STaRT HERE TO GET IT RIGHT

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

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

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

*As compared to Thomson Reuters Practical Law network. Comparison data based on information available as of June 2017.
<table>
<thead>
<tr>
<th>FEATURES</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>Opioids, Justice &amp; Mercy</td>
<td>The courts are on the front line of a lethal drug crisis.</td>
<td>By Liane Jackson</td>
</tr>
<tr>
<td>46</td>
<td>Time's Up</td>
<td>As the Me Too movement continues to shed light on sexual harassment and assault, the legal and judicial systems have been slow to react.</td>
<td>By Stephanie Francis Ward</td>
</tr>
<tr>
<td>56</td>
<td>Creating Your Own Niche</td>
<td>Building a niche law practice takes a lot of work, but the rewards can be substantial.</td>
<td>By Danielle Braff</td>
</tr>
</tbody>
</table>

The opiate crisis court in Buffalo, New York, is a triage program that links participants with treatment within hours of arrest. The goal is intervention before adjudication.

COVER: PHOTOGRAPH BY EARNIE GRAFTON
6 Letters
8 President’s Message
The ABA succeeds in key efforts to protect rights and ensure fairness in the immigration process.
9 Opening Statements
How lawsuits, leads and legwork led to the downfall of the USA Gymnastics doctor convicted of sexual abuse.
10 The new tax code overhaul throws divorce calculations into turmoil for lawyers, mediators and splitting couples.
12 10 QUESTIONS  Ben Schatz, an activist-turned-drag queen, continues his work for social change.
14 MY PATH TO LAW  Shane Correia’s chaotic childhood showed him the value of legal intervention.
15 HEARSAY  Short takes and fast facts on the law.
16 Docket
NATIONAL PULSE  A proposed Florida law resurrects the debate around the legal duty to help someone in distress.
18 NATIONAL PULSE  Texas county experiments with allowing indigent clients to choose their own lawyers.
20 SUPREME COURT REPORT  After a year on the court, observers say Justice Neil M. Gorsuch has been mostly predictable, but upcoming decisions may change that.
22 Practice
ADVCACY  It’s time to rethink the woodshedding drill and trust clients to speak freely, but carefully, when testifying.
24 ETHICS  Is there an ethical problem with attorneys doing ghostwriting for pro se clients?
26 WORDS  Learn how to define words with clarity, brevity and practicality.
28 ON WELL-BEING  Suffering can be the human consequence of lawyering.
30 Business of Law
SPECIAL EDITION: DIGITAL DANGERS  Cyber insurance is a must-have for lawyers, but the market remains unstable.
33 TECHNOLOGY  Coverage of ABA Techshow 2018, with a focus on emerging technology.
35 PRO BONO  Lawyers who donate time and expertise to nonpaying clients find their efforts lead to paid work.
56
63 Your ABA
ABA groups launch a clemency information clearinghouse for death penalty cases.
65 For lawyers, time is invaluable, so podcasts have become a way for ABA entities to both educate and entertain.
67 REPORT FROM GOVERNMENTAL AFFAIRS  ABA Day lobbying puts the focus on protecting the Legal Services Corp. and the student-loan forgiveness program.
71 Cartoon Caption Contest
See the winner from last month’s contest, and submit a caption for this month’s contest.
72 Precedents
Curt Flood, center fielder for the St. Louis Cardinals, challenges baseball’s reserve clause and loses.
EASY FOR YOUR CLIENTS, A NO-BRAINER FOR YOUR FIRM.

THE PREFERRED CHOICE
For more than a decade, LawPay has been the go-to solution for the legal industry. Our simple online payment solution helps lawyers get paid faster. LawPay lets you attach a secure payment link to your email, website, or invoices so that clients can pay with just a click. Our solution was developed specifically for law firms, so earned and unearned fees are properly separated and your IOLTA is always protected from any third-party debiting. Simply put, no online payment processor has more experience helping lawyers than LawPay.

LawPay is a registered ISO of Citizens Bank, N.A.

Contact our legal payment experts at 877-960-1621 or visit lawpay.com/aba
Letters

PIONEER IN LAW
“A Birth and Many Firsts,” April, page 12, was an excellent article on Yvonne Brathwaite Burke, although space did not really allow you to elaborate on all the many firsts that she has to her name. She is one of the all-time trailblazers for women of color in the law. I was particularly proud that, while she was serving as a member of the Board of Supervisors of the County of Los Angeles, she agreed to swear me in as a Los Angeles Superior Court judge in 2002!
Judge Kelvin D. Filer
Los Angeles

CHANGING NUANCES OF GRAMMAR
In reference to “Inclusive Legal Writing,” April, page 22: As a former young fogey educated in the 1980s, I must admit that I resisted gender-inclusive language. Gender-inclusive language seemed awkward and inelegant. But taste is a real thing—and it does change. Now it is the gender-exclusionary language that obtrudes like an inflamed digit.
Christopher Smith
Warsaw, Poland

PETS AND POLICE
Concerning “Pet Threat,” April, page 16, the argument is like that for the criminal exclusionary rule: People object to the principle of it, arguing (correctly) that there is no “fairness” in letting clearly guilty people go free just because a cop makes a mistake (intentionally or unintentionally). The exclusionary rule only protects guilty people, right? If you’re guilty and the cops illegally search you, your remedy is exclusion. But what if you are innocent and the cops illegally search you? No remedy at all, except you can sue the officer. But juries are notorious for refusing to compensate people for being the victims of illegal searches.
So, since juries won’t punish cops who violate a person’s Fourth Amendment rights in a civil lawsuit, the only way to motivate the cops to follow the Constitution is to make sure they know that evidence they seize illegally will not be usable in court. Same thing here: This is all about motivation. When departments start having to cut back on chief salaries and expense accounts because their rank-and-file cops are psychologically incapable of doing their jobs correctly—then, just maybe, they will start training them properly.
David W. Simon
San Bernardino, California

LANGUAGE, LANGUAGE
In regard to “Fighting Words,” April, page 18, gross abuse of profane language reflects badly on the person who is abusing the language, and it also will cause doors of opportunity to slam. The command of the English language and polite manners coupled with emotional control never go out of style.
Felicia Mercer
Colorado Springs, Colorado

SEPARATION OF POWERS...AND ARTICLES
I was bemused by the juxtaposition of ABA President Hilarie Bass’ very fine message, “The Balance of Power,” April page 8, and the article “DOJ Rescinds Guidance on Excessive Court Fines and Fees,” page 9. Bass’ message encourages attorneys to do whatever we can to help enhance the separation of powers and federalism, lamenting, for example, the imbalance caused when the executive branch circumvents local courts by slapping judges’ pay.
The facing article, however, asserts “U.S. Attorney General Jeff Sessions revoked Obama-era guidance warning local courts...” The slant of this article is that it was horrendous to roll back the “warning,” but perhaps the executive branch should not issue threatening warnings to local courts in the first place. Federalism and the separation of powers should be considered first.
While some may feel the attorney general’s rescission “dealt a blow to civil rights,” the rescission also landed a punch for the separation of powers and the concept of federalism.
It is not the job of the DOJ to “embarrass” state courts, contrary to the article’s contention. The attorney general’s rescission rectified an overreach, thus rebalancing the separation of powers and federalism. The positioning of the second article unnecessarily diminished the impact of the president’s message.
Ronald F. Larson
Sun City, Arizona

CORRECTIONS
“Talk Isn’t Cheap,” May, page 18, should have reported that Oklahoma Solicitor General Mithun Mansinghani represented that state and 10 others as petitioners, alongside telecommunications companies, in a dispute over prison phone rates.
“Side Hustle,” May, page 38, should have reported that Kevin Han received a delivery order from a senior associate, Nina Lacher’s Instagram receives more than 300,000 “impressions” per week, and Todd P. Graves received a job offer from a New York City firm. Graves also should have been quoted as saying: “There are some days I can work out there and be on the phone with clients in New York, and then I go outside and move cattle and then go back on the phone.”
“Legal Prey,” May, page 52, should have identified Vanessa Stine as a staff attorney at Friends of Farmworkers. Her Equal Justice Works fellowship ran from 2014 to 2016.
“New School,” April, page 36, mistakenly implies that the San Francisco Affirmative Litigation Project was recently founded. The clinic, a collaboration between Yale Law School and the San Francisco City Attorney’s Office, opened in December 2006. The article also should have reported that the state court ruling that resulted in a $1.1 billion judgment against lead-paint manufacturers occurred in 2013.
The Journal regrets the errors.
President’s Message || By Hilarie Bass

Defending the Huddled Masses
ABA succeeds in key efforts to protect rights, ensure fairness in immigration process

Immigration policy in the United States always has been contentious, but recently it has become unquestionably divisive. Protecting our borders and controlling the number of noncitizens who enter is always of concern. But so is upholding our country’s principles, specifically due process, the rule of law, and providing opportunities for people escaping oppression.

We cannot accommodate everyone who may want to emigrate to the United States, but how do we fairly and consistently decide how many and which individuals to welcome? Immigrants built this nation and are important to its future.

“Nearly all Americans have ancestors who braved the oceans—liberty-loving risk-takers in search of an ideal,” President George W. Bush said. “Immigration is not just a link to America’s past; it’s also a bridge to America’s future.”

