encourages expression in the form of full and frank client speech. “The opinion’s mention, as opposed to thorough analysis, of the First Amendment is appropriate because when individuals become lawyers, they voluntarily relinquish some aspects of their First Amendment rights,” Jesson says. “Because it is an ethics advisory opinion [as opposed to a court opinion], an in-depth First Amendment constitutional analysis is generally thought to be beyond the scope of the ABA committee’s purview.”

The opinion also drew strong opposition from lawyer bloggers, including Josh Blackman, a professor at the South Texas College of Law in Houston. “The ethics opinion provides that it may be misconduct when an attorney publicizes information about a client, without his consent, that is ‘generally known or contained in a public record,’” the author of Josh Blackman’s Blog told the Journal.

“Such a prohibition may run afoul of the First Amendment because it controls the release of information that would not be subject to the attorney-client privilege. If it is a matter of public record, then an attorney should not have to seek his or her client’s consent to publicize it,” Blackman adds.

**RULES IN TANDEM**

The bulk of the opinion addresses lawyer public commentary with regard to Rule 1.6. But it also explains that lawyers should realize public commentary must recognize other ethical constraints, citing Model Rules 3.5 and 3.6. Rule 3.5 prohibits lawyers from seeking to influence judges or jurors, and Rule 3.6 prohibits lawyers from making extrajudicial statements that would have a “substantial likelihood of materially prejudicing an adjudicative proceeding.”

Bazelon of the University of San Francisco says it’s always important to be mindful of these rules. “More and more we are seeing lawyers commenting to the press before, during and after trials,” she says. “One important and positive outcome is that they update and inform the public. One could argue that serves a useful public function by making the legal process more transparent and easy to understand. “I would not want Rules 3.5 and 3.6, in conjunction with this opinion and with Rule 1.6, to be interpreted so broadly as to have a chilling effect on this kind of speech.”
Scenario No. 1: An ambitious pre-law student working on a senior thesis about Shakespeare’s *Love’s Labour’s Lost* goes to the library and discovers, much to his surprise, two long aisles of books about Shakespeare—some 6,500 books on just that subject. He spends hour after hour combing through the many tomes, checking the indexes and then reading the relevant passages. Many scholars, he finds, have written about Shakespeare’s “curious composition of language” (Walter Pater [1889]) in the play, which is “truly a comedy on the state of the English language in 1588” (William Mathews [1964]). One scholar (Friedrich Landmann), in an obscure monograph from the early 1880s, defined the four types of linguistic abuse found in the play: excessive alliteration, Petrarchan love-sonneting, euphemism (fancy syntax and word choice) and perversely extreme Latinity. Nearly a century later, an American critic called the play “a sustained inquiry into the nature and status of words; and the characters in it embody, define and implicitly criticize certain concepts of words” (Ralph Berry [1969]).

Our prelaw student is off to a fruitful start for his senior thesis. His professor has suggested that a true scholar must research enough to know what predecessors have done. Gleaning these quotations, and many others as well, has taken our budding scholar some 100 hours of effort. Along the way, he has learned much about Shakespearean criticism, the means of traditional book research, the methods of literary analysis, and the sheer vastness of scholarly work in the field.

Meanwhile, his faculty adviser insists that the thesis center on the student’s own close reading of the play—not on that of earlier scholars. Along the way, he can mention what others have said either to dispute their conclusions or endorse them. The quotations must be incidental to his own analysis; they can’t substitute for it. But he shouldn’t try to write in ignorance of his precursors.

Scenario No. 2: A legal scholar working on an essay about the doctrine of precedent means to steep herself in the literature on the subject. She goes to the jurisprudence section of her copiously stocked law library and spends days collecting snippets from Francis Lieber (in a posthumous edition of a book dated 1883), Timothy Walker (1895), Clarence Morris (1938), John Salmond (1947), W.J.V. Windeyer (1949), Burke Shartel (1951), W.W. Buckland (1952), A.W.B. Simpson (1961), Max Radin (1963) and Rupert Cross (1991). She’s surprised because none of the law review articles she’s read in the last several years cite any of these authorities. She traces back some aspects of the doctrine to William Blackstone (1765), James Kent (1826) and Joseph Story (1858).

That recitation of authorities just skims the surface of what she’s uncovering. She’s surveying the field so she can trace the development of precedent in common-law systems before embarking on her bold new theory. This time-consuming research will tell her how novel her theory is. She’ll need a thorough grounding.

Many of her discoveries are serendipitous. Working from her library carrel, she browses stacks of books to find relevant essays in unlikely places. She hadn’t expected to find pertinent information in a 1935 book by Henri Lévy-Ullmann or in a 1914 book by Frederic R. Coudert. Those writers’ penetrating insights help refine her thesis. She’s delighted with the copiousness of her university library’s holdings.

Scenario No. 3: A Texas practitioner is briefing an appeal for a woman claiming to be the common-law wife of a man who has died in an industrial accident. Of course, the three elements of common-law marriage are well-known in the 10 jurisdictions that recognize it: an agreement to be married, cohabitation for some period, and a “holding out” as spouses to the community at large. The first two are easily established here, so everything hinges on the holding-out element. Hence our practitioner wants to know what Texas courts have held on the subject.

Westlaw searches mostly produce cases that merely iterate the three elements of a common-law marriage. A colleague tells our practitioner friend he ought to look at Joseph W. McKnight’s annual surveys of family law. Dubious, the practitioner finds a law library that holds print copies of the *SMU Law Review* to discover that each year from 1970 to 2016, McKnight authoritatively analyzed the appellate decisions in Texas relating to family law. Starting with 2016, our friend goes back year by year in the bound volumes, soon discovering that McKnight began each yearly update with discussions of important holdings relating to common-law marriages.

Much to the practitioner’s surprise, McKnight calls them “informal marriages” because “common-law
marriage” is something of a misnomer: It might have been a common-law doctrine at first, but today a statute authorizes these marriages—and informal marriage is the more accurate term. Our friend realizes that his Westlaw searches have missed half the cases—an oversight he soon cures.

From McKnight’s discussions, the practitioner also discovers that half the cases he’s found have been overturned, disapproved or otherwise superseded by later cases. Some of these he would have found later when shepardizing, but not immediately or clearly the reasons why.

Soon, with the help of a junior colleague, the practitioner is categorizing the indicia of holding out and finds eight: (1) spousal introductions, (2) a stepparent–stepchild relationship, (3) published displays such as funeral pamphlets, (4) outward displays such as mutual tattoos, (5) shared debts and financial responsibilities, (6) a shared last name, (7) general community perceptions and (8) formal documents such as tax returns and insurance documents. His client satisfies seven of the eight.

Nobody, including McKnight, has ever said there are eight indicia. That’s original. But McKnight has led the practitioner to 35 cases illustrating those indicia, and computer searches have yielded 15 more cases. Without the McKnight surveys, the practitioner would have been flailing about in a morass of case law, without authoritative guidance to the important holdings.

By flipping from volume to volume in the books, he has accomplished in two hours what he could not have done nearly as efficiently, if at all, on the computer.

The Upshot: Book research is well-nigh irreplaceable to the skillful researcher. It can’t, and shouldn’t, be fully superseded by online research, which of course has its own splendors but also its own limitations.

So it’s disheartening to hear what’s happening to our libraries. A lead Associated Press article on Feb. 7 reports “as students abandon the stacks in favor of online reference material, university libraries are unloading millions of unread volumes in a nationwide purge.” Some books are being hauled off to permanent storage sites; others are being sold en bloc to used-book dealers; and still others are being thrown into dumpsters.

Given that half the library collection at the Indiana University of Pennsylvania has been “uncirculated for 20 years or more,” university administrators decided to purge 170,000 volumes. “Bookshelves are making way for group-study rooms and tutoring centers, ‘makerspaces’ and coffee shops,” the article reports. Oregon State University librarian Cheryl Middleton, president of the Association of College and Research Libraries, is quoted as saying, “We’re kind of like the living room of the campus. We’re not just a warehouse.”

Traditional scholars are outraged. One calls this jettisoning of books “a knife through the heart.” He’s right, of course.

Now back to our three scenarios. Are they realistic? Absolutely. They’re real. They’re lightly fictionalized self-depictions. The first describes me in 1980, the second me in 2014, the third me in 2017.

Is there any good news here? Only for book collectors and used-book dealers: Among the heaps are some treasures. For example, in recent years I’ve obtained many rare books that have been “deaccessioned” from university libraries—including some bearing the signatures of the likes of Learned Hand and Harlan Fiske Stone.

Although it’s nice having them, I know that it was a travesty of librarianship that led to my acquisitions. Worse than a travesty, it’s a tragedy.

Bryan A. Garner, the president of Dallas-based LawProse Inc., was originally a Shakespearean scholar, then a legal lexicographer, then a writer on jurisprudence—as well as a book collector. He has an appellate-consulting practice. His most recent book is the memoir Nino and Me: My Unusual Friendship with Justice Antonin Scalia.
Mindfulness has become a popular program at many law firms and bar associations. Research from the American Psychological Association shows that mindfulness helps to reduce stress, rumination and emotional reactivity while improving memory, focus, cognitive flexibility and relationship satisfaction. And a 2014 study indicates that mindfulness practices may help to reduce implicit bias.

Over the past few years, I’ve been working with law firms to create mindfulness programs that are easy to implement and can fit into the busy lawyer’s schedule, and to measure the impact of the programs. Creating a long-term program that engages the participants and encourages them to practice on a regular basis isn’t easy. It takes a good launch protocol, selecting the right technology and delivery mechanism, as well as curating the content to be highly relevant for the participants.

PERSPECTIVES: WHY AT YOUR FIRM?

Laura Maechtlen, a San Francisco-based partner at Seyfarth Shaw, says that “with 24/7 demands, law firms often overlook the importance of their people’s physical and mental health, but the fault lines forming now threaten the resiliency of both firms and their people. The legal market is increasingly demanding, and our continued high performance is dependent upon the well-being, resilience, grit and ‘growth mindset’ of our talent.”

Leslie E. Wallis, a Los Angeles-based partner at Seyfarth Shaw, says that “with 24/7 demands, law firms often overlook the importance of their people’s physical and mental health, but the fault lines forming now threaten the resiliency of both firms and their people. The legal market is increasingly demanding, and our continued high performance is dependent upon the well-being, resilience, grit and ‘growth mindset’ of our talent.”

Michelle Wimes, chief diversity and professional development officer at Ogletree, believes mindfulness programs can be one prong of a firm’s overall wellness and diversity strategy. “Mindfulness practices not only help us to focus and increase our capacity to think more clearly but also help us to act more intentionally by raising our awareness of our emotions in any given moment. By regulating our emotional responses, we can decrease the occurrence of bias and our natural tendency to employ stereotypes and unconscious expectations in our interactions with others.”

GATHER DATA, INCREASE BUY-IN

It is critical to measure the impact of any mindfulness or other wellness program. This can help highlight areas of improvement as well as measure the effectiveness and return on investment of the program.

The first online mindfulness training program I implemented was in partnership with the National Association of Women Lawyers and Seyfarth Shaw. Seyfarth offered an eight-week mindfulness program to all of its attorneys and NAWL participants. John Paul Minda, a psychology professor with the Brain and Mind Institute at the University of Western Ontario, ran a study to measure the program’s impact. The results were surprising. Lawyers reported a decrease in stress, anxiety and depression (32 percent, 30 percent, 29 percent, respectively), while job effectiveness increased by 6 percent.

Minda studies the impact of mindfulness training in companies. “We are measuring and assessing things like perceived stress, mood, psychological resilience and the occurrence of anxiety-producing thoughts,”
he says. “Based on prior research, we predict a reduction in the negative aspects—like stress—and an increase in the positive aspects—like resilience.”

The goal of the research is twofold. First, to determine the impact on stress and anxiety. Second, to determine whether meditation, with its emphasis on being present and nonjudgmental, provides an additional buffer against stress by increasing resilience.

**FOR LASTING CHANGE, THINK LONG TERM**

As with buying a gym membership—you actually have to go to the gym and work out regularly to see benefits—mindfulness training has to be ongoing.

Anne Brafford, author of *Positive Professionals: Creating High-Performing Profitable Firms Through the Science of Engagement*, says, “To be effective, programs designed to build complex people skills like mindfulness can’t end with a single training session. This train-and-go approach is popular among organizations—with the result that billions of dollars are wasted annually because trainees end up using only about 10 percent of what they learn.”

For a mindfulness training to stick, Brafford says, “organizations will want to provide ongoing support for learning. This includes, for example, providing opportunities or encouragement to apply the new skills, reinforcement learning with feedback and reminders about its relevance and importance, supervisor and peer support, and opportunities for ongoing development.”

**THE IMPORTANCE OF WHO IS TEACHING AND HOW**

Sometimes mindfulness can be presented in a way that is off-putting to lawyers, who tend to overly value their logic while shying away from emotions or anything that is “touchy-feely.” Presenting mindfulness in a way that focuses on the skill development, enhancement of one’s productivity and well-being tends to be more effective.

It is important to find a mindfulness facilitator who will resonate with the lawyers at your firm. According to Clayton Cook of the University of Minnesota Department of Educational Psychology, “People who come off as humble, humorous, easy to connect with and credible are more likely to impact people’s intentions to implement whatever they’re receiving training or support to do.” Additionally, it is helpful for the facilitator to understand the lives of the lawyers and to be able to speak to specific challenges they face.