National leaders have debated immigration policy for decades. Yet the last major legislative reform was in 1996. The American Bar Association believes it is long past the time for Congress to develop sensible and comprehensive legislation to address immigration fairly.

Relying on policy by executive orders that are dependent on court interpretations and which change from administration to administration has created uncertainty. People in the process are unable to rely upon our nation’s policies from year to year.

We witnessed such confusion in April, when the Department of Justice announced it was “pausing” for further study the Legal Orientation Program (LOP), which provides critical legal information to adults in immigration detention centers.

I testified for the ABA before the Senate Judiciary Subcommittee on Border Security and Immigration about LOP’s importance. The program, which has broad bipartisan support, serves 53,000 people a year, shortens the duration of deportation cases, and decreases detention costs. A 2012 study found that LOP costs $8 million but creates savings of $18 million a year.

The ABA quickly mobilized to focus attention on LOP and was prepared to join with other stakeholders to seek judicial relief to prevent termination of the program. Amidst rising pressure, the decision to “pause” the program was rescinded just 10 days after it was announced. The Justice Department will look at the program, and the ABA will watch closely to ensure the study is conducted fairly.

That is just the latest by the ABA on immigration issues.

When the administration tried to institute questionable travel restrictions on people from selected countries, the ABA filed amicus briefs opposing the bans.

When U.S. Immigrations and Customs Enforcement (ICE) agents raided state and federal courthouses to round up undocumented immigrants, the ABA spoke up. The House of Delegates adopted policy calling on Congress to add courthouses to the list of “sensitive locations,” such as schools, hospitals and churches, where immigration enforcement can only be taken in emergencies.

The ABA has worked with Congress and the Justice Department to help fix the immigration adjudication process, pushing for more immigration judges to handle the growing backlog of cases. We have advocated before Congress to create an Article I court for immigration adjudication, enhancing the independence and fairness of the process.

The world is experiencing the worst refugee crisis since World War II. People are desperately looking for a safe place to live and a better life. According to the 2017 Current Population Survey, immigrants and their U.S.-born children number 86 million people, 27 percent of the U.S. population.

Our principles demand we treat individuals who come to the United States respectfully and with due process. Separating children from families at the border, picking up people in the dead of night without allowing them to contact their families, or using detention as a tool to deter others from coming—these processes are not humane, not civilized and decidedly not American.

The ABA continues to promote fairness and work towards effective legislation. Being a refuge for immigrants is in our country’s DNA.

As George Washington wrote in 1783, “The bosom of America is open to receive not only the opulent and respected stranger, but the oppressed and persecuted of all nations and religions; whom we shall welcome to a participation of all our rights and privileges.” ■
The Behind-the-Scenes Case That Helped Expose Larry Nassar

A story of lawsuits, leads and old-fashioned legwork

THE SENTENCING OF DR. LARRY NASSAR for molesting young gymnasts and USA Gymnastics’ alleged complicity riveted the nation for months. More than 150 girls and women read impact statements during Nassar’s sentencing. But it was a lesser-known lawsuit and partnership between investigative journalists and lawyers that helped crack the case wide open and make it front-page news.

In 2016, Indianapolis Star reporter Marisa Kwiatkowski was working on a story about sexual abuse when she received a tip urging her to contact W. Brian Cornwell of Cornwell & Stevens in Savannah, Georgia. Cornwell, along with Jeffrey Lasky of Lasky Cooper Law in Savannah, was working on a Jane Doe sexual abuse case against former USA Gymnastics coach Bill McCabe. During discovery, the attorneys had received 54 complaints against other gymnastics coaches, which the judge had sealed.

Kwiatkowski immediately flew to Georgia, where she reviewed records in the case, and began tracking USA Gymnastics’ vast ecosystem of sexual misconduct complaints. “For our investigations,” Kwiatkowski says, “we rely on documentation and evidence, so court records can be a really important part of that process.”

The newspaper hired partners S. Derek Bauer and Ian K. Byrnside of Baker & Hostetler in Atlanta to gain full access to the sealed documents, including the 54 coaching complaints. Bauer and Byrnside regularly represent media companies in First Amendment, public records and courtroom access cases, and they filed a motion to have the records unsealed. Still, no one predicted the magnitude of what would happen next.

While awaiting a hearing on its motion, the Star published its first USA Gymnastics story, “Out of Balance,” in August 2016, revealing the organization’s policy of not reporting all sexual abuse allegations against its coaches. After the piece went live, two women contacted the newspaper and shared their experiences of abuse at the hands of team doctor Nassar. The story exploded from there. On Sept. 12, 2016, the Star published its first detailed account of the Nassar allegations.

“This case is a textbook example of how
important the media is,” says Bauer. “The Indianapolis Star never quit. That kind of commitment to investigative journalism on issues of significant public importance needs to be commended and acknowledged so our media will continue to do it.”

Bauer hopes the impact of this case demonstrates how journalism and the law can work together for the public good.

“Our job is harder on a day-to-day basis for the media,” Bauer says. “A case like this helps us re-establish the importance of an independent free press to our way of life and improve outcomes for the public’s right to know in cases that may not have quite the same public significance as the USA Gymnastics case, but are nonetheless still vital to our constitutional democracy.”

Kwiatkowski says she’s humbled by how the story turned out. “I think about the justice; about all the survivors who have trusted us with their stories.”

Cornwell’s lawsuit against USA Gymnastics ended in a confidential settlement in April. “Nassar’s just the tip of the iceberg,” he says. “If people think Nassar’s bad, they need to understand the scope of the problem with USA Gymnastics coaches.”

—CAROLINE ROTHSTEIN

“THERE’S GOING TO BE A LOT MORE LITIGATION AND A LOT MORE FIGHTING.”
—LESTER BARCLAY

IN THE OFTEN MESSY FINANCIAL negotiations that are part of divorce, one rule has always been clear across state lines for 75 years: Alimony was deductible for the payer, and the recipient paid income tax on it. Now, President Donald Trump’s tax code overhaul has thrown that relied-upon calculation into turmoil, causing confusion for matrimonial lawyers, mediators and, most important, divorcing couples trying to reach financial settlements.

Divorce lawyers say uncertainty about the new law, which takes effect Dec. 31, 2018, as part of the Tax Cuts and Jobs Act, is causing an uptick in some unhappy couples scrambling to split before the year-end deadline, while others may decide it’s better to drag their feet.

“Both lawyers and litigants are aware of the deadline and are gearing up,” says Lester Barclay, principal of the Barclay Law Group in Chicago. “There’s going to be a lot more litigation and a lot more fighting.”

The inability to deduct alimony payments will make negotiations more contentious, he says, because the higher-earning spouse will be less willing to agree to bigger payments. Previously, both sides benefited: The provider was able to reduce his or her taxable income, while the recipient, of course, gained more support.

“I’ve never seen anyone walk out of court thrilled to pay, but the deduction was a spoonful of sugar,” says Rhonda de Freitas, a clinical associate professor at Chicago-Kent College of Law.

But while high-earning spouses have reason to hustle through divorce proceedings this year, dependent spouses may have reason to drag out the process. That’s because the tax overhaul also ends the requirement that recipients pay taxes on the alimony as though it were regular income.

Proponents say the changes will be easier for the IRS to monitor. Current tax data shows that one
spouse will sometimes deduct alimony, but the money doesn't get reported as income by the recipient. The new law essentially “moves the tax burden from the payee to the payer,” Barclay says. And though this may seem to benefit the dependent spouse, the only real winner is the federal government.

Consider this: In higher-earning families, the breadwinner’s income is often taxed at 35 percent, while the dependent spouse may be in the 15 percent bracket. Under the current tax rules, the payer was incentivized to pay more alimony not just because of the deduction but because the money would be taxed at a significantly lower rate in the recipient’s possession.

“The beauty of the deduction was the ability to float some income from one side of the family balance sheet to the other without Uncle Sam getting his hands on it,” de Freitas says. When the breadwinner loses the alimony deduction, he or she may claim to be able to afford 35 percent less support.

The dependent spouse, meanwhile, won’t have to pay taxes on that money—but because he or she is in, say, the 15 percent bracket, that savings doesn’t counteract the 35 percent hit. In the end, this scenario nets out to 20 percent more alimony money going to taxes—and 20 percent less staying in the family.

According to Congress’ nonpartisan Joint Committee on Taxation, eliminating the alimony deduction will add $6.9 billion in new tax revenue over 10 years. That loss is far more perilous to poorer divorcing couples, de Freitas says. As these couples cope with the extra expenses associated with establishing two separate households, every dollar counts. The current tax structure helps ease that burden.

“My fear is the people who will be the most harmed are the spouses on the edge,” she says. “The people on the higher end of the wealth spectrum won’t really feel it, as opposed to a firefighter earning $75,000 a year, supporting an ex-wife and two kids.”

Ultimately, de Freitas adds, this squeeze will be bad for women and children. According to the U.S. Census Bureau, 98 percent of the 243,000 people who received alimony last year were female.

“I’ve never seen anyone walk out of court thrilled to pay, but the deduction was a spoonful of sugar.”

—Rhonda de Freitas

“There’s a Thin Line Between Who You Are and Who You Could Be.

Expert legal marketing to push you beyond your competition.

ScorpionLegal.com | 866.344.8852

—Kate Rockwood
Opening Statements

10 QUESTIONS

Playing Both Sides

Once torn between practicing law and the performing arts, this activist-turned-drag queen has built successful careers doing both degrees are generally people with a bunch of options. Having options is an enormous privilege. Do something intelligent with that. Do something that makes you feel like you’re privileged and delighted to do it. Just don’t become a singing drag queen, because I don’t want the competition.

Did you enter law school with your sights set on legal activism and, specifically, activism within the LGBT community?

I went to law school with no passion for the law—trust me, I had none—but with a very specific, strategic goal: I wanted to be Martin Luther Queen! At that time, being a gay activist was hardly a career path. There were only a handful of people working professionally for gay activism organizations. I figured that a Harvard Law degree would give me respectable credentials that could change the demeaning way that many people viewed the gay and lesbian community, and I would be more likely to be taken seriously by people who would have automatically dismissed me.

Did that happen?

Well, I went on to become a singing drag queen, so who knows! I seem to be doing my best to scurry down the totem pole of respectable career choices.

Seriously, though, do you feel your Harvard degree helped you along your path to professional activism?

Yes, after I graduated, I received a fellowship in public interest law from my fellow law students. Because I had been such an insufferable loudmouth, they knew I was serious. This was the same time that the AIDS crisis was just beginning to be recognized as an issue, and thanks to the support of the class of ’85, I became the first lawyer in America working full time nationally on AIDS-related impact litigation cases. The community was dying; everyone was

When Ben Schatz graduated from law school in 1985, he had a decision to make: Should he pursue a career in legal activism or follow his dream of becoming a performer?

He chose law and put it center stage: Schatz founded one of the country’s first legal nonprofits to combat AIDS-related discrimination, served as executive director of the Gay and Lesbian Medical Association and held a leadership position on the Presidential Advisory Council on HIV/AIDS during the Clinton administration.

Over time, however, his artistic side started seeping in, reawakening his love of the performing arts. The time had come to shift to that second act. In 1999, he left the world of law and public policy for good and became a full-time singing drag queen. It was a risky decision, but not a sudden one. Schatz had been performing onstage as Rachel since 1993, when he had helped form the Kinsey Sicks, a self-styled “Dragapella Beautyshop Quartet” known for blending biting, mostly political satire with a capella harmony and high camp. The name comes from renowned sex researcher Alfred Kinsey’s metric for gauging homosexuality.

Over the past two-plus decades, the group has released nine albums and two full-length films and has staged original shows such as Electile Dysfunction and Chicks with Schticks for audiences around the world. Schatz’s résumé includes a New Yorker profile, a nomination for a Drama Desk Award for Best Lyrics and a turn playing himself on an episode of The Simpsons.

You could be the spokesmodel for the concept of life after law. Do unhappy lawyers ever ask you for career advice, and if so, what do you say?

They do. And I say, “If you hate what you’re doing, stop.” This is the thing I’ve never understood. People with law
Ben Schatz: “People with law degrees are generally people with a bunch of options. Having options is an enormous privilege. Do something intelligent with that.”

scared, and I was able to come to the fight with funding. You had done some musicals in college, but did you ever seriously consider a career in show business? I was always torn between being a performer and working for social change. I hadn’t yet realized that I could combine the two in one career.

But you chose activism over show business. Even as an activist, I was very conscious of the fact that I was playing a role. I was very involved in public policy—I became a so-called expert on AIDS and insurance. And I would do up to 10 press interviews a day. I’d go to work in jeans, and I’d put on my suit and tie to do my best to sound reasonable in the face of hysteria. It was acting even then.

I have to ask: Why drag? Why did you feel it would be more effective to serve up political satire while dressed in women’s clothes? Is it like a sugarcoating for the biting humor?

The music and the comedy are more a sugarcoating than the drag. I see drag as inherently provocative. We are definitely not about creating a stunning visual image—I describe us as female impersonator impersonators. We are not trying to imitate Liza or Cher; we are onstage to challenge our audience and deliver gorgeous a cappella harmonies.

The musical parodies you’ve written have won both fans and awards. Tell me about your writing process.

We have two types of songs: originals and parody. With a parody, I’ll hear a song and a twist of the lyrics will worm its way into my brain, and I can’t turn it off until I write it down. My goal is to come as close as I can to the original lyrics and rhyme scheme, but to turn it on its head as much as I can. The process of writing an original song is entirely different. Every couple years, I think I’ve written my last song ever—I don’t have it anymore. Then I’ll put myself into some sort of self-imposed isolation for a few weeks, and I’ll come up with several new songs.

Has the Trump presidency been a boon to your creative process? Yes, but I’d rather have a different president and struggle with a lack of inspiration! I had been counting on retiring, and then Trump got elected. The Kinsey Sicks are entering our 25th year. We were formed at the darkest days of the AIDS crisis. We wanted to poke fun at those who were delighted by our decimation. I feel the same sense of foreboding with the Trump phenomenon and its pernicious and terrifying philosophy as I did back then. I wrote Things You Shouldn’t Say, the show we’re currently touring with, out of anger, frustration, fear and fury.

How have audiences been responding to the show? We get standing ovations during the show and at the end. And not just in New York and California. Some of our most meaningful performances have been in places like Whitefish, Montana, Idaho Falls and Lubbock, Texas. It’s because we’re hilarious, completely authentic and original, and we sing stunningly, if I may say so myself. People often tell us they love us, even though their politics are different. As a performer, I’m thrilled. But as a writer, I think, “Were you even listening?”

—Jenny B. Davis

Ben Schatz: “People with law degrees are generally people with a bunch of options. Having options is an enormous privilege. Do something intelligent with that.”

Opening Statements

RAISE

YOUR EXPECTATIONS FOR EXCELLENCE

MAI, SRPA and SRA Designated members of the Appraisal Institute are widely recognized as among the most qualified real property professionals practicing today.

Excellence? Appraisal Institute Designated members raise it to a whole new level.

JUNE 2018 ABA JOURNAL || 13
Opening Statements

Structure from a Chaotic Beginning

My Path to Law celebrates the diversity of the legal profession through attorneys’ first-person stories detailing their unique and inspiring trajectories. Read more #mypathtolaw stories on Twitter, where the hashtag was created by Exeter University lecturer Matthew Channon.

By Shane Correia

My path to law has been shaped by legal institutions that brought order to a chaotic upbringing. As a child, family law brought safety from domestic violence that motivated my parents’ divorce. That early ancillary primer on criminal justice provided orientation for my adolescence when witnessing the prosecution of my two siblings for murder charges, and it shielded against physical abuse due to my sexual orientation. On my entry into adulthood, legal assistance supported my escape from homelessness and journey to law school.

Growing up in the Bronx, I loved the nights when my mother, sister and I stayed in hotels. It was nice to come home from school or services at the Kingdom Hall of Jehovah’s Witnesses to find the room was clean and our beds were made. The relative luxury of quiet hotels contrasted to the nights huddled with my siblings at the top of the stairs as my father hurled plates and insults at my mother in the kitchen below.

My mother is an immigrant from Guyana, where a wife’s rights were subordinate to her husband’s, and she learned the American justice system would protect her. A divorce, the courts and police involvement removed my father’s physical presence and neutralized his threatening advances. Though my father attempted to fight for custody, the “best interest of the child standard” anchored me to my mother and sister.

Growing up, my mother encouraged a religious and academic focus. I excelled in school and preached a religious doctrine door-to-door that promised divine justice and salvation. Around the age of 11, my sister moved to Washington state, and my mother and I followed. Any chance of a smooth transition was squashed with the arrest of my sister and brother-in-law on murder charges, and my own gradual awareness that I was attracted to men.

My mother tried shielding me from the murder prosecution of my siblings. An impossible task, considering the headline-grabbing investigation and trial was being used as a case study in a prelaw class at my high school. I was not in that class, but a group of students approached me in the cafeteria: “Is it true? Did your sister kill someone?”

No one had explained the situation to me, so I was incapable of forming any response outside of shock. Forget the nuances of “innocent until proven guilty,” or the difference between an arrest and conviction.

BACKING AWAY

I began to withdraw. The line between normalcy and delinquency started to blur as I willfully avoided school and religion.

Then the letters and calls started. My poor attendance triggered a protocol known as the Becca bill. In Washington state, truancy can be a crime. Mandated participation in truancy programs and recommended sessions with a counselor forced me out of the apartment and into engaging with nonfundamentalist adults.

In essence, the legal system required I engage the worldly values and people I had been taught to shun.

A pressure began to press against the surface. I needed to say something to my mother. I forced out the words: “I’m attracted to men.”

My mother looked at me and said, “Why is it that my children become my worst fears?” Then, silence.

Our interactions became limited. I’d find food outside my bedroom door. The silence lasted for what would ultimately become a decade. In a way, her silence encouraged me to find my own voice and to use it.

I began to advocate for myself, and I moved to New York City to live with my father at the age of 14.