**TRANSFER TRAINING INTO ACTION**

Offering a mindfulness program should be part of an overall strategy to create a better work environment. This requires buy-in from everyone. Firm leaders can lead by example by modeling mindful behaviors: having an understanding of self, being aware of their own emotions and staying committed to personal well-being.

Integrating wellness in a manner where it counts toward, and not against, the almighty billable hour would represent a true firm cultural buy-in.

Another factor to consider is the delivery mechanism. In-person workshops tend to encourage engagement but are costly to implement. I’ve found that a combination of live training and online, on-demand content is best. This helps to create a sense of community, gives an opportunity to practice the skills and ask questions, and also offers to deepen one’s practice through online modules. (Hear audio versions of my guided meditations at jeenacho.com/wellbeing.)

Finally, lawyers may have the intention to participate in the program, but carving out time for mindfulness practice can be challenging. Firms can increase participation and success by offering incentives and a goals structure, as well as by identifying barriers and planning solutions to overcome them (if-then plans). Additional behavior-change techniques that can facilitate training transfer include peer accountability partners; prompts, reminders and nudges; self-monitoring forms; and leadership support.

Jeena Cho consults with Am Law 200 firms, focusing on strategies for stress management, resiliency training, mindfulness and meditation. She is the co-author of *The Anxious Lawyer* and practices bankruptcy law with her husband at the JC Law Group in San Francisco.
BIG BUSINESS

WITH SO MUCH MONEY AT STAKE, IT'S NO SURPRISE THAT CYBERSECURITY IS A RAPIDLY GROWING INDUSTRY—SO HOW CAN LAWYERS FIND WHAT WORKS FOR THEM?

BY ANNA STOLLEY PERSKY
As this yearlong series has already covered, lawyers and law firms are sitting on valuable information that could be worth billions to cybercriminals. Additionally, this country loses hundreds of billions annually due to stolen intellectual property.

With so much money at stake, perhaps it’s little wonder that the cybersecurity industry is one of the fastest growing in the world. For instance, research firm MarketsandMarkets projects that the worldwide cybersecurity sector will be worth over $230 billion by 2022. Another company, Crystal Market Research, had a less optimistic projection but still forecast a $173.57 billion cybersecurity market by 2022. As for this year, Gartner Inc. predicts that spending on cybersecurity will reach $96.3 billion, an 8 percent increase from last year.

Luckily, lawyers don’t have to break the bank if they wish to be protected. But that doesn’t mean they can afford to be cheap. Experts say that law firms can give themselves the best protection by first hiring outside companies to perform vulnerability assessments. Once law firms know where they are most at risk, they can better determine where they need to spend money and effort, such as on training their employees and buying insurance to help cover their costs for the likely occurrence of a major data breach.

“Every company and every law firm has to do a cost-benefit analysis about making investments in cybersecurity,” Levine says.

The cost for a vulnerability assessment varies. Privacy Ref, a cybersecurity consulting company in Delray Beach, Florida, for example, will run a vulnerability assessment for about $30,000 and then, depending upon the remediation needed, will address privacy issues for either a fixed price or on an hourly basis. Levine’s law firm charges a negotiable fixed rate for overseeing and managing the vulnerability assessment. In addition, there’s a fee from the vendor performing the technical assessment.

“The more complex your computer system is, the more it’s going to cost from the technical side,” says Levine.

Law firms are increasingly getting involved in the vulnerability assessments because, as Levine puts it, the results can then be “cloaked in privilege.”

“You want to do a vulnerability assessment, but you also want to avoid having that assessment used against you in court,” says Levine. “You want to at least have the argument that the results are part of attorney-client privilege.”

Once a firm has learned its vulnerabilities, it may then use the same company or hire a different consultant or outside company to help establish a cybersecurity plan and assist with ongoing security needs, such as employee training in best practices for maintaining data protection.

Law firms are going to have to do their due diligence when it comes to finding cybersecurity services and products that meet their needs, says Jody Westby, CEO of Global Cyber Risk in Washington, D.C.

"IT’S LIKE ANYTHING ELSE—YOU HAVE TO PICK CAREFULLY. FIRST, UNDERSTAND YOUR NEEDS. THEN TRY TO FIND THE RIGHT MATCH.”
—JODY WESTBY

Experts say that law firms can give themselves the best protection by first hiring outside companies to perform vulnerability assessments. Once law firms know where they are most at risk, they can better determine where they need to spend money and effort, such as on training their employees and buying insurance to help cover their costs for the likely occurrence of a major data breach.

“It’s certainly worth it for everybody in a company or a firm to have the most up-to-date firewalls and anti-virus software. That’s just a cost of doing business, but cybersecurity doesn’t end there,” says Eric B. Levine, an attorney specializing in privacy issues and a shareholder at Lindabury, McCormick, Estabrook & Cooper in Westfield, New Jersey. “Every company and every law firm has to do a cost-benefit analysis about making investments in cybersecurity.”

“Don’t want to pay for something that can’t give you the right service, and you don’t want to pay a company that doesn’t understand your industry and can’t meet your needs,” Westby says. “You have to take a step back and really think about what you are doing and what services and products you need and who can best provide that.”

CHOOSE WISELY

Cybersecurity experts say law firms should take the additional step of hiring security companies to examine outside vendors for potential data security issues. In addition, firms may want to hire an outside contractor to continuously monitor the firm’s network.

“One thing to consider is what are the capabilities of your internal staff and what is the most cost-effective way to supplement them,” says Westby.

Once the assessment is completed, law firms must put a cybersecurity plan into place. But do they know what they’re doing when it comes to setting up a plan and picking from among the plethora of privacy and security options?

Law firms face an array of options. Big tech companies, such as Cisco and IBM, have expanded their cybersecurity services and products. On
Business of Law || SPECIAL EDITION

One of the cybersecurity portfolios, boutique privacy and security businesses offer their own services and devices. So it can be challenging for law firms to determine their best route for protecting data.

"It's like anything else—you have to pick carefully," says Westby. "First, understand your needs. Then try to find the right match. Check which companies have won awards. Look at their personnel, and ask for references." She advises that firms looking at small cybersecurity companies "pay close attention to the people in charge and their track record."

"If a company says something that sounds too good to be true, it may be," Westby says. "On the other hand, a small company with good personnel and a good reputation could be the right fit for your firm."

John W. Simek, vice president of Sensei Enterprises Inc., a cybersecurity firm in Fairfax, Virginia, says what no lawyer wants to hear: There are no easy answers. There is no single piece of technology or even multiple products or services that can protect your data from breaches. So any company that says it can completely protect information isn't telling the truth, Simek says.

"People think it's like the old days. You can just buy anti-virus software and be protected," he says. "One piece of technology will not be your silver bullet. ... We can't keep the folks out anymore. Building the wall by itself doesn't work."

According to Simek, companies and law firms—no matter their size—must now be focused on more than just keeping threats out. They must also be able to quickly detect and react to threats when they occur.

Another concern is that some companies purporting to offer data protection might actually be vulnerable to attacks themselves. When choosing among cybersecurity options, how can a law firm avoid increasing, rather than decreasing, its vulnerability?

Bob Siegel, president of Privacy Ref, warns of privacy-related product companies that developed their software for one purpose—and then try to claim it can do more than originally intended.

"Sometimes companies stretch the abilities of the functionality they provide to try to meet their prospect's needs," says Siegel. "So my advice is, if you are looking at a privacy product, make sure the vendor demonstrates that it can do what they say it can do."

Pick a company, Siegel advises, that understands not just the legal industry but also the way your firm is managed and business is conducted. "If the privacy and cybersecurity protocol gets in the way of business, employees are likely to ignore what they are supposed to do," he adds.

One size does not fit all

Cybersecurity experts also emphasize looking for the most affordable but reliable way to meet your company or firm's specific needs.

For example, Levine says, there is technology out there that may be ultrasophisticated and able to pinpoint exactly who is trying to attack your company. "That's nice technology, but can you afford it or is your money better spent somewhere else?" Levine asks.

Simek's advice to small law firms: Don't pay for services intended for multinational law firms. This means, says Simek, "stay away from the big guys. They are too expensive for you. They are for the major law firms."

Simek also advises lawyers to attend continuing legal education classes that are now being offered on cybersecurity and related topics. In fact, there is one area in which law firms should not be stingy: employee training. A law firm's carefully crafted cybersecurity can be useless if an employee is unaware of the firm's security protocol.

Law firms, experts say, should prioritize hiring outside security companies to conduct a variety of safety and privacy training of their employees. Training should include making employees aware of the impact to the firm and the customers when they ignore cybersecurity protocol.

"The first line of defense and the weakest link is the human factor," says Levine. "Everybody can buy firewalls and anti-virus software, but the easiest breach still comes from that pesky email someone clicks on."

Unfortunately, despite all these best efforts, even the smallest law firm may still have to handle the fallout from a cyberattack.

The Verizon Data Breach Investigations Report found that last year, 61 percent of cyberattacks targeted smaller companies. In addition, according to UPS Capital, cyberattacks can cost small businesses between $84,000 and $148,000, and 60 percent of small companies go out of business within six months of a cyberattack.

Given the likelihood that even the best-protected company will be breached, cybersecurity experts advise every law firm to buy cyber insurance.

"Most of the premiums are highly negotiable," Levine says. "If you don't have a policy in place, repairing the damage from a breach could easily run in excess of a million dollars. For some companies, a breach like that could wipe them out."
Outside Help
Studies show most lawyers don’t know how to advertise effectively on social media, so some have hired specialists
By Danielle Braff

When National Public Radio mentioned that a company had been dumping toxic chemicals into the ground for 25 years in a San Diego suburb, Toby Danylchuk knew he’d be working overtime at the office.

Danylchuk wouldn’t be speaking with potential clients about the effects of those chemicals on their water, nor would he be in court explaining how the chemical is associated with certain types of cancers.

Instead, his first task would be to help his client, a major law firm, attract victims of the toxic dumping.

“We ran paid social ads in Facebook, covering citizens living in the affected suburb, creating awareness of the disaster, and letting them know that if any of these people had cancer in their families from growing up there, they potentially had a case,” says Danylchuk, head of San Diego-based 39 Celsius Web Marketing Consulting.

The result: The Facebook advertisement was seen in 130,000 residences in the affected area. It made more than 120,000 impressions and more than 780 engagements.

“Many of the engagements in the ad were people tagging others in the area to help notify them, sharing it and commenting,” Danylchuk says, explaining that this type of specific targeting would cost thousands of dollars in print, radio or TV. But he charged just a few hundred for this social media campaign.

Businesses have been paying for outside social media help for years, but attorneys are just starting to supplement their social media needs—and it appears to be paying off.

TO TWEET OR NOT TO TWEET

A 2016 study found that potential clients are increasingly using social media to inform their hiring decisions—including those who need attorneys. More than half of consumers say they’d be likely to hire an attorney who is active...
on social media, according to an August 2016 FindLaw survey; 34 percent have already used social media to find a local service provider, such as a lawyer, plumber or doctor.

But while 96 percent of attorneys say they use social media, only 7 percent say they believe it’s directly responsible for bringing in new clients—a stat that social media experts say means they’re not using it to its fullest potential, according to a 2017 Attorney at Work survey.

“I spent years studying how other law firms use their voice in social media. Some do a good job, but most do a really bad job,” says Jessica Hoerman, an attorney with TruLaw in Edwardsville, Illinois. Hoerman says that most lawyers who use social media aren’t using it properly. Instead of building relationships online by engaging in conversations or interacting with prospective clients, they are overselling their services and work. Additionally, she says the posts and tweets lawyers and law firms share tend to be very dry and legal—“as if the news being shared was meant for other lawyers.”

Currently, 67 percent of lawyers are managing their own social media, while 23 percent get some help, and 10 percent hire someone else to do it all for them, according to the Attorney at Work survey.

Keith Strahan, managing partner with Strahan Cain in Houston, hired a marketing company about a year ago to blog, post and build his firm’s brand online.

“We are able to focus on the things that make us money and build relationships with clients,” says Strahan, who uses Ashley Johnson of Mouth Marketing to do his social media. “We have grown tremendously with the help of someone building our network through social media.”

And Kenneth Kossoff, a partner with Panitz & Kossoff in Westlake Village, California, started paying a social media consultant in Los Angeles $1,100 monthly to manage his Facebook page and take care of his firm’s voice, strategy, content and curation.

“For those people who follow us, we are being kept at the top of their mind,” Kossoff says. “We also are getting more inquiries from people who say they are calling from internet searches.”

A good social media plan is especially helpful for newer firms, says Shlomo Zalman Bregman, founder of the law offices of Samuel M. Bregman and CEO of Bregman Success, a social media and sales consultancy based in New York City.

There are plenty of attorneys and firms doing similar things on social media. And while you may be the best in your particular field, Bregman says, if no one knows how to discover you, then you won’t attract clients.

“If social media is where the biggest number of eyeballs and attention is, I’d be there,” says Bregman, who has more than 90,000 Facebook followers. “You will be perceived as just another number and another face in the crowd unless you’re able to get a form of distinction in the marketplace.”

But first, you need to find the correct person to run your social media page.

A LITTLE ASSISTANCE, PLEASE

Tyson Mutrux is managing partner at Mutrux Finney, which has three Missouri offices in Clayton, Columbia and St. Louis. He says his firm hired a social manager via Upwork, paying about $20 per hour. But they only used the expert for about six months because the firm didn’t feel like it helped at all.