My father’s behavior vacillated between genial and hostile. His constant threats of physical abuse were met with my threats to involve law enforcement. Throughout our tenuous stalemate, until I turned 18, my name was no longer Shane but rather some derisive homophobic moniker. Still, the noise was preferable to silence.

I enrolled myself in a high school, where I was encouraged to apply to the Center for Court Innovation’s Youth Justice Board that exposed high school students to the justice system. This provided opportunities to meet attorneys and judges in situations where I wasn’t being represented by or appearing before them. I was inspired by their sense of purpose and loyalty to helping people they had never met. This sparked my desire to pursue a career in law.

With this new sense of purpose aligned with the YJB, I gained confidence. I accepted my sexual orientation without shame. My relationship with my father felt détente until I came home the night of my 18th birthday to find that the locks had been changed.

Later, I returned to my father’s house to claim my belongings. My
father answered the door and refused to let me in. I called the police. When they arrived, my father argued, “He can’t take any of it. I bought it all.” To which I calmly rebutted, “Those were gifts.”

My moment of self-advocacy was validated when the officers told my father, “If they were gifts, then you have to take it up in civil court. He’s free to get his stuff.”

MOVING ON

I set out on a bureaucratic scavenger hunt to gather the legal documents required to qualify for employment, shelter, college, emergency resources and financial aid.

I entered a youth shelter and endured for a month before opting to sleep on the subway. I kept myself busy with school, work and drop-in centers. After my high school graduation ceremony, a dark reality became apparent: I was homeless. As fear set in, my pride capitulated, and I admitted my situation to close friends who immediately offered a place to stay.

I tried enrolling in college but quickly learned that financial aid was dependent on my father’s income. I went to an organization where attorneys used a federal regulation to draft a dependency override letter that explained my constructive abandonment. That letter provided me with the ability to apply for financial aid through college and law school. It was an annual reminder of the impact of effective advocacy.

Eventually, my sister was exonerated, and the outcome of the experience challenged my bias toward law enforcement, as opposed to criminal justice overall. For my first legal internship, I worked at the Mayor’s Office of Criminal Justice, combining legal analysis with data to inform policy. I researched the collateral consequences of low-level marijuana arrests and demonstrated that even the act of an arrest, absent any adjudication, could have a profound impact on a defendant’s immigration, financial aid, credit and a slew of other consequences.

The broken windows model of policing operated under an assumption that deferred adjudications were harmless. However, precedent demonstrated otherwise for some of the 51,000 people annually arrested for marijuana possession in NYC. These findings resonated with my supervisors, and the city altered its arrest policy later that year.

Earlier, I experienced how the law’s intervention can provide safety and escape. Later, I learned the justice system isn’t always just, but through legal review, analysis and data we can steer it in the right direction.

Today, I reflect on how the justice system shaped me and my family and hope the progress and improvements I contribute throughout my career will provide similar securities and justice to families who need help.

Shane Correia is associate director of strategic partnerships at the Center for Court Innovation, where he helps promote new thinking about reducing crime and incarceration and strengthening public trust in justice.
BAD SAMARITAN

Proposed Florida law resurrects the debate around the legal duty to help someone in distress

By Lorelei Laird
The teenagers laughed as they watched Jamel Dunn drown. “Get out the water, you goin’ die!” yelled one of the teens, caught on video. “Ain’t nobody finna help you, you dumb bitch!” another one called. “You shouldn’t have got in there!”

They were right on both counts. The body of Dunn, 31, was found last July at the edge of a pond in Cocoa, Florida. The unidentified kids didn’t intervene directly or call for help, although they had a smartphone. Instead, they made fun of Dunn as he died, then went home and put the video on social media, where it eventually got at least 20,000 comments on Facebook.

The video came to the attention of police after Dunn’s body was found and the teens were identified. But originally authorities said the video wasn’t evidence of a crime—because it’s not illegal in Florida to stand by and let someone die.

After a public outcry, Cocoa police Chief Mike Cantaloupe suggested charging the teens with misde-meanor failure to report a death, a public health code violation. A spokesman for the local state attorney’s office says the office is still considering whether that law applies.

But Florida Sen. Debbie Mayfield, whose district begins just south of Cocoa, would like something stronger. In October, she introduced a bill that would make it a misdemeanor to fail to provide reasonable assistance to an endangered person.

“If it passes, Florida would be in a distinct minority of states that impose a duty to rescue people in distress. As law students quickly learn, the rule in the United States is you have no duty to rescue a stranger—and legal scholars are divided on whether that’s a good thing.

Supporters say a “bad Samaritan law” might save lives and penalize behavior that many find repugnant. Opponents say it would be difficult to enforce and have unintended consequences, including putting would-be rescuers in danger.

“To me it’s a basic human responsibility to save somebody’s life, especially when it takes such minimal behavior,” he says. “I felt that the main purpose of the bill would have been to make it illegal not to, so that people knew this was their responsibility.”

CULTURE QUESTIONS

Some critics of Kavanagh’s bill said passing a law as a statement was silly, but the idea is not uncommon. Like laws that limit where someone may smoke or increase penalties for drunken driving, the argument goes, a law can communicate society’s disapproval of failure to rescue.

“It has aspirational value,” says Ken Levy, a law professor at Louisiana State University whose background includes a PhD in philosophy. “The government is ... putting its stamp on what is really a moral obligation.”

Levy wrote a paper in 2010 for the Georgia Law Review that argued for mild punishment of bad Samaritans such as the Florida teens. He would prefer a harsher penalty because he thinks allowing someone to die is not very far from killing the person. But he also thinks low penalties are the only practical way to get a bad Samaritan law passed because American culture has a strong libertarian streak that might reject any such measure.

Levy is less supportive of the part of Mayfield’s bill that prohibits putting a video on social media. Although he thinks publishing the Florida video was “callous and disgusting,” the provision could violate the First Amendment and discourage people from providing evidence of crimes.

“It’s not the capturing it on video; it’s the passively standing by and not helping,” he says. “If they’re capturing a crime being committed, we want that.”

Hyman of Georgetown Law agrees that the idea probably has constitutional problems and says he’s not sure the provision does anything to encourage attempts to help people in distress—presumably the goal of the bill. “My focus has always been on the frequency of rescue vs. nonrescue, and it’s hard for me to
Defendant’s Choice
Texas county experiments with allowing indigent clients to choose their own lawyers
By Lorelei Laird

In early 2015, attorney Gina Jones became too popular for her own good. As a private criminal defense lawyer, Jones might normally welcome new business. But on Feb. 2, 2015, her home jurisdiction of Comal County, Texas, started to experiment with how it handles indigent defense. Rather than appointing counsel according to its old “wheel” system—in which the next lawyer on the list is appointed—the county gave clients a choice of any court-approved lawyer. Within six weeks, dozens of them chose Jones. In the first few weeks, she says, her office was receiving two or three appointments every day. Project organizers say it’s unclear why she was, as she put it, the “flavor of the month,” although courtroom successes and positive reputation might have played a role. Jones was soon overwhelmed with work—and because of the low pay for court-appointed cases, she also saw a substantial drop in income. Eventually, she had to take herself off the felony appointments list. “I’m doing this because I like to fight for people that can’t fight for themselves,” says Jones of the Canyon Lake, Texas, office of Jones Sullivan. “But I can’t help everybody. It’s just impossible.”

If there were some kinks to work out in Comal County, a fast-growing area between San Antonio and Austin, that could be because it was the first jurisdiction anywhere in the United States to provide defendants this choice. The Client Choice program in Comal County was organized by the Texas Indigent Defense Commission, a state agency dedicated to improving such defense without driving up costs. A year of data showed that it worked—clients had better outcomes and felt more listened to. The county liked the system enough that it still uses it today.

“It was a successful proof of concept,” says Edwin Colfax, grant program manager at the commission. “We didn’t identify any … pragmatic obstacles to implementing it, and we didn’t observe any harms.”

REJECTION OF A RELATIONSHIP
Giving indigent clients a choice of lawyers is standard practice in Britain, but it’s nearly unheard of in the United States. Courts here have rejected attempts to make client choice a right in indigent defense. In 1983, the U.S. Supreme Court held in Morris v. Slappy that indigent defendants don’t get a choice because they’re not entitled to a “meaningful relationship” with appointed counsel. In the same year, the 7th U.S. Circuit Court of Appeals at Chicago anticipated Jones’ problem, holding that clients would “paralyze the system by all flocking to one lawyer.”

Nonetheless, the concept was backed in a 1993 law review article, “Rethinking Indigent Defense,” by law professors Stephen Schulhofer of New York University and David Friedman of Santa Clara University. They argued that client choice could remove some perverse incentives in existing indigent defense systems. It might also improve the relationship between attorneys and clients, they suggested.

In 2010, the Cato Institute published “Reforming Indigent Defense,” based on the earlier article, which is how it came to the attention of James Bethke, former executive director of the Texas commission. He decided to test its theory, enlisting help from Colfax as well as Norman Lefstein, a professor at Indiana University’s Robert H. McKinney School of Law.
and a longtime adviser to the ABA’s Standing Committee on Legal Aid and Indigent Defendants. They chose Comal County because it was big enough to provide meaningful data—but not so big that it would be hard to get local stakeholders on board.