“If anything, it made things worse because we lost that crucial connection that is so important with social media,” Mutrux says. “You have to remember that social media is not a billboard; you actually have to interact for it to work.”

Still, it’s possible for it to work well, as long as you hire someone who specializes in law firms, says Ethan Wall of Miami, president of the marketing company Social Media Law and Order and founder of the Social Media Law Firm.

Attorneys need to understand legal advertising rules, along with legal ethics. They should also be a legal expert in social media for lawyers, Wall says.

“Work with someone who understands what their goals and objectives are as an attorney, because there’s no one-size-fits-all marketing approach for lawyers,” Wall says.

“The strategy that might work for a large law firm is going to be different from a solo practitioner in a small town.”
ABA Treasurer’s Report

At the ABA Midyear Meeting in Vancouver, BC, I presented my first official Treasurer’s Report to the House of Delegates. This report covers the FY17 year-end results as audited by Grant Thornton, including a review of our Statement of Financial Position (balance sheet). I will also provide results through January for fiscal year 2018, touch on the status of the ABA Pension, and preview the fiscal 2019 budget challenge.

Year-end Audit and Financial Results

Grant Thornton issued an unqualified audit opinion for the fiscal year ended August 31, 2017. The audit includes an audit of our government grants. The audit committee reviewed the audit and recommended acceptance by the Board of Governors and the Board did in fact accept and approve the audit at its meeting on February 2, 2018.

As you can see from the chart below, on a consolidated basis, operating revenue was $207.5 million and operating expenses were $215.2 million, producing an operating deficit of $7.7 million.

<table>
<thead>
<tr>
<th>Consolidated ABA Results for FYE2017</th>
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<tbody>
<tr>
<td>Amounts in millions</td>
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<td></td>
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<tr>
<td>Operating Revenues</td>
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<tr>
<td>Actual: $207.5</td>
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<td>Budget: $211.4</td>
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<tr>
<td>LY: $207.7</td>
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<tr>
<td>Variance to: Budget / LY</td>
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<td>(39) / (0.2)</td>
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<td>Operating Expenses</td>
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<td>Actual: 215.2</td>
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<td>Budget: 220.3</td>
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<tr>
<td>LY: 216.4</td>
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<td>Variance to: Budget / LY</td>
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<td>Operating Deficit</td>
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<td>Actual: (7.7)</td>
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<td>Budget: (8.9)</td>
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<td>LY: (8.7)</td>
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<td>Variance to: Budget / LY</td>
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<td>1.2 / 1.0</td>
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<td>Investment Income</td>
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<td>not in Operations</td>
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<td>Actual: 12.2</td>
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<td>Budget: 0.5</td>
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<td>LY: 3.3</td>
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<td>Variance to: Budget / LY</td>
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<td>11.7 / 9.0</td>
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<td>Other Non-Operating Items</td>
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<td>Actual: 0.4</td>
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<td>Budget: (0.3)</td>
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<td>LY: (0.9)</td>
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<td>Variance to: Budget / LY</td>
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<td>0.6 / 1.2</td>
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<tr>
<td>Results before Pension Adjustment</td>
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<tr>
<td>Actual: 4.9</td>
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<td>Budget: (8.6)</td>
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<td>LY: (6.3)</td>
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<td>Variance to: Budget / LY</td>
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<tr>
<td>13.5 / 11.2</td>
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<tr>
<td>Year-end Pension Adjustment</td>
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<td>Actual: 12.2</td>
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<td>Budget: (13.3)</td>
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<td>LY: 25.6</td>
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<td>Variance to: Budget / LY</td>
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<td>12.2 / 25.6</td>
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<tr>
<td>Change in Net Assets</td>
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<td>Actual: $17.1</td>
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<tr>
<td>Budget: $ (8.6)</td>
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<tr>
<td>LY: $ (19.6)</td>
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<td>Variance to: Budget / LY</td>
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<td>$ 13.5 / $ 11.2</td>
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Final audited results are posted on the ABA web page at the ABA Groups tab, ABA Leadership and then the Office of Treasurer tab.

A review of the operating deficit shows that the revenue shortfall in General Operations is attributable to a shortfall in Dues ($2.9 million), Advertising ($0.9 million) and Royalties ($0.8 million). The shortfall for Sections of $0.4 million came in the areas of Meeting Fees, Publications, Investment Income for Operations and Dues. There was a shortfall in Grants ($1.5 million) attributable to a slowdown in international grants. On an operating basis, expenses were managed such that operating expenses were below budget and below last year.

The Association has historically managed expenses within or below budget, but the revenue component of the budget has been the weak point. In FY17, expenses on a consolidated basis were $5.1 million favorable to budget. The General Operations expense line was unfavorable to budget for the first time in a few years ($2.9 million), but the Section expense line was favorable to budget ($4.0 million), Grants ($2.4 million) and Gifts ($1.5 million). Also worth noting: General Operations included a number of unbudgeted expenditures, like web development expenses, severance expenses, and recognition of a new Illinois state law requiring payment of accrued administrative leave when an employee leaves employment which, if excluded, would have resulted in a positive General Operations variance to the expense budget.

FY17 Statement of Financial Position (Balance Sheet)

The Association balance sheet is strong, but it is important to review the components and the changes in the components. A few years ago, it was commonplace to refer to the entire investment portfolio as “our reserves.” However, such a statement ignores our liabilities (such as the pension obligation) and gives a false sense of the assets available to support operations or implement other opportunities. Looking at the graph on page 36, you will see that total assets as of August 31, 2017 were $344.8 million and total liabilities were $172.7 million, leaving total net assets of $172.1 million. As compared with 2016, our total assets increased by $2.6 million and our liabilities decreased by $14.6 million.

Long-term investments grew by $4.8 million year over year. The interest rate by which our pension liability is calculated increased so that our pension liability decreased by $12.2 million. Despite the operating deficit, net assets increased by $17.1 million. This is a significant swing from the FY16 decrease in net assets of $19.6 million. The drivers of this positive change in net assets were (1) strong investment returns and (2) increase in the interest rate that is used to determine our pension liability. This increase in net assets is certainly good news, but in late January and early February we saw market volatility and the verdict is still out on whether this is the market correction that advisors have been anticipating and the beginning of an inflationary period or just a reaction to economic events. Of the total unrestricted net assets of $159.6 million, $53.6 million is attributable to General Operations/FJE and $106.0 million is attributable to the Sections and the balance are temporarily or permanently restricted funds.
Consolidated FY18 Operating Results through January 31, 2018

Consolidated operating revenue through January 31, 2018 was $77.1 million, which was $3.1 million below budget. Revenue budget variances are primarily due to unfavorability in Grants ($1.5 million), Sections ($1.0 million), and General Operations of $0.9 million. Unfavorability in Grants is driven by both domestic activity ($0.7 million) and international activity ($0.8 million). Grant activity is expected to pick up as the year progresses and ultimately meet budget. Unfavorability in Section revenue is driven by Meeting Fees ($0.7 million) and Gifts, Contributions and Sponsorships ($0.4 million) and is more than offset by favorable Section expenses. The main drivers of the General Operations revenue shortfalls to budget are Dues revenue of $0.6 million and timing of some Gifts, Contribution and Sponsorships of $0.3 million due to the Center for Innovation contributions not yet received and Advertising ($0.3 million).

Consolidated operating revenue compared to prior year is $3.2 million unfavorable, mainly driven by unfavorable Grant revenue ($2.0 million) and General Operations revenue ($1.8 million). Grant revenue unfavorability is mainly driven by decreased spending in International grants. The unfavorability in General Operations is driven by a decrease of $1.8 million in investment income and designated reserves for operations (in compliance with our updated reserve spending policy of 3.5%).

Through the same period, consolidated operating expense of $83.8 million was $1.4 million favorable to (under) budget. Favorable expense budget variances are mainly driven by Gifts ($2.1 million) and Sections ($1.9 million). Gifts unfavorability reflects a $2.0 million transfer from the Section of Taxation to its quasi-endowment, as well as domestic fixed fee grants proceeds transferred to program support funds. The Section favorability is a result of lower expenses across nearly all reporting line items, notably, Meetings & Travel expense ($1.7 million) and Publishing ($0.9 million). Section personnel costs are favorable and partially attributable to last year’s transfer of Section related personnel from the General Operation segment to the Section segment. Sections now reap any savings from open positions, whereas these savings used to benefit General Operations. This Section favorability is partially offset by the $2.0 million transfer from the Section of Taxation, as mentioned above.

Partially offsetting the favorability in Gifts and Sections segments are higher than expected expenses in General Operations of $1.8 million, and Grants of $0.8 million. General Operations unfavorability is driven by Professional Services ($1.0 million – mainly legal fees) and Facilities ($0.5 million). Grants unfavorability of $0.8 million reflects the domestic fixed fee grants proceeds that were moved to the Gifts segment in FY2018, as mentioned above.

Consolidated net results by segment are shown in the chart on page 37. On a consolidated basis, revenue under expense was $6.7 million, which is unfavorable to budget by $1.6 million and unfavorable to prior year by $1.4 million.

### Pension Funding/Pension Issues

As you may be aware, the ABA pension plan was frozen to new entrants eleven years ago. However, the extended period of low interest rates drove up our pension obligation so that the pension was underfunded by $90 million as recently as 2015. In order to increase the funded level and benefit from the historically low interest rates, two years ago we borrowed $40 million to fund the pension. This transaction not only reduced our pension expense, but it also gave us the 80% funded level so that we were able to offer lump sum settlement to former employees and save more than $200,000 annually in Pension Benefit Guarantee Corp. (“PBGC”) premiums.

I am happy to report that this year we made further progress on managing the legacy pension obligation, on the recommendation of our financial services staff and the...
The Board of Governors authorized additional borrowing to further fund our pension obligations. The idea was to replicate the earlier loan to further fund the pension fund and keep us at or near the 80% funding level. On December 1, 2017, we closed on a new loan of $20 million and contributed those funds to our pension invested funds. The additional debt was issued at a fixed (as opposed to variable) rate in order to provide a hedge should interest rates rise. The loan now has a variable rate component and a fixed rate component. The variable rate portion of the loan does not have any prepayment penalty. The current outstanding balance on the loan as of January 31, 2018 is $42.0 million.

You will see both the reduction in the pension liability and the increase of the loan reported on the “Pension Liability & Loan to Fund Pension Liability” line item on the balance sheet below. In FY18, it is projected that the pension net liability will decrease by approximately $30 million because of this $20 million loan and the expected increase in interest rates. We will continue to monitor and evaluate this liability.

We have also entered into a transaction to purchase annuities for former employees who had small pension payments. This buyout allowed the ABA to secure the future payments due these former employees while reducing the ongoing administrative costs and PBGC premiums.

**Preview of FY19 budget challenges**

Given the continued softness in dues revenue, the FY19 budget will once again require a careful look at expenses and some reorganization of our work in order to gain efficiencies and reduce overall expenses. Committees of the Board were created to review the ABA’s cost structure and propose potential structural changes or elimination of activities. By the time that this goes to press, that work should be nearing completion. FY19 will also be the first year that the Section/Entity Normalization process will be implemented, a process that provides a more standardized approach of General Operations funding to the Sections.

You have all heard of the OneABA concept that, in the most basic sense, calls for a complete collaboration of all parts of the ABA to best serve its members. Given the demographic, cultural and other market changes, there is a consensus that the ABA needs to make changes to stay relevant. The goal is to bring more value, use targeted marketing to tell our story and provide a more simplified dues structure to bring a product to the market that results in maximized revenue through an increase in dues-paying members. If implemented, we will need to determine the funding options which will likely include expense reductions to make up for the initial lost revenue. Much work is still needed to determine how to address the value proposition and achieve the needed growth for the Association. These are challenging issues but everyone that is working on the issues wants the Association to thrive and prosper. With the help of the many volunteer leaders and an incredible financial services team, we will continue to outline the issues and alternative to help make wise financial decisions that lead this Association to prosperity.

It is my honor to serve as your Treasurer. Thank you.

Michelle Behnke
THESE LAWYERS BALANCE A FULL-TIME PRACTICE AND A FOR-PAY SIDE PROJECT
Kansas City, Missouri, litigator Todd P. Graves learned early on that his cows don’t care about his day job. Graves might be in a client meeting, attending a conference or in the middle of a murder trial, but if a gate gives way on his family farm, his herd is liable to head out. This means Graves has to go, too, and bring them all home—hopefully before they make it to the river.

Wrangling is one of many responsibilities Graves manages as he toggles between his two careers: law firm partner and farmer. He’s maintained this professional duality for decades, through times of success and moments of stress. But he wouldn’t—he couldn’t—have it any other way.

“When you’re a seventh-generation rancher, it’s who you are,” he says.

Lawyers often take on additional work beyond the boundaries of their practices. It’s common to see lawyers leveraging their expertise by teaching classes or consulting, and many engage in complementary endeavors such as selling title insurance or providing financial planning services.

But some attorneys such as Graves take parallel paths, excelling in another area completely unconnected to law. These mega-multitaskers have essentially built second careers—making money, gaining recognition, building brands and reporting a level of satisfaction they think wouldn’t be possible working in law alone.

PARALLEL PATHS

Taking on a side job isn’t unique among lawyers or other professionals: Some estimates say as many as one in five American workers supplements their income this way, according to New York University business professor Arun Sundararajan, author of *The Sharing Economy*.