Right away, the program had to be modified because Texas law requires that judges appoint indigent defense counsel. That meant organizers couldn’t simply hand out vouchers as the 2010 paper envisioned. Instead, they decided to let defendants choose any lawyer Comal County already had approved for indigent defense work and struck an informal deal with the county’s six judges to appoint the defendants’ choices.

**BINDERS FULL OF LAWYERS**

Another practical problem was the time required for making a choice. Originally, the plan was to give people being held in jail up to 36 hours to choose a lawyer, using a binder full of lawyer biographies. But the courts were concerned about keeping track of everyone’s decisions, and jailers were worried that the binder would become a weapon. In the end, incarcerated defendants got 15 to 30 minutes with the binder before they had to choose.

Of course, there was the problem Jones encountered: Defendants tended to choose the same lawyers over and over again if arrested multiple times.

It wasn’t just her, according to the Justice Management Institute, a nonprofit in Arlington, Virginia, that was brought on to gather data and report on the project. Three other lawyers also were disproportionately popular early on—and while assignments evened out over time, three to five lawyers continued to get about one-third of the cases.

The JMI’s 2017 report said it wasn’t clear why but said some lawyers interviewed thought the defendants were choosing counsel who’d had recent high-profile successes or responding to good word of mouth.

Colfax of the Texas Indigent Defense Commission notes that the busiest lawyers took themselves off the list when necessary, showing that the system worked as intended.

Lefstein of Indiana University suggests that—also as intended—client choice might have improved the quality of representation.

“The lawyers who had been identified to me as very good lawyers, or with whom I had been very impressed, they were precisely the lawyers who got all the cases at the very beginning,” he says.

**REINVENTING THE WHEEL**

The Justice Management Institute report sought to quantify such impressions, using data generated during the first year of client choice. One of the most dramatic findings: Clients seemed to like choosing their own attorneys. Seventy-two percent elected to do that rather than have the court appoint the next lawyer on the wheel, which remained an option. That’s a success in itself, Lefstein says.

The JMI also found some indications that client choice improved case outcomes. Those who chose their own lawyers generally had their first meeting with that lawyer more quickly. Client choice cases were more likely to be resolved by a guilty plea to lesser charges (as opposed to pleading guilty to the original charges), and they were more likely than nonchoice cases to go to community supervision instead of jail.

Unfortunately, the study couldn’t reach firm conclusions in a lot of other areas, including whether client choice improved clients’ sense of fairness, case transparency and lawyer effort. Although the project was not expected to bring down costs—a perpetual problem in indigent defense—cost data was confounded by an expensive, high-profile felony case during the project year.

The JMI also surveyed clients, lawyers and judges about their impressions of representation under both systems. Most lawyers said they didn’t change their practices under client choice. But more often than defendants who used court-appointed counsel, “choice” clients reported feeling like the lawyer was concerned for them, worked hard for them and was honest. Most of Comal County’s judges also felt the quality of representation had improved. One noted that lawyers submitted more requests for funds to hire an investigator, suggesting they were being more thorough.

Jones, for her part, likes some aspects of the program. For example, if a private lawyer is working with someone who runs out of money, the courts are open to dismissing that lawyer and then appointing them again through the indigent defense system. “It kind of kept the docket flowing because they weren’t starting over with a new court-appointed attorney,” she says.

On the other hand, there was that deluge of new clients. “I wouldn’t say [it’s a] flaw, but it’s definitely something that needs to be taken into consideration before it’s talked about in other markets,” Jones says.

Marea Beeman, director of research initiatives and defender legal services at the National Legal Aid & Defender Association, says her organization has no official policy on the idea of client choice. But she’s a supporter, as long as the system is subject to the same controls the association wants on all indigent defense, such as adequate resources and training.

“If [people] can pick their doctors on Medicare, Medicaid, that type of system, I don’t really see what is the difference,” she says.

Colfax and Lefstein haven’t heard from anyone who wants to try it elsewhere, but they’d be happy to help. Lefstein says more data might be crucial. “It’s going to take a couple of more examples before you’re going to convince lawyers in America that there is merit in this,” he says.
Assessing Gorsuch

After a year on the court, observers say the newest justice has been mostly predictable, but upcoming decisions will paint a fuller picture

By Mark Walsh

As the U.S. Supreme Court enters June—the traditional month for wrapping up its term—legal observers have much to anticipate. There are potential landmark decisions coming on a range of controversial issues. Speculation continues about a potential vacancy on the bench due to retirement. And many are looking forward to getting a fuller picture of where the newest member of the court, Justice Neil M. Gorsuch, stands at the end of his first full term.

Of course, that doesn’t mean observers have been withholding their assessments of President Donald J. Trump’s first Supreme Court nominee—both at the time of Gorsuch’s anniversary on April 10 and in the weeks that followed. Conservatives have generally been pleased with what they have seen, while liberals say their concerns have been confirmed.

“What you’re seeing in terms of Justice Gorsuch’s work product is pretty much what the president said he was seeking for the court, and pretty much what Neil Gorsuch represented himself to be in his confirmation hearing,” says Leonard Leo, executive vice president of the Federalist Society and an outside adviser to the White House on potential Supreme Court nominations.

“This is an individual who has honed himself to the text of the Constitution,” adds Leo, who helped shepherd Gorsuch through his Senate confirmation process in 2017. “He has been quite forward-leaning in bringing up originalism and the text of the Constitution.”

Kristen Clarke, president and executive director of the National Lawyers’ Committee for Civil Rights Under Law, an advocacy group that raised concerns about the nomination, notes that while some may say the verdict is still out, there’s much evidence over the past year suggesting that Gorsuch is deeply aligned with Justice Clarence Thomas, considered by many measures and observers to be the court’s most conservative member.

Clarke says that despite some recent instances of Gorsuch voting differently from his colleague, “at the end of the day, I think that the verdict is clear: This is a judge who is very much of the Justice Thomas ilk.”

A LECTURING TONE?

Gorsuch participated in 13 cases during the court’s last month of arguments in April 2017. In those, and in the new term that began last October, he attracted attention for several reasons: his frequency of writing, including numerous separate dissents; a perception that he was, at times, addressing his new colleagues in a lecturing tone; and for a writing style that some observers say overwrought.

In Gorsuch’s very first dissent, there was an example of the lecturing tone. In an arcane case involving the proper forum for review in an employment discrimination case, he suggested that courts should confine themselves to the text of the statute at issue, even when it presents a difficult result.

“If a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation,” Gorsuch wrote for himself and Thomas in the dissent to the 7-2 decision in Perry v. Merit Systems Protection Board.

Meanwhile, Gorsuch’s tendency to overexplain things in opinions (such as when he was on the 10th U.S. Circuit Court of Appeals at Denver and clumsily explicated his use in one opinion of a Groucho Marx line about elephants wearing pajamas) drew the spotlight. Daniel Epps, co-host of the popular First Mondays podcast, came up with the Twitter hashtag #GorsuchStyle, and participants sought to rewrite famous Supreme Court passages the way the new justice might.

By the time of his anniversary as a justice, Gorsuch’s performance on the bench and his writing continued to please his conservative supporters. But on April 17, a week after that milestone, a Gorsuch concurrence elicited a more mixed reaction.

Gorsuch joined the court’s four liberal justices in a judgment that struck down as unconstitutionally vague part of a federal law that has been used to deport non-U.S. citizens who commit felonies.

Gorsuch joined parts of the majority opinion by Justice Elena Kagan in Sessions v. Dimaya, which was also joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer and Sonia Sotomayor.

The case involved a native of the Philippines and
lawful permanent U.S. resident whose convictions for residential burglary made him eligible for deportation under a catchall provision of a federal immigration statute. Kagan wrote for the court that the section of the Immigration and Nationality Act at issue was so “fuzzy” about which type of aggravated felony requires deportation as to violate the due process clause.

In Gorsuch’s opinion concurring in part and concurring in the judgment, he wrote, “Vague laws invite arbitrary power.”

Before the American Revolution, he continued, the crime of treason in English law was so widely construed that “the mere expression of disfavored opinions could invite transportation or death,” and the founders of this country cited the crown’s abuse of ‘pretended’ crimes like this as one of their reasons for revolution.”

“Today’s vague laws may not be as invidious,” the justice wrote, “but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.”

Some on the right were alarmed by Gorsuch’s first alignment with the court’s liberals against its conservatives.

“Has Gorsuch ‘Gone Wobbly’ Already?” wrote Austin, Texas, lawyer and legal blogger Mark Pulliam. He further worried that answer may be yes, with Gorsuch succeeding Justice Anthony M. Kennedy as “the court’s unpredictable flip-flopper.”

HITTING HIS STRIDE

But most conservatives saw Gorsuch’s vote and concurrence in Dimaya as a principled stand that followed the example set by Justice Antonin Scalia in a 2015 decision, Johnson v. United States, which struck down a vague definition of violent felony in the Armed Career Criminal Act.

Adam White, a research fellow at the Hoover Institution at Stanford University and executive director of the Center for the Study of the Administrative State at George Mason University’s Antonin Scalia Law School, wrote that “no one familiar with Gorsuch’s record should be surprised to see him lean toward demanding greater specificity from Congress.”