These second jobs—tagged as “side hustles” among millennials—have become increasingly popular thanks to the advent of the gig economy. Regardless of the types of tasks, Sundararajan
thinks lawyers are uniquely trained to maximize side-job success.

"Being organized, being able to design and execute on your own vision, being able to imagine and manage your own career trajectory, being able to manage your own time and having an ambition that comes from within rather than an ambition that's in competition with your co-workers—these are qualities that are going to be especially valuable as we transition to a gig economy, and these are all qualities that lawyers possess," he says.

Kate Neville isn’t surprised that lawyers mixing careers are happy in both areas. As executive coach and president of Neville Consulting Services in Washington, D.C., she’s spent the past decade helping lawyers achieve career satisfaction in and out of the practice. She says it can be beneficial for lawyers to excel at something unconnected to the law.

“There are some lawyers who are so busy at work that when they have a minute, they don’t know what to do with themselves, and that’s not the most satisfying way to have a personal life,” she says. Having more to do in life than legal work leads to feeling like something unconnected to the law.

Another perk of a parallel career, she says, is the opportunity to enjoy being the boss. "Often, if you’re in a firm you don’t have a lot of autonomy—you’re on call to clients 24/7," she says. With an additional endeavor, “you can really take the reins.”

Straddling two worlds provides a stellar opportunity to explore outside interests without giving up the stability that law can provide, Neville says. Should that law career suddenly prove unstable, a second career could easily provide “an exit plan should they need or want one.”

Sundararajan agrees, noting that many lawyers don’t just welcome the extra money a side job can provide; they need it.

“Successful professionals, especially early in their careers, are carrying a tremendous amount of student debt relative to 20 to 30 years ago,” he says. “If actual employment is increasingly not giving people as much money as they need, they’re going to be looking out for gigs on the side.”

ETHICAL CONCERNS

Regardless of how lucrative or fulfilling a side job can be, lawyers are obligated to ensure what they’re engaging in is also ethical under the ABA Model Rules of Professional Conduct and state ethics rules. This can be a pretty easy call if what a lawyer is doing is legal.

“Like any other activities, there are provisions of Rule 8.4 that come into relevance,” says Dennis A. Rendleman, lead senior ethics counsel at the ABA’s Center for Professional Responsibility in Chicago. “If you are doing something and you get involved in criminal activity, fraud or dishonesty, it doesn’t matter if it’s law-related or not; that’s going to reflect on your law license.”

It’s also important to be mindful of overlaps between law practice...
and business activity, Rendleman says. Generally, the more lawyers separate their law practices from their side jobs, the less likely they are to run into ethics issues.

It all comes down to intent, he says. If the intent of the side venture is unconnected to promoting the lawyer’s practice or soliciting clients, the chances of an ethics violation lessen.

What if the target audience of that side hustle knows the venture is headed by a lawyer—say the side business is called “Barrister’s Bed and Breakfast,” or its website mentions the owner also practices law? That’s fine, Rendleman says. “If you’re just using it as a way to stand out, that’s going to have very little impact because you’re just stating a fact about yourself,” he says. And if the lawyer happens to gain a client through their side hustle? That’s equally OK, he says, so long as it was not an obvious solicitation.

Rendleman posits a hypothetical case involving a lawyer who’s also a rancher: If an employee cowpoke happens to know the rancher is a lawyer and asks to come in to the rancher’s law office to talk about a legal problem, that’s ethical. If the rancher brands his cattle with his legal problem, that’s ethical. If the client happens to know the rancher is a rancher: If an employee cowpoke happens to know the rancher is a lawyer who’s also a rancher, all Han’s side income, an amount that typically ranges between $1,000 and $2,000 every month. Han can quote exact amounts because he keeps a monthly accounting of all his side-hustle income on his blog, Financial Panther. Han started the blog in 2016 to share his story of financial independence and the earning power of the sharing economy.

Now, Han uses his gig income to beef up his retirement savings and act as a safety net that could help him weather a law-profession downturn. The best thing about the sharing economy, Han says, is that it’s open to anyone, including busy lawyers. “You don’t really have to have any special skill to do it, and it doesn’t take up a lot of time,” he says. “If this stuff took me a lot of time, I wouldn’t do it.”
and my husband would still be asleep, and I’d go to work for my parents,” she says. “I felt like I was wasting my time, and no one was seeing me. I wanted to be able to share what I was doing and have some fun.”

In December 2014, she began the Law of Fashion Blog. She tied the blog to her profession as a way to differentiate herself from other bloggers. “Everyone was doing something with pearls or flowers, but that wasn’t really me,” she says. Her strategy was to pair photos of her outfits with “laws of fashion,” such as the rules for wearing skinny jeans or how to wear foldover pants, she says.

She loved blogging from the start, she says, but her goal was always to monetize the effort. So she took the extra time putting outfits together, editing the photos and writing the accompanying text. The public noticed. She began to gain more and more followers, and advertisers and sponsors soon followed. She has since collaborated with major brands such as DSW, Toyota, Payless ShoeSource, Marriott and Hertz. When she got pregnant, she incorporated it into her posts, bringing in a new sector of sponsorship that has included Buybuy Baby and Nuna.

Lately, she has been directing her efforts toward Instagram. This online platform is image-driven rather than narrative-driven, allowing her to maximize her time. Now she only posts once or twice per month on the blog but up to three times per day on Instagram, where she has 114,000 followers and enjoys upwards of 14,000 monthly page views. She estimates about 75 percent of her traffic now originates there, and it’s where she earns her highest returns. These returns come from a program Lacher was accepted into that connects retailers to social media posts, allowing her to earn commissions from purchases made from participating retailers when the purchase originates from a click-thru on her posts. In addition to biweekly direct deposits, the company running the program also supplies her with detailed analytics on who’s clicking on what items tagged in each post, allowing her to fine-tune her digital strategy.

Lacher describes her earnings as “a nice extra,” noting that profits always spike on major sales days such as Black
Friday, Cyber Monday or during events such as Nordstrom’s Half Yearly Sale. She also frequently receives free merchandise and hosts ads on her blog.

Lacher says she could make more if she devoted herself full time to social media, but that’s something she’ll never do. “I put a lot of time and effort into being an attorney, and I would never leave that—and I have a client base that I can’t walk away from,” she says.

She also appreciates the stability of practicing law. “You don’t know where blogging is going to go; you don’t know what’s going on with technology or even how long people will care what bloggers are wearing,” she says. “With law, people will always need lawyers, and I could never 100 percent give that up.”

LINDA ROSE: JAZZ MUSICIAN

When the American Immigration Lawyers Association brought its annual meeting to Nashville, Tennessee, six years ago, Linda Rose seized the opportunity. She not only attended the conference—she is, after all, the founder and managing partner of the Rose Immigration Law Firm there—she also booked the conference on behalf of her band, Rose on Vibes. The band also recorded a CD to sell at the show to raise funds for an immigration nonprofit.

“I had wanted to be a musician from the time I was 6 years old, but it didn’t happen until I was 50,” Rose says.

When she was young, she desperately wanted to play piano, but her parents couldn’t afford it. They were finally able to buy her a piano when she turned 12. “I was never very good at it,” she admits, but she loved it anyway. When she was a teenager, an eccentric cousin turned her on to jazz. “One year he brought a Lionel Hampton album; he was the first musician to bring a vibraphone into jazz, and I loved it. I remembered it my whole life.”

Fast-forward many, many years, through graduate school, through a successful career in social services, a law degree and clerkships. Rose eventually moved to Nashville, and in 1990, she founded her firm. She still had her piano, and she still dreamed of jazz.

“One year, in 2002, I got that feeling again, and I really wanted to try to play, to be a musician,” she says. “I took out all my piano music, but rather than try again at piano and fail one more time, I thought maybe I should try another instrument. I remembered that Lionel Hampton album, and I bought myself a vibraphone.”

She also connected with a school specializing in jazz, and that’s when she says it all clicked into place. “I imagined that Rose would put together a band. ‘I am an organizer,” she says. “I have my own law firm, and I approached organizing a band the same way.”

Today, Rose on Vibes plays at least once per month and has played up to six times per month. Rose and her band members aren’t paid a lot, but they never play for free.

“It suppresses wages for everyone when musicians play for free,” she says. “If you’re not a musician, you have no idea what it’s like to play music and how hard it is, how much work it takes.” This, she says, “is no hobby.”

Rose coordinates gigs, musicians, set lists and more. The band has a regular gig at a local restaurant and also is on the rotation list to play at the Nashville International Airport. In addition to the vibraphone, Rose performs on the gyil, an African instrument similar to the xylophone, which she learned when she traveled to Ghana in 2007.

She intended to take the trip to learn drumming and improve her rhythm, but she ended up discovering the gyil and connecting to the music, the culture and the people in a way that has influenced her ever since. Rose on Vibes now mixes African influences into its jazz sets at every gig, and Rose has composed some songs for the instrument.

In addition to running the band and her 12-employee firm, Rose also raises her 8-year-old grandchild, whom she adopted five years ago, and cares for her 91-year-old mother. Managing multiple responsibilities has always come easy, according to Rose. “I like to say I can be at two
places at once,” she says. The overlap makes it manageable. “My music overlaps with my law practice; my little child overlaps with my music; my mother overlaps with my little child,” she says.

Next up, she’d like to record a new CD. And an immigration law conference is coming to Memphis this month. Rose plans to attend and speak at the conference. And, of course, Rose on Vibes will be there, too.

**TODD P. GRAVES: CATTLE RANCHER**

The Graves family has been farming and raising cattle in Missouri’s northern Platte County for more than 150 years, and that legacy drives Todd Graves.

“I grew up on the family farm. I didn’t know where the family ended and the farm began,” says Graves, a founding partner at Graves Garrett in Kansas City. “When I went to college, I wanted to be a farmer—a rancher—and over time my interests changed and I migrated away from it, but it never really left me.”

With a law degree and a master’s degree in public administration from the University of Virginia, Graves accomplished much. He managed 120 lawyers across three offices as the U.S. attorney for the Western District of Missouri and was a member of the U.S. attorney general’s advisory committee, helping draft Department of Justice policies.

He was appointed to the U.S. attorney position from his role as Platte County prosecuting attorney, to which he was elected in 1994 and 1998 (at the time of the first election, he was the youngest full-time prosecuting attorney in the state). For more than 20 years, Graves has done it all while also raising cattle on a 270-acre farm near Edgerton, Missouri, north of Kansas City. The land has been in his family since 1867. He also owns a separate spread, the J.C. Ranch, 5 miles away. At any one time, Graves has about 300 head of cattle, raising premium, “grass-finished” beef for the plate. He sells mostly to restaurants and through the traditional supply chain.

Graves calls the farm a responsibility and a love. But from the beginning, he says, he took ranching as seriously as he took his practice. “I didn’t want to do it in a hobby way; I wanted to do it as a legitimate, freestanding business,” he says.

To do that, he knew from the beginning that he had to make certain decisions. When he graduated from the University of Virginia, he was offered a job at a major Washington, D.C., law firm that paid $95,000 per year, quite a large amount of money in the early 1990s, he says. Instead, he came home to Jefferson City, Missouri, to take a job that paid $26,000 per year. He has never regretted it.

Most days, Graves makes the 40- to 45-minute commute to the firm, but he’s also built a thoroughly modern office in a barn on the farm that makes multitasking easier.

“TODD P. GRAVES: CATTLE RANCHER”

The Graves family has been farming and raising cattle in Missouri’s northern Platte County for more than 150 years, and that legacy drives Todd Graves.

“I grew up on the family farm. I didn’t know where the family ended and the farm began,” says Graves, a founding partner at Graves Garrett in Kansas City. “When I went to college, I wanted to be a farmer—a rancher—and over time my interests changed and I migrated away from it, but it never really left me.”

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get done working on the farm at the end of the day, I can see what I’ve done, and I’ve made things better.”

**GRACE BURROWES: BEST-SELLING ROMANCE NOVELLIST**

*New York Times* best-selling romance novelist Grace Burrowes has always been a writer, but she came late to publishing.

By the time her first published romance novel was released in 2010, she already had established a career in federal procurement, earned a law degree and a master’s degree, and hung out a shingle as a solo practitioner near Hagerstown, Maryland. Her practice focuses on child welfare law, and she manages about 100 open cases. Over the years, she has employed as many as four additional lawyers to help with a caseload that’s topped 600.

For Burrowes (a pen name), writing began as a personal escape—a way to de-stress after the often-harrowing days she spent advocating for children in cases involving abuse. “I have dealt with people who have killed their children; I have dealt with people who have sold their children,” she says. “If you think of the worst things you can do to a child, I have represented a child who lived it—or whose sibling didn’t live through it.”

Burrowes soon found that she gravitated toward writing romance novels, a genre she’d enjoyed reading since middle school. She spent nearly every evening and weekend writing. Although the number of finished manuscripts mounted, she was content to let her characters exist solely on her computer. That is, until she attended a Romance Writers of America seminar. After one of the sessions, she had a chance meeting in the hotel bar with an editor who was on one of the panels and she seized the moment.

Friends and family had long encouraged Burrowes to submit her books to a publisher. So with their words ringing in her ears, she says, she awkwardly mentioned her writing. The editor invited Burrowes to submit three of her best manuscripts. She did, beginning a relationship that eventually resulted in Burrowes publishing more than 30 books with the editor’s publishing house.

From the beginning, she has published under a pseudonym. The purpose, she says, is twofold: Protection for herself and her clients, and the chance to have her work shelved next to some of her favorite romance authors, who also happen to have last names beginning with the letter “B.” Burrowes has about 70 titles, including e-books and novellas. The types of tales she tells range from modern-day dalliances to period pieces involving lords and ladies of the Scottish Highlands. She’s also published writing guides, maintains a blog and an online bookstore, and is a popular speaker and panelist at Romance Writers of America conventions. She travels to England at least once per year, and two years ago she took a group of readers on a tour of Scotland, which she’d like to do again soon.

The work is more than fulfilling and fun; it’s also quite lucrative. Burrowes says proceeds from her novels more than double the income from her practice.

Over the years, the extra earnings gave her peace of mind when she was a single parent, and it allowed her to maintain a lifestyle for her and her daughter that was comparable to a dual-income household, she says. Burrowes says she has about four books going all the time, each in different phases of completion. This allows her to continue writing when a manuscript is being reviewed by her editor or ideas are flowing in a different direction.

She says the fast pace is necessary to keep up with reader demand. “Passionate romance readers will read a book a day; bless their hearts!” she says.

Novel writing, she says, is something lawyers are well-suited to do. “We love words, we have grist for the favorite mills, and we are good with deadlines and contracts,” she says, adding that “creative self-expression is good for us.”

**Jenny B. Davis, a former practicing lawyer, is a freelance writer based in Fort Worth, Texas.**
Nixon IN New York

A NEW BOOK LOOKS AT HOW A LAW FIRM STINT REVIVED HIS POLITICAL AND PRESIDENTIAL PROSPECTS

The inspiration for Nixon in New York: How Wall Street Helped Richard Nixon Win the White House came out of a story idea I had to interview people who worked with Nixon at his New York City-based law firm, Nixon, Mudge, Rose, Guthrie & Alexander, on the 50th anniversary of his joining in 1963. That article didn’t go forward, but the idea for the book remained stuck in my head. This edited excerpt looks at how Nixon’s role as public partner at the firm was the ideal platform as he looked to reinvent himself after election losses in 1960 and ’62. Having his own firm gave Nixon access to deep-pocketed clients, allowed him to travel internationally and burnish his foreign policy credentials and, most importantly, helped build a formidable staff of top-notch lawyers, researchers and writers—a staff that did just about everything for him when it came time to ramp up for the 1968 campaign.

DURING HIS FIRST MEETING with Richard Nixon, Leonard Garment recalled, his senior partner was pretty clear about his vision for the firm. “He thought that what was right for him would also be good for the firm,” Garment said.

The latter part of that statement came true almost immediately: Nixon proved to be every bit the client magnet he had promised to be. Business boomed at Nixon Mudge almost from the moment he joined.

According to an accounting report prepared by Arthur Young & Co., the firm collected $2.6 million in fees in 1963 (Nixon joined in August of that year and became partner in January 1964). That number shot up to nearly $3.5 million the following year before creeping up toward $3.8 million in 1965. (The $2.6 million in fees from 1963 translates to over $21 million in 2018 dollars based on the CPI Inflation Calculator from the U.S. Bureau of Labor Statistics. Likewise, the $3.5 million from 1964 is roughly equivalent to $28 million in 2018, while $3.8 million becomes more than $30 million.)

A lot of work came into the firm during that time, as Price Waterhouse & Co. found when it conducted a survey of various law firms in the country. In 1963, firm partners billed an average of 857 hours each, a decrease from 1962, when partners billed 929 hours each. In 1964, however, average partner billable hours shot up to 1,119 hours and hit 1,251 the following year. Nixon Mudge associates were likewise busy, seeing their average hours shoot up during that three-year span from approximately 1,500 hours a year to over 1,700.

As a result of this increase in business, Nixon’s partners at the firm saw their bank accounts swell. According to a Price Waterhouse study, average operating income per partner increased from $46,150 in 1963 to $68,110 in 1964. The study, which compared Nixon Mudge to a group of 49 large firms in the United States, ranked Nixon’s firm 42nd in 1963 when it came to average operating income per partner. A year later, they were up to 26th. After 1965, the average operating income per partner increased further, going up to $73,500. (The $73,500 in 1965 translates to over $586,000 in 2018 dollars.)

Nixon’s arrival also led to an expansion at the firm. In 1963, the same year Nixon came aboard, the firm acquired Dorr, Hand, Whittaker & Watson, a smaller firm on Wall Street that specialized in railroad law. With Nixon in tow, the firm anticipated an uptick in government-related work. As such, the following year, Nixon Mudge acquired a two-partner maritime law firm in Washington, D.C., named Becker & Greenwald.
The main office, at 20 Broad St. in Manhattan, also expanded considerably, as the firm hired so many additional lawyers and employees that it went from three floors in 1962 to five by the start of 1967.

Nixon was hardly the only rainmaker at the firm, but he quickly established himself as one of the most effective. Almost immediately after his arrival, several of the firm’s existing clients, like automaker Studebaker and longtime Nixon friend Elmer Bobst’s Warner-Lambert Co., started sending most of their work to Nixon Mudge.

Nixon also proved highly adept at bringing in new clients. “For the young lawyers that wonder how business is gotten—it isn’t done always directly,” Nixon said. “It’s a matter of fact the most effective way is indirectly.”

For instance, he recounted that he would often go to dinner parties, meetings and other social events with prospective clients, and he would never bring up business or legal representation. “As time goes on—when they need representation or when they want to change their representation—they will think of you,” Nixon said. “In all the time I was with either [previous firm] Adams Duque or [Nixon Mudge], I have never asked anybody for business, never. And I think that’s the most effective way to do it.”

In private, Nixon was far less charitable. “I never realized how easy it is to make money,” he said. “I just got $25,000 for telling a bunch of stupid jerks something they could have learned from the newspapers.”

As one partner explained to legal journalist Paul Hoffman, corporate executives have “an almost childlike enthusiasm for celebrities,” and Nixon was one of the biggest. Some of them simply wanted to be able to brag: “You remember my lawyer, Dick Nixon, don’t you?”

‘IT SAVED MY JOB’

Long before Pepsi had the likes of Michael Jackson, Madonna or Shaq as a celebrity endorser, it had Nikita Khrushchev and Richard Milhous Nixon. Their commercial for Pepsi didn’t include pyrotechnics, choreographed dancing, catchy jingles or sex appeal—unless you consider a debate over the merits of capitalism versus communism between the vice president of the United States and the premier of the Soviet Union sexy.

In 1959, Nixon was visiting Moscow when he and Soviet leader Khrushchev made a joint appearance at the American National Exhibition at Sokolniki Park. The exhibition was held to promote cultural understanding between Russians and Americans, but the two leaders took the opportunity to engage in an impromptu debate that started inside the kitchen of an American-style display house and continued all over the showroom floor, with the two men gesturing and jabbing fingers at each other while reporters and photographers recorded everything. When they got to the Pepsi-Cola stand (which featured two different Pepsi drinks: one made in the United States and one made with Russian water), that’s when it happened.

The company’s new slogan was “Be Sociable! Have a Pepsi!” What better ad than a picture of American’s foremost adversary (and the scourge of Coca-Cola, which the party in Europe equated with capitalist decadence) acting sociable over a Pepsi made in the USSR?

[excerpt from As Seen on TV: The Visual Culture of Everyday Life in the 1950s by Karal Ann Marling]

“Don’t worry about it, Don,” Nixon is said to have told Pepsi’s CEO, Donald Kendall. “I’ll bring Khrushchev by and we’ll get a Pepsi in his hand.”

Pepsi’s photographer got numerous shots of Khrushchev drinking Pepsi-Cola. Obviously, the Soviet leader preferred the one with Russian water—and touted its
superiority over the American version—calling it "quite refreshing."

It may not have had the same cultural impact of Joanie Sommers singing "It’s Pepsi, for Those Who Think Young," but it was no less effective. After all, in a totalitarian state like the Soviet Union, if the leader drank something, then everyone drank it. As such, Kendall was able to negotiate a 15-year exclusive deal with the USSR shortly after the expo ended—a deal that, effectively, shut Coke out of the Communist stronghold.

Kendall was grateful to Nixon for his role in making it happen. "We got front-page publicity all over the world: 'Khrushchev learns to be sociable,' " he recalled. "The publicity was unbelievable. It saved my job."

So when Nixon started job hunting in 1962, Kendall paid him back by giving him a very important chit to play with potential employers. He made it known that whichever firm hired Nixon would also get Pepsi, with its annual legal billings in excess of $3 million, as a client.

Pepsi wasn’t the only client Nixon brought with him. Several from a previous stint at Adams, Duque & Hazeltine in California after the 1960 election followed him to the Big Apple, including Jessop Steel, Dreyfus Corp., Richfield Oil, Precision Valve Corp. and Virginia Industries. Nixon also proved adept at signing up new clients, including shipping magnate Daniel Ludwig, one of the richest men in the world, and banknote manufacturers Thomas De La Rue Inc. The latter also gave him a seat on its board, and chairman Francis Sorg recalled that Nixon "did no legal work at all. ... With us, he was not going to be a lawyer; he was going to be a salesman."

**EL JEFE**

On several politically sensitive matters that his firm was involved with, including a potential representation of controversial Vietnamese political figure Tran Le Xuan, better known as Madame Nhu, Nixon was content to keep a low profile. On one matter, however, he was more than happy to be out in front, even if his actual involvement was somewhat limited.

On May 30, 1961, longtime Dominican Republic strongman Rafael Trujillo’s car was ambushed by several gunmen while the “First Teacher, First Doctor, First Journalist of the Republic” was executed gangland style as he was being chauffeured home. The assassins wielded American-style M1 carbines, leading to the conclusion that the CIA had Trujillo killed.

That theory didn’t hold much water—especially coming on the heels of the Bay of Pigs debacle. The last thing the Kennedy administration wanted was to take out an anti-Communist leader like Trujillo and leave a power vacuum for a Dominican Fidel Castro to fill. Indeed, declassified CIA documents indicate the agency wasn’t directly involved but almost certainly had foreknowledge of it and had provided the guns used by the assassins.

With most long-term dictators, the safe assumption is that they have a fortune squirreled away in a country with secretive banking laws. Trujillo was no different, as he was rumored to have a personal wealth of nearly $500 million, with over $180 million stashed in a Swiss bank account. The sheer enormity of such a fortune guaranteed that it would serve as a battleground for the various Trujillo heirs, who all wanted a piece of the late strongman’s estate.

What made this battle even more complicated came down to the other dictatorial cliché that Trujillo had more than lived up to. “Lover of Dominican Women” had not been one of his extravagant titles, but it probably could have been. Trujillo had many, many mistresses and girlfriends, and as a result, he had many, many illegitimate children. (It’s never been definitely proven how many he had.) Given the reputed size of his fortune, it was inevitable that Trujillo’s death would trigger a veritable battle royale for his riches.

In July 1964, the Los Angeles Times reported that a group of six illegitimate children had hired Nixon
and his firm to represent them as they tried to collect their portion of the estate. Nixon’s clients were based in Miami and had named the Miami Beach First National Bank as their trustee.

Nixon got the publicity, but how much work he actually did on the case is in dispute. Raymond Steckel, an associate in the Paris office of Nixon Mudge, recalled that the case belonged to Nixon’s partner Randolph Guthrie, who had a relationship with the chairman of the Miami bank.

“I have no recollection of Nixon working on the case,” said Steckel. In fact, a December 1965 message from Nixon secretary Rose Mary Woods to Nixon seemed to confirm this, as Woods relayed a message from John Davis Lodge, former ambassador to Rose Mary Woods to Nixon seemed to confirm this, as Woods relayed a message from John Davis Lodge, former ambassador to Rose Mary Woods to Nixon seemed to confirm this, as Woods relayed a message from John Davis Lodge, former ambassador to Rose Mary Woods to Nixon seemed to confirm this, as Woods relayed a message from John Davis Lodge, former ambassador to Rose Mary Woods to Nixon seemed to confirm this, as Woods relayed a message from John Davis Lodge, former ambassador to Nixon. In December 1965, Lodge relayed a message from Nixon secretary Rose Mary Woods to Nixon, saying, “Nixon did not work on the case.”

“I explained that this was not your case—that this material would have to come from Mr. Guthrie since this was his case—NOT YOURS,” Woods wrote to Nixon.

The firm, on behalf of the Miami-based children, filed a criminal complaint in Geneva accusing Trujillo’s son Radames of misappropriating his late father’s millions. Radames, who was living in exile in France, was accused of stealing $150 million from his dad’s coffers and was extradited to Switzerland in November 1964 to face the charges. The Miami heirs claimed that, because of Radames’ theft, there was less than $6 million left in the account. Ultimately, Nixon Mudge reached a settlement with Radames (the terms were not disclosed), and he was released from Swiss custody.

However, there were other fish for the Miami heirs to fry. At one point the lawyers looked at whether or not to file a case in Santo Domingo, and Steckel recalled flying into the Dominican Republic’s capital to explore that possibility. The post-Trujillo years were highly unstable, with multiple revolutions and coups d’état taking place before the United States forcibly intervened in 1965. It was during one of these revolutionary periods when Steckel flew down to the country. “I could still hear guns going off in the background,” he recalled. “It was exciting but also scary.” He met with the newly appointed minister of justice and asked to copy some files relevant to the Trujillo matter.