Those who wonder whether Gorsuch has “gone wobbly” are asking “the fundamentally wrong question,” White adds in an interview. The justice’s opinions so far, he says, “reflect the values he espoused as an appeals court judge.”

Legal experts on the left also commended Gorsuch’s Dimaya opinion.

“We should be cautious about overreading or misreading Gorsuch’s vote as somehow being support for immigrants in general,” says Elizabeth B. Wydra, president of the Constitutional Accountability Center, a progressive legal organization in Washington, D.C.

“But ultimately, he had the better of the argument about the law in that case. When Gorsuch is right, even his critics like me should say he’s right.”
Rethinking Woodshedding
Trust clients and let them speak freely, but carefully, when testifying
By Edna Selan Epstein

We all know, and most of us use, the woodshedding drill when preparing a witness to testify:

“Don’t volunteer.”
“Don’t guess.”
“If you know the answer, give it. If you don’t, say so.”
“If you can answer the question with a yes or no, do so.”
“Don’t elaborate.”
“I’ll fix any problems that might arise from your testimony on a redirect examination.”

Who among you has not used this time-honored standard technique in preparing a witness to testify during a deposition or at trial? Who among you even remembers when and by whom you were taught what can best be described as the standard woodshedding drill? In the standard drill, the unvoiced assumption is that but for the “magician lawyer’s” inestimable assistance, who knows what errors the “idiot client” would be capable of, thereby dooming the case?

There is another possible approach to witness woodshedding. It is based on the premise that the client can be trusted not to be an idiot, and that it is best to present the client’s affirmative case even during the course of a client’s deposition—and even during questioning by the opposing lawyer. So says Kenneth R. Berman in Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success, an ABA publication.

Berman argues that, most of the time, the tacit assumptions on which the standard woodshedding drill are predicated do not serve to advance the client’s case. Instead, all too often, they act to the client’s detriment and are not readily reparable on questioning by the opposing lawyer. So says Kenneth R. Berman in Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success, an ABA publication.

Berman argues that, most of the time, the tacit assumptions on which the standard woodshedding drill are predicated do not serve to advance the client’s case. Instead, all too often, they act to the client’s detriment and are not readily reparable on questioning by the opposing lawyer. So says Kenneth R. Berman in Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success, an ABA publication.

There are four simple rules you can give to any witness about how best to answer questions from opposing counsel. I derived these by watching how superlatively a CEO of a Fortune 500 company answered questions I put to him during his deposition. Thereafter, I threw away the multipage do’s and don’ts that so many large firms use automatically. I concluded that witnesses found all those multiple admonitions too numerous to remember. If anything, their very multiplicity and complexity made witnesses more anxious, often leading to stupider answers.

So here are my four simple rules:

• Listen to the question.
• Consider your answer before you speak.
• Give your answer—succinctly or broadly—depending on the strategic decision we made, as explained to you by your lawyer.
• Stop or continue depending on the underlying strategic decision about how expansive we have decided your answers should be.

Aw, shucks, you doubtlessly are thinking: That’s way too easy and too simple. Believe it or not, it is hardly as easy to follow those four simple rules as they appear on paper. And you—and far more significantly the witness—will discover the difficulties in any “rehearsal” of the witness’s testimony. Yet I assure you that these four rules are so much easier for the witness to remember, and therefore follow, than the 30-plus pages of directions that law firms give witnesses to read before preparation begins and expect them to follow.

How did the Fortune 500 CEO teach me this simple yet all-encompassing approach? For starters, he actually waited about 15 full seconds before answering my very first question: “Please state for the record your full name.” And thereafter, as my questions became more complex, he never deviated from the measured approach encompassed by the four
simple rules. What he conveyed thereby was a consummate ease and careful thought before answering. He clearly demonstrated his unwillingness to be browbeaten into saying anything he did not intend to say and whose ramifications he had not thoroughly thought out.

The tactical advantage of those four simple rules is that any witness with a modicum of intellectual competence can’t forget them. Even a child can follow them. And even a sophisticated and frequent expert witness can make good use of them. Try them during your next witness preparation. The four rules make it easier to point out: “You didn’t really stop and think what your answer would be before you gave it, did you?”

GOING FURTHER

The four points also are susceptible to considerable embroidery, if doing so makes you more comfortable. For instance:

• **Listen to the question** also means be sure you have understood it. You are not obliged to, and indeed you must not, answer any question you are not sure you have understood. There is nothing wrong with saying you have not understood the question or with asking the lawyer to clarify what they mean. It is very dangerous to our case if you and the opposing lawyer become ships passing in the night. It also means that you should not answer poorly worded compound questions. One question at a time.

• **Consider your answer before you speak** means that very many people tend to engage their mouths before their minds are in gear. Do not do that. The lawyer can and will wait while you consider your answer. Indeed, the fact that you are doing so, and are demonstrating that you are doing so, will garner the lawyer’s respect. That means that this is neither an intelligence test nor a memory quiz. If you do not know or don’t remember the answer, do not guess. If you genuinely don’t remember, say so; don’t give some answer that you think is probably true. You’re not there to be accommodating. You’re there to give your testimony fully, completely and truthfully. If your memory is jogged by our preparation, that is good. If your memory is jogged during your testimony by something or some document you are shown, well and good—but remember to consider your answer before you give it. Never just blurt out something without considering what it will sound like to the listener.

• **Give the answer you have considered as clearly and unambiguously as possible.** Don’t engage your mouth before you have engaged your mind. Don’t think while you are speaking. Think first, and then speak.

• **Once you have given your answer, stop.** Do not ramble or free-associate. If you believe the question unfairly states some proposition, you are not obliged to answer yes or no without giving the explanation that you believe makes your answer truthful, fair and complete.

You may think these four rules are far too simple to be of any use or value. Nonetheless, try them. You’ll find that they are deeply reassuring even for the most sophisticated of witnesses. The witness’s reaction is likely to be: “I can do this!”

Once I had a trial judge for a client in a divorce matter. You would think that someone who had years of experience in hearing witnesses in contested hearings daily would take offense at such simplicity. Wrong. Emotions wreak havoc with what one does or should know intellectually. After the ordeal was over, the judge admitted that having those four simple rules, expounded and embroidered and practiced beforehand, helped immeasurably in getting through the ordeal.

Edna Selan Epstein is retired from the active daily practice of law, having established her own firm in 1989 and handled a variety of litigated matters. Epstein has served on the book publishing board of the ABA Section of Litigation and on the editorial board of the section’s journal.
Ghostwriting Controversy

Is there an ethical problem with attorneys drafting for pro se clients?

By David L. Hudson Jr.

Thomas Ice and his team of attorneys often help clients write pleadings and complete other tasks. Ice thinks his business model improves access to justice for those who otherwise cannot afford the often-exorbitant hourly fees of the legal profession.

“We don’t see writing as an ethical problem,” says Ice, a Florida lawyer based in Palm Beach County who founded the virtual firm Ice Legal. “We see it as helping the access-to-justice problem. Not only is everything we are doing ethical but also we are doing something in providing unbundled legal services that is recommended by all the think tanks to solve the access-to-justice problem.”

Ice came up with his business model after spinning his wheels during court hearings on foreclosure cases in which he was required to sit for hours while the judge handled other hearings.

“We noted that some judges were especially abusive in foreclosure cases with regard to attorney time,” he says. “Some judges would call you down for a hearing every month, and you might waste hours just sitting there.”

From that experience, Ice Legal was created to assist clients with their own advocacy. “We coach clients from the sidelines; we draft motions; we get them filed for clients; and we prepare clients for their hearings,” Ice says. “We do all these things for as little as $100 a month. We feel we are on the cutting edge of access to justice.”

His efforts have irritated a few judges and inspired the wrath of some opposing lawyers.

ETHICS RULES RUNDOWN

Ice’s activities fall within the ambit of Rule 4-1.2 of the Florida Bar’s Rules of Professional Conduct, titled “Objectives and Scope of Representation.” The rule says lawyers may provide limited representation, as long as the issue is worked out clearly with the client.

However, the comments to the rule say the lawyer and client can work out an arrangement in which the lawyer provides advice and writes documents but doesn’t have to sign them. The comment provides: “In addition, a lawyer and client may agree that the representation will be limited to providing assistance out of court, including providing advice on the operation of the court system and drafting pleadings and responses. If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document.”

The comment further says the lawyer must write the following on the document: “Prepared with the assistance of counsel”—to avoid misleading the court into thinking the client has not received any assistance from an attorney.

ABA Formal Opinion 07-446 also approves of lawyers ghostwriting for clients, viewing it as a “form of ‘unbundling’ of legal services.” The ABA opinion reasons that pro se clients receiving ghostwriting services should not be required to disclose that fact: “Because there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.”

“We conclude that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer’s conduct,” the 2007 ABA opinion says.

Tamara M. Kurtzman, an attorney in Beverly Hills who has written about ethical issues related to ghostwriting, says there is no consensus on how to deal with it.

“The lack of a clear and consistent position by courts and bar associations is one of the substantial challenges facing the profession on this issue,” Kurtzman says. “For example, bar associations have typically taken a more favorable view of ghostwriting than have the courts themselves. Even among courts there are differing viewpoints, with federal courts generally viewing ghostwriting less favorably than state courts. Likewise, different states have adopted different views on this issue.”