“I show up, in my little lawyer suit, and here’s this rather burly fellow in his early 40s wearing a short-sleeve white shirt,” Steckel said. “He asked me to sit down and then started explaining why I couldn’t actually copy the files. Before I could say anything, he pulled open his right desk drawer and pulled out a .45 and put it on his desk. He didn’t say another word.”

Ultimately, Steckel said, he was allowed to look at the files and copy what he could by hand. “So, when the Miami bank suggested filing an action in Santo Domingo, I told them that, based on what little I knew about civil law in the Dominican Republic, pursuing this claim in the middle of a revolution didn’t strike me as a very useful thing!”

**NEXT STOP: SPAIN**

Instead, Nixon Mudge turned its attention to Spain. The firm went after a group of Trujillo heirs living in Madrid, including the biggest fish of them all: Ramfis Trujillo. The eldest son and heir apparent to his father, Ramfis parlayed his lifelong career in the Dominican military (his father had appointed a major at the age of 3) to succeed his assassinated father as leader of the Dominican Republic in 1961.

However, before he could bestow upon himself an outlandish title like “Defender of the Dominicans,” he found himself out of power and forced into exile. He ultimately settled in Spain, where he lived an extravagant lifestyle under the protection of that country’s strongman, Generalissimo Francisco Franco. The St. Petersburg Times reported that...
Ramfis had about $60 million stashed away in his account in Spain and mentioned that Nixon was working on trying to get some of it for his clients.

On May 5, 1965, Nixon took a well-publicized trip to Geneva to meet with Swiss Department of Justice officials. According to an internal firm memo, the trip was necessary because Nixon Mudge lawyers believed that, unlike with Radames Trujillo, the Swiss courts had been dragging their feet when it came to adjudicating the complaint against the Madrid heirs.

“The present inaction, on a complaint filed with impressive supporting fact, by an American bank and American citizens (or residents) might lead one to wonder if the Swiss laws on secrecy in the banks are not construed to provide a safe haven for embezzlers and receivers of stolen goods,” the internal memo stated. The memo also noted that it was vital to have the threat of an “actively prosecuted” criminal case against the Madrid heirs to provide the kind of leverage necessary to get the Miami heirs their fair piece of the estate.

To that end, a few days after the Geneva meeting, Charles Celier, European counsel at Nixon Mudge’s Paris office, and Lodge met with Spanish officials to pressure them to extradite the Madrid heirs to Switzerland. According to a letter from Lodge to Nixon, the Spanish authorities were sympathetic, but they stated outright that “the basis for intervention did not seem entirely clear.”

Spain’s stance only hardened in the next year. In a letter dated April 2, 1966, Spain’s undersecretary of foreign affairs, Pedro Cortina, told Lodge “there was no possibility on the part of Spanish administrative authorities in a matter strictly of a private order.” Cortina said the only way Spain would get involved would be if it received an extradition order from Switzerland, and that had not happened.

Additionally, Cortina stated that Spain had an interest in maintaining its neutrality in this issue because of the Madrid heirs’ status as refugees. “The desire that the Spanish authorities should intervene in the matter for the purpose of reaching a friendly settlement with the object of avoiding the publicity which repeatedly had taken place in the world press was not at any time considered appropriate for the Spanish government,” Cortina said.

The result was somewhat ironic for Nixon. An internal firm memo had emphasized that “there is strictly nothing political about this case” and that it was “strictly a family feud.”

Of course, things weren’t that simple. After all, Trujillo may have been a bloodthirsty, megalomaniacal despot, but from the point of view of many American officials, he was our bloodthirsty, megalomaniacal despot. He had been an important counterweight to Castro in the Caribbean, and a friend to American business leaders like aviation executive William D. Pawley, who had gotten rich by doing business in the Dominican Republic. Without him, the Dominican Republic could be the next domino to fall, and the last thing the White House wanted was another Castro in its backyard.

“If Castro is going to support revolution in the Dominican Republic, it is time for us to go to the source of the problem,” Nixon told House Minority Leader Gerald Ford in 1965. “I am not calling for war on Castro. I am saying he should be warned, and this cannot be a one-way street.”

BUILDING BONA FIDES

As for Nixon, it made sense why he would want his name in the papers in relation to the Dominican Republic and Trujillo. It reaffirmed his anti-Communist credentials and reminded voters of his foreign policy knowledge. Most importantly, his representation of Trujillo’s offspring sent a signal that he remained interested in the fate of the republic as well as the U.S. businesspeople who were heavily invested there.

With plants in Cuba and the Dominican Republic, Pepsi’s Kendall had long been concerned about the region and had gone so far as to send Lyndon Johnson a letter heaping praise on the president for acting boldly and decisively by sending the military into the Dominican Republic. Kendall even tried to forge an unofficial alliance between Johnson and Nixon, bringing up Nixon’s solid and outspoken support for the intervention.

“After listening to Nixon discuss both the Vietnam and Dominican Republic situations,” Kendall wrote, “it occurred to me that since there is such a problem of selling your policies to certain segments of the American population, as well as some of our friends abroad, you might want to consider using him as a spokesman in this country and abroad to help sell your policies.”

In fact, Nixon was not only supporting the Johnson administration’s stance; he was using the Dominican intervention as a wedge to drive between liberals and that administration. In speeches he would alternately commend Johnson and Vice President Hubert Humphrey for taking swift, decisive and necessary action while criticizing their liberal base for opposing the move. “History will be kinder” to Humphrey than his fellow liberals, Nixon said mischievously during a speech before the 46th U.S. Junior Chamber of Commerce Convention in 1966.

But for Kendall and others like him, who were desperately concerned about the fate of Latin America, Nixon’s words were music to their ears. And like many of Nixon’s clients and business friends, they did not forget Nixon when it came time for the 1968 campaign.

INCREASED ENFORCEMENT OF IMMIGRATION LAWS HAS RAISED THE RISK OF SCAMS

BY LORELEI LAIRD
Alicia, an immigrant from El Salvador, had plenty of time to renew her work permit under the Deferred Action for Childhood Arrivals program. Unfortunately, she went to a “notario” for help.

Alicia, who is using a pseudonym because of the uncertainty of her immigration status, was brought to the United States at age 11 and lives in Maryland. That made her eligible for the Obama administration’s DACA program, which grants two-year work permits to young people who came to the United States illegally as minors, deferring any deportations during that time.

She started the DACA renewal process in late August and then left for Texas, where she had a job helping with restoration and cleaning after Hurricane Harvey. Not long afterward, Attorney General Jeff Sessions announced that the government was canceling DACA, creating a hard Oct. 5 deadline for renewal applications. Feeling nervous, she called the person she’d hired to make sure the application had been sent in. He assured her it was.

It wasn’t. Alicia had gone to a notario, a kind of nonlawyer who exploits a mistranslation of “notary public” to convince Spanish speakers he’s licensed to practice law. The notario stopped answering Alicia’s calls—and when she contacted the federal government directly, she discovered that her application had never been received. That means her work permit was set to expire early this year—and with it her chance to get better jobs. However, thanks to court rulings, she’s been able to renew it and is able to work in the U.S. until early 2020.

“I believed … he was going to send it because he’d never let me down,” says Alicia, who had used the same notario for prior DACA applications. “He told me that there were a lot of other kids, students, who’d called for the same reason, and he was going to look into it and see what was going on. And that he was going to call me back, but he never called me back.”
Anne Schaufele of the Washington, D.C., immigration public-interest firm Ayuda, is now representing Alicia. She says there’s very little chance the federal government will bend deadlines in recognition of fraud. And Schaufele suspects there are lots more Alicias.

“What we see from our receptionist, who answers calls all day long, is that whenever there’s a change [in the law], she gets a flood of additional calls,” says Schaufele, who runs Ayuda’s Project END (Ending Notario Deceit). “In the absence of licensed practitioners, … folks are going to nonattorneys that are capitalizing on this [increased] interest.”

In fact, advocates say immigration legal-services fraud jumps every time there’s a change in the law. In the first year under President Donald Trump, immigration law saw multiple high-profile changes. That included a 42 percent increase in arrests by Immigration and Customs Enforcement, according to a report from the agency; the cancellation of DACA and temporary protected status; and the end of broad prosecutorial discretion in immigration court.

The Trump administration is not itself responsible for any fraud that results. Still, advocates say changes could frighten immigrants into the arms of cut-rate fake attorneys.

“With the recent announcement on DACA, we’re looking at thousands of people who may not have [legal immigration] status, and that’s in addition to thousands and thousands of people who are already undocumented,” says Christy Williams, who leads the project on unauthorized practice of immigration law at the Catholic Legal Immigration Network Inc. in Washington, D.C.

“I suspect that bad actors will see this as an opportunity to prey on people who are in desperate circumstances right now.”

EXPLORING ANXIETY

Fraud targeting immigrants did not begin with the Trump administration; advocates say it’s constant and pervasive. But the administration’s aggressive approach to immigration law enforcement is driving up interest in legal services, they say. And some subset of those immigrants looking for help will end up trusting the wrong people.

“I think always when people are afraid, they may go out looking to see if there’s anything they can do about their case,” says Camille Mackler, director of immigration legal policy for the New York Immigration Coalition. “There are more people who are going to try to prey on that.”

Scams vary, but fraudulent nonlawyers typically take the client’s money, then do either incompetent work or no work at all. Some may truly mean to help, but others draw their clients in with outright lies, citing “new laws” or a friend in the federal government who can be bribed. When the clients wise up and ask for their money and documents back, the scammer may ignore them, withhold documents or even threaten to turn them in to immigration authorities.

Though scams target immigrants of all kinds, Spanish-speaking communities have a special and very pervasive problem, thanks to notaries like the one Alicia hired. In many Latin American countries, a notario is a kind of attorney authorized to prepare documents. In the United States, notaries public may not practice law, but dishonest people exploit the similarity to fool Spanish-speaking immigrants.

In the best-case scenario, the client loses thousands of dollars—money many immigrants can’t afford to lose. At worst, the scammer may actually hurt the client’s case, up to and including getting the client deported. That’s a likely result of one common scam where the false lawyer tells undocumented clients there’s a green card available if they’ve lived in the United States for 10 years and have a child who is a citizen. No such program exists, says Vanessa Stine, who runs the Notario Fraud Project at Friends of Farmworkers, located in Pittsburgh and Philadelphia.

“They file affirmative asylum applications without actually explaining that to the victim, and then that puts them on track to having contact with Immigration and Customs Enforcement,” says Stine, an Equal Justice Works fellow. Like Ayuda, others who provide immigration legal services saw a
dramatic increase in interest after the 2016 election. Daniel Sharp, legal director of the Central American Resource Center in Los Angeles, says the end of the year is normally the slowest time there—but not in 2016, when there were “huge numbers of people coming in.” Schaufele says Ayuda got so many calls that it started running consultation clinics. C. Mario Russell of Catholic Charities Community Services in New York City says calls to a hotline increased dramatically in early 2017. “[There was] just an incredible number of people calling in for assistance, for directions, for guidance, for reassurance, for information, during that whole phase with the travel bans,” says Russell, the charity’s director of Immigrant and Refugee Services. “So we saw, obviously, a co-relative reaction to the administration.”

Advocates say it’s difficult to show with statistics that this leads to increased fraud, because fraud against immigrants is extremely underreported. (See “Underreporting Makes Notario Fraud Difficult to Fight,” page 57.) But they’re confident that scammers exploit people’s anxiety. For example, Mackler says immigrants living in the United States have started trying to claim asylum in Canada. An international agreement requires Canada to turn them away at border checkpoints, so they’ve been crossing by foot in rural parts of upstate New York—sometimes in dangerous winter conditions—and hoping they pass the Canadian asylum process.

It’s a dicey proposition, but Mackler says you might not know it from some of the lawyer advertising she’s seen. “Basically, they think that the U.S. has become a dangerous place for immigrants and that Canada is a welcoming place for immigrants, based in part on statements made by the heads of both countries,” she says. “I know that people are giving wrong information—or sort of like glossing over the truth, to be more charitable—to people who want to go to Canada and preying on that fear.”

That fear is on top of the vulnerability created by many immigrants’ lack of familiarity with our legal system, lack of fluent English, poverty and, in some cases, rural locations that provide few legal services. Advocates say there just aren’t enough competent, affordable attorneys to meet the need—and fake lawyers step in.

“The less you have legal services, the more you see these schemes happen,” Mackler says. “There are parts of New York I can go to where I won’t find a single immigration attorney, but I’ll find a lot of notarios.”

HELP WANTED

Of course, all of this is against the law. Every state forbids unauthorized practice of law, and a majority have laws regulating unauthorized practice of immigration law specifically. Some, especially those with large immigrant populations, have laws regulating the use and translation of “notary public,” or permitting victims to sue false lawyers. Advocates would like to expand those laws to all 50 states; Williams says the UPL statutes don’t always fully address UPIL. But having a law on the books is one thing; enforcing it is another. Clemente Franco, a private attorney in Los Angeles who has filed several lawsuits against false lawyers, says there’s an enormous amount of fraud in that city—but maybe one prosecution every few years.

“You could throw a stone [in certain neighborhoods] and you’re probably going to hit one of these guys,” he says. “They’re operating openly.” Schaufele says one solution might be for more municipalities to adopt a strategy that’s helped in Chicago: stings on businesses suspected of
practicing immigration law without a license. Chicago requires immigration consultants to post a sign saying they cannot offer legal advice. Roughly half of businesses reviewed in 2015 and 2016 weren’t complying, Schaufele says. The stings may not eradicate businesses engaged in unauthorized law practice, but she says they may scare some out of business.