Some states require no disclosure on the part of attorney ghostwriters assisting pro se litigants. Some states mandate disclosure, while other states sometimes require such disclosure. For example, a 2006 ethics opinion from Nevada provides that “ghost-lawyering” is unethical unless the lawyer discloses to the court their identity and assistance to the pro se client.

A 2008 North Carolina ethics opinion also follows the approach of the ABA ethics opinion and does not require attorneys to disclose their identity or assistance to the
pro se client. The North Carolina opinion stresses the importance of attorneys providing assistance to those who cannot afford legal representation.

“Ghostwriting is a form of limited scope representation, and court systems differ from state to state,” says Dennis A. Rendleman, lead senior ethics counsel at the ABA’s Center for Professional Responsibility. “It can also depend on the matter—family law courts are going to be more used to seeing ghostwriting than a civil trial court that deals with larger disputes.”

Rendleman says some judges find it challenging to deal with pro se clients, and limited scope representation can exacerbate the issue. “There’s a duality in that frequently unrepresented persons don’t understand the legal system and can’t respond to questions about matters in a ghostwritten document, and may not even understand what’s in their own document,” he says.

But the growing trend of unbundled legal services means courts will be dealing with more clients turning to limited scope representation, including ghostwriting.

**BACKLASH FOR EXTRA SERVICES**

Ice Legal has faced heat from judges and opposing counsel for its ghostwriting services.

“Apparently, some judges believe that our clients are getting an extra advantage because they not only receive our help but also they receive the benefit of the doubt from the judges because they are pro se litigants,” he says.

For example, in one case involving an attempted foreclosure regarding an alleged late payment of home association fees, Ice’s client got sanctioned to pay the other side’s attorney fees of $350 for an hour of court time.

“The judge mistook the ethically required notice on the document we wrote for the client as an indication that we were attorneys of record and needed to be present,” he says.

His client had to attend a second hearing, and his firm had to prepare a motion to vacate those sanctions, which are still pending. The client in that case, Jeff Haym, appreciates the services that Ice provides.

“I’m using Thomas’ services to help me not make a rookie mistake,” he says. “It gives me a chance to at least get my day in court and my fair shake from the legal system.

“The whole situation here is almost hard to believe. One day, I got a knock on the door from a process server saying that I am being sued for foreclosure for $18,000. There were no dates for late payments. I made the motion to dismiss and the judge turned that down.”

The bottom line for Haym is that ghostwriting services help even the playing field. “I’m a little guy, and having the Ice firm helps me have a better chance at not getting bullied,” he says.

The Haym case is only one example of Ice inspiring consternation in court. “It is not an isolated incident,” Ice says. “We have situations where other attorneys refuse to deal with our clients directly. In fact, most problems come from other attorneys, not judges.”

Ice doesn’t plan to stop ghostwriting for clients. “We are still going to do our same business model; we won’t be abandoning that anytime soon,” he says. “We need to educate the judges and educate opposing counsel in order to make this business model work.”

---

**FEDERAL COURTS GENERALLY [ARE] VIEWING GHOSTWRITING LESS FAVORABLY THAN STATE COURTS.**

—TAMARA KURTZMAN
Every Lawyer a Lexicographer

Defining words with clarity, brevity and practicality

By Bryan A. Garner

I’m a lexicographer by trade: a writer of dictionaries—or, as Samuel Johnson added to his 1755 definition, “a harmless drudge.”

But then so are you if you prepare legal instruments. Lawyers are constantly creating definitions, seemingly to a greater extent as time goes by. These definitions appear mostly in transactional practice (contracts, wills, etc.) but also in legislative and regulatory work (statutes and rules)—and even in briefs.

Over the past quarter century, I’ve hired lawyer-staffers to help me in my work on Black’s Law Dictionary. The test I formerly used was to ask interviewees to define the word hotel—on the spot, with just a pencil and a legal pad. It’s a pretty good test.

In fact, I encourage you to take that test now. Before reading to the end of this column, try writing a definition for the word hotel. Later, you can compare your efforts against what I’d consider an acceptable definition. Mind you, there’s no client asking for a particular definition slanting things one way or another. You’re just trying to define the common meaning of hotel. Have at it.

The Utah Supreme Court once tried to define hotel, and its definition became enshrined in the fifth and sixth editions of Black’s Law Dictionary (1979, 1990). It was a pretty poor definition, missing a crucial element and containing a grammatical bobble. So when I became editor-in-chief of Black’s in the mid-1990s, I removed it—partly because it’s not a legal term anyway.

True, there has been litigation about hotels, but there has also been litigation about nails, screws, washers and just about everything under the sun. If those terms go into a law dictionary, then everything goes in. For lexicographers (like you and me), the choice of coverage in a glossary or dictionary is known as lemmatization. Which words get in?

I trust you’ve now defined the word hotel to the best of your ability. Excellent.

‘ABSORDLY ENCYCLOPEDIC’

The word hotel has a history with me as a lexicographer. In July 1979, while studying at Oxford University, I attended a talk by Robert W. Burchfiel, editor-in-chief of A Supplement to the Oxford English Dictionary. He was the most revered lexicographer on earth, and he made the word hotel the centerpiece of his talk by contrasting how American and English dictionaries treat the term.

Burchfiel was proud of the definition in the Oxford English Dictionary: “a house for the entertainment of strangers and travelers, an inn; esp., one that is, or claims to be, of a superior kind.” That had first appeared in print about 1901. Burchfiel conceded that house wasn’t quite right in the late 20th century, but then it wasn’t really quite right when it was written: There were many hotels that were large commercial structures even in the late 19th century.

But Burchfiel argued that at least that definition is a definition, not an encyclopedia entry. To a lexicographer, encyclopedic information goes beyond the core meaning of the term being defined, and it’s generally viewed by British lexicographers as extraneous.

Burchfield criticized American lexicographers as absurdly encyclopedic in their approach, and he cited a definition of hotel in Webster’s Third New International Dictionary of the English Language (1961)—but still the definitive Merriam-Webster unabridged dictionary. Here goes; stay with it through the end: “a building of many rooms chiefly for overnight accommodation of transients and several floors served by elevators, usu. with a large open street-level lobby containing easy chairs, with a variety of compartments for eating, drinking, dancing, exhibitions, and group meetings (as of salesmen or convention attendants), with shops having both inside and street-side entrances and offering for sale items (as clothes, gifts, candy, theater tickets, travel tickets) of particular interest to a traveler, or providing personal services (as hair-dressing, shoe shining), and with telephone booths, writing tables, and washrooms freely available.”

As you might imagine, hearing Burchfiel read this definition, slowly, in his inimitable Oxonian/New Zealander accent, provoked a good deal of laughter from the students present at his lecture. The definition is surely wrong in requiring “several floors served by elevators,” but at least much of the silly specifics (shoe shines, hair-dressing, etc.) follows the abbreviation “usu.” (usually). One element missing from both of those definitions is that lodging at a hotel typically involves a charge—it’s a commercial affair.

A HOTEL EVOLUTION

The definitions in Black’s Law Dictionary show an interesting evolution. In 1891, Henry Campbell Black’s entry read this way: “An inn; a public house or tavern; a house for entertaining strangers or travelers.” That’s about as good as the definition in the OED, even though we no longer equate hotels with pubs and taverns.

In 1910, Black kept that entry but expanded the discussion, saying “there is no difference whatever between the terms, hotel, inn, and tavern” unless a state-specific statute might say otherwise. He went on to say that a
hotel is different from a boarding house, which keeps permanent boarders. And it is different from a lodging house because the furnishing of food is a requisite for a hotel. (That’s surely wrong to modern readers.) And it’s different from a restaurant or eating-house, neither of which must furnish lodging. (That’s surely right.)

The entry stayed the same in the 1933 third edition—the first edition prepared after Black’s death.

The fourth edition (1951) became a little extravagant: “a house which is held out to well-behaved members of the traveling public, who are willing to pay reasonable rates for accommodations, as a place where they will be received and entertained as guests for compensation, and will be furnished with food, drink, and lodging, and everything which they have occasion for while on their way.” Really? They will be furnished with “everything which they have occasion for while on their way”? In support of that definition, two cases are cited—one from Missouri and one from New York.

While drafting this column in a Miami hotel, I had the opportunity to test the definition. I asked the bellhop for the first through sixth editions of Black’s Law Dictionary. He sent me to the concierge, who politely demurred while acting as if I must be joking. When I suggested that the place must not be a hotel because they couldn’t supply my every need, the employees at the front desk waved me off with a frown.

OK, that didn’t happen, but it just might have if I’d been so silly.

CHANGEABILITY AND CHALLENGE

The fifth (1979) and sixth (1990) editions of Black’s Law Dictionary were more practical. They eliminated the requirement of well-behaved guests, suggesting that transients must be received no matter how ill-behaved (surely wrong): “A ‘hotel’ is a building held out to the public as a place where all transient persons who come will be received and entertained [!] as guests for compensation and it opens its facilities to the public as a whole rather than limited accessibility to a well-defined private group.” A Utah opinion supports that definition. But must all hotel guests be “transient persons” (no local residents)? And must all transient persons be received and entertained?