“It was a way for the city to just say, ‘You’re on our radar. We’re aware that what you’re doing is incorrect and here is a fine,’” she says. “That’s not going to help shut down all of the actors. But I think the well-intentioned actors, which there are plenty of, might take notice.”

Another thing advocates would like is more reassurance that victims who report immigration law fraud won’t be deported—a realistic concern and one that keeps immigrants from coming forward. This wouldn’t have to come from the federal government; local and state government agencies take more complaints than federal authorities. Schaufele says there’s a Department of Homeland Security memo on this subject, but ICE won’t assure her—or the various elected officials who have asked—that it still applies.

Just giving that assurance could help, she says.

Mackler suggests that the New York state government could help by tweaking state law to allow victims of unauthorized practice of immigration law to claim a U visa, granted to immigrant victims of crime, but it isn’t granted for fraud alone. Those who’ve received it after falling victim to immigration legal-services fraud typically were also victims of crimes such as witness tampering or extortion. Broader state statutes could open the door to more U visa claims, giving immigrants a better incentive to come forward.

Another change some advocates would like to see is a preventive one: getting rid of state “immigration consultant” statutes, which permit nonlawyers to do a limited amount of immigration law work. Sharp explains that California’s statute dates to the late-1980s federal amnesty program, when far more applications were expected than there were lawyers available to help. The state authorized nonlawyers to help fill out the paperwork.

But those applications were simple, Sharp says, and expressly guaranteed that those who were rejected wouldn’t be put into deportation. Modern immigration law is much more complicated, he says, and comes with no such guarantee.

Now, he says, the main effect of state immigration-consultant licenses is to provide an appearance of legitimacy for fraudulent businesses.

“It’s well-intended, it’s very comprehensive, and it has been an utter failure from our perspective,” he says. "I've yet to encounter a scenario where someone is in compliance or could be in compliance.”

**IMMIGRATION ATTORNEYS NEEDED**

All the same, advocates say there just aren’t enough immigration attorneys to meet all the need. To address that, the federal government has created a program that certifies nonlawyers to do some of the same work. Accredited representatives must work for a recognized nonprofit and undergo substantial immigration law training, after which they can be certified by federal authorities as competent to represent immigrants. Williams says the Catholic Legal Immigration Network is actively promoting the program as a way to increase access to legal services.

Williams would also like to see more attorneys doing pro bono work—and she might get her wish. For the past decade, the ABA Commission on Immigration’s Fight Notario Fraud project has offered information and resources to attorneys, bar groups and the public about notario fraud and how to fight back. Tanisha Bowens-McCatty, associate director of the commission, runs that project and has seen an increase of interest from attorneys in helping with immigration cases. She hopes to soon start connecting those lawyers with pro bono cases.

And she’s not just looking for immigration expertise. The ABA member who founded Fight Notario Fraud, David Zetoony, is a consumer protection attorney who now leads that practice area for Bryan Cave. Stephen Zack, who drew attention to notario fraud during his 2010-2011
ABA presidency, practices complex business litigation at Boies Schiller Flexner.

“The problems that we see people are facing on the ground are not necessarily immigration problems,” Bowens-McCatty says. “We really need attorneys that have experience in civil court, in criminal court or experience sort of walking through complex matters.”

FLOOD OF FRAUD

But for Alicia, there are few legal mechanisms to fix the problem her notario caused. U.S. Citizenship and Immigration Services announced last November that it would reconsider the cases of people who could prove their DACA renewal applications were delayed by postal errors. Schaufele said in December that she was trying to analogize Alicia’s case to those, but she wasn’t hopeful.

“It depends on the case type, but often USCIS views preparer error as victim error,” she says. “They see it as the individual who’s the applicant signed off on the application, and that signature is what’s weighed heavily against the applicant.”

But Alicia has gone ahead and filed a complaint against the notario with the Federal Trade Commission anyway.

Regardless of whether her situation can be fixed, she wants to put him out of business.

“That way, he won’t be able to do harm to other people in the future,” she says. “So that they’ll revoke his permission as a notary, so that he can’t harm other people who perhaps are also trying to submit their papers.”

Underreporting Makes Notario Fraud Difficult to Fight

If you need to understand a problem in order to solve it, lawyers who fight immigration legal-services fraud are in trouble. Accurate data is impossible to get, they say, because it’s extremely underreported.

There are lots of reasons for that. Because immigration law is complex and slow-moving, it can take victims months or years to realize they were cheated. When they do, they are often too embarrassed to come forward. When there’s no way to fix the damage caused by false lawyers, immigrants may not see the point of complaining. Those who end up in deportation because of a scam might have bigger problems.

And for people without legal immigration status, there’s also the fear of being deported if they come forward, which advocates say is well-founded.

Though many police departments won’t share immigration information with U.S. Immigration and Customs Enforcement, reporting provides no legal immunity to deportation. The Trump administration removed an informal protection when it canceled an Obama-era policy against deporting immigrants who are exercising their legal rights.

As a result, Washington, D.C.-based immigration nonprofit Ayuda says there could be as many as 100 victims for every one who steps forward. In one case prosecuted by the Federal Trade Commission in 2011, authorities recovered 2,785 case files—but only 99 consumer complaints. That’s a reporting rate of 3.55 percent.

Tanisha Bowens-McCatty, associate director of the ABA’s Commission on Immigration, has been studying this problem, which she calls “the elephant in the room.”

In October, she led a panel on collecting fraud data at the ABA’s UPL School, a conference on fighting the unauthorized practice of law.

She says bar leaders there told her that immigration-related complaints have actually gone down—but nobody in the room thought it was because the problem has disappeared.

“You know, what’s the benefit for the victim?” she says. “In this current immigration climate, a big part of it is people are afraid to come forward.”

That’s why she’s working on finding a better way to collect that data. Nothing is ready yet, but she hopes to eventually develop better information or even a toolkit for immigrant advocates. That could help quantify the problem of immigration legal-services fraud and support her commission’s Fight Notario Fraud program’s mission of being a resource for advocates.

One potential solution: making victims of immigration legal-services fraud more comfortable coming forward. Juan Manuel Pedreroza, a PhD student in sociology at Stanford University, has studied what conditions might be helpful there.

After analyzing FTC complaints from different areas, he concluded that complaints tend to be higher where people have greater access to legal aid, as well as places where more Hispanic families receive food stamps. By contrast, he found that areas with more deportations and greater local support for Republican candidates had fewer complaints.

Most likely, he says, neither finding reflects actual rates of fraud. Rather, they likely show different levels of trust in government.

“What we do know is ‘Where is the tip of the iceberg feeling comfortable showing itself?’” he says.
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Like most lawyers, Jamie Quient has heard how building a network is key to getting business referrals, learning the quirks of opposing counsel, or hearing insightful tidbits about courtroom conduct.

But for Quient, networking holds the key to a more basic need: survival. As founder and president of the Free to Thrive legal clinic in San Diego, she helps human trafficking victims who are struggling to break from their traffickers and rebuild their lives.

Quient uses her networking skills to get her clients access to safe housing, drug treatment programs and job training.

“My clients are the strongest, most resilient and determined women that I have ever met in my entire life,” says Quient, an ABA member since 2012. “They have complex needs that extend far beyond their legal needs.”

Quient’s typical day is spent traveling through San Diego County in her mobile office: a Prius equipped with her laptop, a Wi-Fi hot spot, a briefcase filled with legal forms, and a blanket and pillow.

Her clients often are traumatized, she says, so “the blanket and pillow can make a client feel safe and comfortable.”

Safety, housing and therapy are the first needs that have to be filled, she says. “We look at all their needs and basically triage and prioritize them,” she says. “We can’t work on their legal needs if they’re not safe.”

This is particularly an issue with Quient’s clients who are serving jail terms. They often have no place to go when they are released.

“If they get out and their situation is unstable, they’re likely to go back to their trafficker,” she says.

That’s where her networking pays off. Quient is in constant contact with community partners who run residential treatment programs because she knows space is in tight demand.

“I want my clients to be first in line to get those spots when they open up,” she says. “If I can bring them from jail to a safe environment, it gives them a greater likelihood for success when they get out.”

RESTORING RECORDS

Quient’s passion for her work began when she was a board member of the Lawyers Club of San Diego and served as president for the 2016-2017 term. The association founded the Human Trafficking Collaborative with the aim of bringing together the legal profession and the broader community to address trafficking and support survivors.

Quient, who was a civil litigator with Procopio, Cory, Hargreaves & Savitch based in San Diego, immersed herself in training and began representing clients on a pro bono basis. She started advocating for legal reform when she learned of the setbacks experienced by one client who was sexually exploited for six years beginning at age 16.

Like many victims of human trafficking, Quient’s client had amassed a criminal record that included drug charges and citations for failed court appearances. Her criminal record...
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record thwarted every attempt she made to find employment. Potential employers would extend an offer, only to rescind it once they began a background check.

Quient contacted the ABA’s Survivor Reentry Project to help the Human Trafficking Collaborative in getting vacatur legislation passed in California. Vacatur allows human trafficking survivors to remove legal charges from their criminal records if they can prove their crimes arose from their victimization.

The ABA and the Human Trafficking Collaborative were successful, and a law to add vacatur to California’s penal code was approved by the governor in September 2016.

For human trafficking survivors, a clean record opens the door to housing, employment, education and reunifying with their children.

Quient told her client: “You inspired this law, and you inspired me to push for it.”

REACHING GOALS

With the support of her firm, Quient left private practice last year to launch Free to Thrive. The nonprofit marks its first anniversary this month.

Looking back on the first year, Quient describes it as “running a marathon while putting on your shoes.” She worked full time at Procopio until mid-August 2017, winding down her cases and transferring matters to other attorneys. She still was president of the Lawyers Club of San Diego, drafting bylaws and seeking funding for Free to Thrive, when the calls from clients in crisis began.

Her law firm’s support has been truly incredible, she says. Procopio donated office space, conference space and equipment, essentially serving as an incubator for the nonprofit. Her former colleagues handle cases on a pro bono basis.

Quient has short- and long-term goals for Free to Thrive along with one important personal goal: a commitment to take care of herself while she shoulders the traumas of others.

“Some of the issues they are facing are so serious,” she says, referring to one client fighting for custody of her daughter and another who isn’t safe from her trafficker.

“Our program only goes so far in terms of the services we can provide,” she says. “I try really hard not to let these things keep me up at night and to do the best with what I have.”

To avoid the pitfall of “vicarious trauma,” Quient relies on yoga, meditation and outdoor sports to de-stress after difficult days.

Her immediate need for Free to Thrive is raising money so she can add staff and expand services. She is on track to represent 70 to 80 clients in this first year, well above the goal of 60 clients established at the launch.

Quient recently hired a part-time staff attorney and will be managing several interns during the summer—law students as well as public health and social service graduate students.

Her long-term goal is to significantly improve her clients’ employment opportunities. It’s one of their most urgent needs, she says.

“Imagine someone who’s been trafficked from age 16 to 29, and now imagine her trying to put a resumé together at age 29,” she says.

Quient wants to help clients articulate their experience without having to divulge their past. She also hopes to develop a network of employers committed to hiring trafficking survivors. Her dream is that Free to Thrive will be able to provide jobs to former clients.

But, again, those are long-term goals. For now, she says, “I come in on the weekends to do copying and scanning because I don’t have time during the week to do that or any money to hire administrative staff.”

Even so, she doesn’t miss her days as a civil litigator. “I feel like I’m a far better human trafficking lawyer than a civil litigator because I’m so passionate about the work,” she says.
A View Toward the Future

ABA president-elect nominee champions a mindset of ‘continuous improvement’

By Lee Rawles

As structural changes are being proposed at the ABA, the nominees for leadership positions will be called upon to prepare the association to meet the challenges of a changing legal market and the needs of 21st-century lawyers and clients.

For Judy Perry Martinez, the president-elect nominee, this is not a new addition to her portfolio. As chair of the ABA Commission on the Future of Legal Services, Martinez spent two years with the group’s members studying the legal needs of communities; the changes to the traditional methods of practicing law that could be made to meet them; and the ways in which innovations and new technologies could be used to advance the profession.

The commission’s work, initiated by former ABA President William C. Hubbard and completed in August 2016, led to the creation of the ABA Center for Innovation; Martinez acts as special adviser to the group.

“There’s a lot of very innovative thinking by staff and volunteer leaders alike going on right now with regard to how we can deliver more efficiently, effectively and competently both the services that the association delivers to its members and the services ABA members deliver to the public,” says Martinez, of counsel with Simon, Peragine, Smith & Redfearn in New Orleans. “We should always be in a mode of continuous improvement.”

This philosophy of continuous improvement was reinforced for Martinez during the 12 years she spent at Northrop Grumman, an aerospace and defense technology company. She retired as vice president and chief compliance officer in 2015 and rejoined Simon Peragine, where she’d spent the beginning of her career.

“The notion of ‘This is how we’ve done it, but that doesn’t mean that this is how we have to continue to do it’ is one that I think is with me every day because of my years inside a corporation of the caliber of Northrop Grumman,” Martinez says.

Martinez, who was nominated without opposition at the ABA Midyear Meeting in Vancouver, British Columbia, will face a vote by the House of Delegates at the 2018 annual meeting in Chicago this August, after which she would become the president-elect. Robert M. Carlson, now serving as president-elect, will automatically assume his one-year term as president at the close of the annual meeting, then pass the gavel to Martinez after the 2019 San Francisco annual.

The close of the 2018 annual meeting will also mark the end of Deborah Enix-Ross’ two-year term as chair of the House. The nominee to assume her position is William R. Bay, a partner with Thompson Coburn in St. Louis. Bay completed a three-year term on the Board of Governors in 2017.

He served on the Finance Committee for two of those years, acting as chair from 2015 to 2016. He was also 2012-2013 chair of the Section of Litigation. His term as chair of the House would continue through 2020.

There are 13 new nominees to replace open seats on the 44-member Board of Governors. Their nominations were also approved at the midyear meeting in February and will also be voted on by the House in August. They will serve three-year terms. Once the Nominating Committee has made its selections for president-elect, chair of the House and the Board, the nominees are virtually assured of being elected.
JUDY PERRY MARTINEZ
PRESIDENT-ELECT
Of counsel with Simon, Peragine, Smith & Redfearn in New Orleans. Served as chair of the ABA Commission on the Future of Legal Services (2014-2016) and is special adviser to the ABA Center for Innovation. Chaired the Standing Committee on the Federal Judiciary from 2011 to 2014. Past member of the House of Delegates. Sat on the Board of Governors from 1996 to 1999. Past chair of the Young Lawyers Division and the Commission on Domestic Violence. Past member of the Commission on Women in the Profession; Task Force on Attorney Client Privilege; Task Force on Building Public Trust in the American Justice System; the council of the ABA Center on Diversity; and the ABA’s World Justice Project Committee. Former lead ABA representative to the United Nations. Member of the board of directors for the American Bar Foundation. Received JD in 1982 from Tulane University Law School.

WILLIAM R. BAY
CHAIR, HOUSE OF DELEGATES
Partner with Thompson Coburn in St. Louis. Served on the Board of Governors from 2014 to 2017. Member of the Finance Committee from 2014 to 2016, serving as its 2015-2016 chair. Member of the House since 2002, serving on multiple committees, including the Technology and Communications Committee (2012-2014); Resolution and Impact Review Committee (2007-2008, 2010-2012); and the House Select Committee as reporter (2008-2010). Past chair of the Section of Litigation (2012-2013) and the Standing Committee on Bar Activities and Services (2009-2012). Member of the Commission on Racial and Ethnic Diversity in the Profession from 2012 to 2014. Appointed by the Missouri Supreme Court in 2015 to serve as co-chair of the Commission on Racial and Ethnic Fairness and co-chair of the Joint Task Force on the Future of the Profession. Received JD in 1978 from the University of Michigan Law School.

LYNN FONTAINE NEWSOME
DISTRICT 3
Partner with Newsome O’Donnell in Florham Park, New Jersey. Member of the ABA House of Delegates since 2006. Has served on the Standing Committee on Membership since 2015. Past member of the Advisory Committee to the Commission on Lawyer Assistance Programs. Fellow of the American Bar Foundation since 2007. President of the New Jersey State Bar Foundation. Past president of the New Jersey State Bar Association. Received JD in 1981 from Seton Hall University School of Law.
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**CHARLES “BUZZ” ENGLISH JR.**
**DISTRICT 5**

Partner with English Lucas Priest & Owsley in Bowling Green, Kentucky. Member of the ABA House of Delegates. Has served on the ABA’s Standing Committee on Bar Activities and Services, Standing Committee on the Federal Judiciary and Legal Opportunity Scholarship Fundraising Committee. President of the American Counsel Association. Past president of the Kentucky Bar Association (2009-2010). Received JD in 1983 from the University of Kentucky College of Law.

**SUSAN M. HOLDEN**
**DISTRICT 9**


**ANDREW J. DEMETRIOU**
**DISTRICT 14**


**MARK H. ALCOTT**
**DISTRICT 15**

Of counsel with Paul, Weiss, Rifkind, Wharton & Garrison in New York City. Serves as the ABA representative to the United Nations and to the U.N. Economics and Social Council. Member of the Steering Committee of the Nominating Committee and is New York’s state representative to the ABA House of Delegates. Life fellow of the American Bar Foundation. President of the New York State Bar Association from 2006 to 2007. Received JD in 1965 from Harvard Law School.
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DAVID W. CLARK
DISTRICT 16

Of counsel with Bradley Arant Boult Cummings in Jackson, Mississippi. State delegate for Mississippi to the House of Delegates from 2009 to 2017. Chair of the Standing Committee on Gun Violence from 1998 to 2001 and from 2013 to 2017, and now serves on its advisory committee. Served as the 5th Circuit representative on the Standing Committee on the Federal Judiciary from 2008 to 2011. Member of the Section of Litigation since 1987 and served as member of the section’s council from 2009 to 2012. Life fellow of the American Bar Foundation. Received JD in 1974 from the University of Michigan Law School.

REW R. GOODENOW
DISTRICT 17


H. RUSSELL FRISBY JR.
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE


STEPHEN J. WERMIEL
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

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HOWARD T. WALL
HEALTH LAW SECTION
Executive vice president and chief administrative officer, general counsel and secretary for RegionalCare Hospital Partners in Brentwood, Tennessee. Chair of the ABA Standing Committee on Medical Professional Liability and a member of the Council for the Fund for Justice and Education. Past chair of the Health Law Section from 1999 to 2000, and vice-chair of the section’s Sponsorship Committee and the ABA Relations Committee of the Policy Division. Serves as the section’s liaison to the AIDS Coordinating Committee. Member of the section’s council from 1995 to 2008. Member of the House of Delegates from 2002 to 2008. Patron fellow of the American Bar Foundation. Received JD in 1983 from Washington & Lee University.

JUDGE FRANK J. BAILEY
JUDICIAL MEMBER-AT-LARGE
Judge in the U.S. Bankruptcy Court for the District of Massachusetts, where he served as chief judge from 2010 to 2015. Also sits on the U.S. Bankruptcy Appellate Panel for the First Circuit. Past chair of the National Conference of Federal Trial Judges of the ABA Judicial Division. Serves on the division’s Standing Committee on Diversity in the American Judiciary. Received JD in 1980 from Suffolk University Law School.

MICHELE WONG KRAUSE
MINORITY MEMBER-AT-LARGE

SHEENA R. HAMILTON
YOUNG LAWYER MEMBER-AT-LARGE
Associate at Dowd Bennett in St. Louis. Fellow of the American Bar Foundation and the ABA Section of Labor and Employment Law. Former communications director for the Young Lawyers Division (2015-2017) and managing editor of TYL magazine (2013-2014). Received JD in 2010 from St. Louis University School of Law.
Setting Boundaries
ABA advocacy prompts new protections for lawyers’ electronic devices at US border

By Rhonda McMillion

As summer vacation approaches, lawyers traveling internationally with electronic devices will have greater privacy protections because of ABA advocacy. The government has revised its border search policies to include several reforms supported by the ABA to safeguard confidential client information.

Under previous Department of Homeland Security standards, officers with U.S. Customs and Border Protection and Immigration and Customs Enforcement could search and review the content of lawyers’ laptops, cellphones, tablets and other electronic devices at border crossings without any showing of reasonable suspicion.

Because these devices typically contain client information that is inherently privileged or otherwise confidential, the ABA urged the DHS to ensure that proper policies and procedures are in place during border crossings to prevent the erosion of these important legal principles.

In a May 2017 letter to DHS officials, the ABA acknowledged and expressed support for the critical role that the department, the CBP and ICE play in protecting national security. But “just as border security is fundamental to national security, so too is the principle of client confidentiality fundamental to the American legal system,” the letter stated.

REDEFINED DIRECTIVES

After a meeting of department officials, ABA leadership and ABA Governmental Affairs Office staff, the CBP issued a revised directive on border searches of electronic devices in January that adopted several key ABA-requested reforms. Under the new policy:

- Border officers must consult with CBP senior counsels before searching any electronic devices allegedly containing privileged or protected material.
- Border officers and counsels are required to ask the individual asserting the privilege for specific file names, file types, attorney and client names or other identifiers that could help the CBP separate out and protect privileged information.
- The CBP must segregate privileged materials from other information on the device and ensure that privileged materials are handled appropriately.
- And any copies of privileged materials the CBP maintains must be destroyed at the end of the review process (unless they indicate an imminent threat to homeland security or copies are needed to comply with a litigation hold or other requirement of law).

The new policy also clarifies that Customs and Border Protection officers may only search the information stored on the physical device.

They are prohibited from accessing material that is only stored remotely, such as in the cloud. In addition, while CBP officers are authorized to ask the traveler for passcodes or other means needed to access information on the electronic device, records of those passwords must be destroyed when the search is completed.

Under the new policy, a CBP officer may conduct a “basic search” with or without suspicion, but an “advanced search” (defined as connecting the device to external equipment to review, copy or analyze its contents) may only be performed if there is reasonable suspicion of unlawful activity or a national security concern.

ABA President Hilarie Bass has been getting the word out about the new directive and its benefits. “While not all of our proposals were adopted, and more clearly needs to be done, the new directive includes several new protections for privileged and confidential client information ... and is a clear improvement over the prior policy,” she wrote to law firms in the PartnerUp email newsletter, which is designed to keep law firms apprised of the ABA’s advocacy activities.

As part of the association’s continued efforts to protect the legal rights of lawyers, clients and other travelers crossing the U.S. border, the ABA Criminal Justice Section recently established a new Task Force on Border Searches of Electronic Devices.

The task force plans to increase awareness of these issues and explore possible policy solutions.

This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is the editor of ABA Washington Letter, a Governmental Affairs Office publication.
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ABA Notices

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 as 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.

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.

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CONGRATULATIONS to James A. Walker of Wichita, Kansas, for garnering the most online votes for his cartoon caption. Walker’s caption, below, was among more than 130 entries submitted in the Journal’s monthly cartoon caption-writing contest.

"He takes the art of ‘pic'-ing a jury to a whole new level.”
—James A. Walker of Wichita, Kansas

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, May 13, with “May Caption Contest” in the subject line.

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

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Abolitionist Beaten Senseless on Senate Floor

On the afternoon of May 22, 1856, Massachusetts Sen. Charles Sumner was sitting at his desk in the U.S. Senate chambers when a large, nearly apparitional figure appeared behind him. A startled Sumner turned to look when he was struck in the head with the handle of a gutta-percha walking stick.

His seat and desk bolted to the floor, Sumner was unable to right himself as the cane struck again and again—as many as 30 times before the attacker was finally persuaded to pull away from his blood-spattered victim.

As the attack ended, the assailant bent over, casually plucking up the crested gold handle that lay among the splintered remains of the cane on the Capitol floor.

Sumner's assailant was Preston Brooks, a House member from South Carolina—a Democrat with a reputation for violence. Brooks had taken offense to insults sallied against his distant cousin, Sen. Andrew Butler of South Carolina, in a five-hour speech delivered earlier in the week from the Senate floor.

Several onlookers trying to intercede were held back by Brooks' supporters. Brooks left the floor unmolested but later presented himself to authorities and agreed to pay a $300 fine.

Reaction to the attack was provincial and complicated. Despite nearly killing a defenseless man, Brooks was hailed as a hero in the South. In the North, Sumner was characterized as a martyr. The muted official response reflected Congress' inability to agree on anything when it came to slavery. A hastily convened Senate select committee concluded the obvious: Brooks did indeed "assault [Sumner] with considerable violence," but no Senate rules were available to punish him. Although the House failed to pass a resolution expelling the congressman, Brooks resigned.

Brooks returned home unrepentant. He later wrote to his brother: "Every lick went where I intended. For about the first five or six licks, he offered to make fight. But I plied him so rapidly that he did not touch me. Towards the last, he bellowed like a calf."

In the North, Sumner was not universally popular. Those who shared his view were sometimes uncomfortable with his strident rhetoric. He wasn't simply anti-slavery but a determined enemy of racial laws. For that, he was condemned by Sen. Stephen A. Douglas of Illinois as a champion for "the cause of niggerism."

Although Brooks envisioned himself as chivalrous (his need for the walking stick grew from one of two earlier duels), he saw Sumner as a race and class traitor unworthy of a conflict of equals, deserving only the kind of beating a master might deliver to an unruly slave. Sumner viewed those such as Brooks and Butler as brutish, pretentious purveyors of a culture whose sole source of existence was perpetual violence.

That cultural chasm grew deeper as the territories of Kansas and Nebraska were settled, sparking a struggle for their future as slave states or free states. Sumner's newly founded Republican Party wished to contain slavery in states where it already existed or eradicate it completely. Democrats wanted to let the new states decide for themselves.

The speech to which Brooks took offense, "The Crime Against Kansas," denounced the role Butler and Douglas had played in the compromise that led to ongoing violence between pro-slavery and anti-slavery settlers in the territory. The day before the Sumner assault, pro-slavery raiders looted the anti-slavery township of Lawrence. And three days after the caning, abolitionist John Brown led a raid that killed five pro-slavery residents of Pottawatomie Creek.

Brooks was re-elected to Congress a few months after his summer resignation. He died in January 1857 at age 37. Sumner returned to the Senate after 18 months and served until his death in 1874. The violence reached a crescendo during the Civil War, but the chasm between their cultures continues to this day.
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