In the sixth edition, the first three words were deleted (so the definition begins with A building), making the latter part of the definition (beginning with it) an ungrammatical shift. A small matter, you might think.

All this shows both the changeability of dictionary definitions and the tremendous challenge of writing good ones. Merely “borrowing” definitions from judicial opinions is a risky business at best.

Have you noticed something? All the definitions so far define hotel as if it’s a building or house—a physical structure. None defines it as a business. So how could you explain a sentence such as: “The hotel was found to be liable, not the guest”? Surely there are two meanings for the word. It can be a structure <I’m in the hotel> or a business <employees of the hotel>.

Mind you, I’ve cut hotel from the four unabridged editions of Black’s Law Dictionary for which I’ve served as editor-in-chief. But if I were to include an entry, here’s how the definition would read (test your attempt against this): “1. A business that provides overnight lodging and usu. meals and other services for the public, esp. travelers. 2. The building in which such a business operates.”

Next month: lexicography in legal drafting.
A Distressing Business
Suffering can be the human consequence of lawyering

By Jeena Cho

Many lawyers practice in the suffering business. Perhaps they should've taught us this in law school. Day One would've been a good place.

As a bankruptcy lawyer, I see a lot of human suffering. Needless to say, no one ever comes to see a bankruptcy lawyer with happy news. Often, people end up in my office because of a death, illness, divorce, loss of job or some other unexpected life event that overwhelmed them financially.

What they also should've taught us in law school is that being in the presence of someone suffering affects you. Often, attorneys mistake this effect as weakness, ineffective lawyering, or as a sign that they are somehow flawed as an attorney.

RECOGNIZE VICARIOUS TRAUMA

I wish I had known that none of these assumptions are true, and that the distress lawyers experience when faced with a client who is suffering simply makes us human. There’s a diagnosis for the distress one experiences when witnessing someone else’s suffering: vicarious trauma.

The symptoms of vicarious trauma are similar to direct trauma. Lawyers might experience sleep disturbances or vivid nightmares; feel numb when interacting with clients; or, on the flip side, may experience an unusual intensity of emotions, such as obsessive rumination about the traumatic events.

Also common is extreme anxiety or fears that the attorney herself will experience a similar trauma. Some also may experience a change in bodily functions, such as different eating habits, loss of sexual desire or even panic attacks.

Sarah Weinstein, a former lawyer and now psychotherapist based in Berkeley, California, says lawyers can recognize vicarious trauma when “instead of feeling separate from their clients and having compassion for their struggles, attorneys find themselves overwhelmed with emotion and unable to think constructively or sometimes at all. Emotion begins regularly to overtake cognition.”

It is important to recognize that vicarious trauma can be cumulative from prolonged exposure to the traumatic experiences of many clients or, with a very intense trauma, can arise from a single exposure.

Shannon Callahan, a Chicago-based senior counsel at Seyfarth Shaw, says she experienced vicarious trauma while handling an asylum case based on sexual violence. “I felt so sad and couldn’t stop crying. I avoided working on the same type of cases because I didn’t want to risk losing again and the impact on the client if I did,” Callahan says.

Often, the cases we work on as lawyers carry with them dire consequences, yet our ability to influence the outcome of any given case is limited. Perhaps one privilege we get as lawyers is we can advocate and change outcomes. But we must be mindful of the impact exercising this privilege has on our own well-being.

Callahan says, “I still think about my client and wonder how she has been since her deportation. I worry for her and wish the best—and feel responsible and sad for the outcome. My narrative, to help me cope, is that I knew it was a tough case and that I did my best.”

After many years of struggling with chronic insomnia, feeling sad yet at the same time feeling numb and working around the clock, I finally sought a therapist. It was liberating to learn that I am not the only one who struggles with these feelings, that it’s normal to think about your clients and to relive their trauma. I learned that I can be more resilient through self-care and mindfulness practices.

"SECURE YOUR OWN OXYGEN MASK BEFORE HELPING OTHERS.”
—JEENA CHO

PHOTOGRAPH COURTESY OF THE JC LAW GROUP
I learned tools for being with the clients experiencing distress without losing myself in their suffering, as well as techniques for leaving work at the office. “One important goal for minimizing vicarious trauma is to be intentional about having compassion rather than strict empathy for clients,” Weinstein says.

WHEN LAWYERS SHOULD SEEK HELP
Compassion is a concern for the suffering of others and taking some steps to alleviate the suffering. Empathy, on the other hand, is stepping into the shoes of another. It is important for attorneys to be able to do both. But for lawyers who regularly are working with traumatized clients, it’s very important to remind yourself that you care about your clients but you are not your clients. Keeping a separate identity allows you to function at a higher level as an advocate and to avoid your own trauma. Also, as with diminishing stress generally, self-care is very important to minimizing vicarious trauma. Maintaining healthy habits of sleep, nutrition and exercise go a long way.

Lawyers can be tight-lipped. It’s easier to avoid talking about our feelings and distress. Often, we can be in denial about our own suffering, leading to unhealthy coping mechanisms.

Weinstein suggests lawyers seek help when, for more than two or three months, they find themselves experiencing the symptoms of trauma, including numbing, obsessive rumination, change in bodily functions or intense fear, and worry that dangerous or very distressing events will occur in their own lives.

It may feel self-indulgent to focus on your own suffering in light of the tragedy your clients are experiencing. Yet we can only be an effective advocate if we are well. As the directive goes: Secure your own oxygen mask before helping others.

When a lawyer feels overwhelmed by the struggles of clients and is no longer able to take a reflective, compassionate stance about the client’s experience, help from a therapist is not only a good idea but absolutely necessary to continue functioning as an effective advocate.

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.

---

**MEDITATION: COMPASSION TOWARD OTHERS**

1. Find a comfortable, seated position.
2. Bring your attention to the breath. Breathe in and out.
3. Bring an image to mind that represents unconditional love or acceptance. This can be the sun, which shines its light on everyone without discrimination; the ocean; a tree; or any other place in nature you resonate with. It also can be a person you view as having unconditional regard, love and acceptance. It also can be an animal, such as a pet. Spend some time bringing this image into your mind’s focus. Imagine being in the presence of this loving person, place or object.
4. Bring to mind someone you care about. It can be your friend, spouse, significant other, child, parent, sibling or anyone you can easily extend care, attention and warmth toward.
5. As you think about this person, notice any feelings of tenderness or warmth that arise inside you.
6. Now imagine this person you care about is experiencing some difficulty. This may be a difficulty known or unknown to you. As you imagine this person suffering, notice any feelings of tenderness that arise in you. Notice any desire to help.
7. As you imagine your loved one suffering, repeat these phrases:
   - “May you be happy.”
   - “May you be healthy.”
   - “May you know peace and joy.”
   - “May you be free from suffering.”

Listen to an audio version of this meditation at jeenacho.com/wellbeing.

---

Get Paid Faster

**HEADNOTE** The New Choice in Legal Payments

Online payments for law firms with no monthly fees

You only pay transaction fees, and only when you get paid

Claim your $100 credit before August 1

Headnote.com/ABA
ARE YOU COVERED?

Cyber insurance has become a must-have for lawyers, but the still-nascent market is highly unstable and lacks uniformity

By Jason Tashea

With a single click, a law firm can be brought to its knees. On May 22, 2015, an employee at Moses Afonso Ryan, a small business-law firm in Providence, Rhode Island, opened an attachment in an email from an unknown source. Within a short time, every document and device on the firm’s network was disabled. Access was hidden behind a wall of encryption that even hired experts could not crack.

Thinking it had no other options, the firm capitulated to the perpetrators of the ransomware attack, went through two rounds of negotiations, and paid two ransoms for a total of $25,000 in bitcoins to free its system.

Although not every document was fully recovered, the law firm was functioning again. But the cost was steep. Not only did it lose the ransom money; the attack also forced the firm offline for three months. Additionally, being unable to operate during that time cost the firm more than $700,000 in potential income, according to court documents.

The firm thought it was completely insured, thanks to a property coverage policy from Sentinel Insurance Co. that covered loss of income under certain circumstances, including computer fraud. However, the firm got a rude awakening when Sentinel paid only $20,000 of the claim for damage to the computer system. Sentinel argued that the loss of income is not insured under the property coverage because there was no “direct physical loss of or physical damage to property at the ‘scheduled premises.’” As a result, the firm sued.

Expanding Policies

The case languished in the U.S. District Court for the District of Rhode Island for three years before both sides came to a settlement in late April. A representative from Moses Ryan, the firm’s current name, confirmed that a deal had been reached but declined to elaborate, citing a confidentiality agreement. The Hartford Financial Services Group, Sentinel’s parent company, did not respond to requests for comment.
As cyberthreats evolve and proliferate, more insurers are expanding options to help law firms mitigate loss. However, without industry standards, coverage and cost vary from plan to plan, sometimes causing gaps in potential coverage, such as what Moses Ryan experienced.

Despite the state of flux, experts say there are concrete steps for attorneys to take in trying to navigate a fluid and confusing market.

Kevin Kalinich, the cyber-risk global practice leader at insurance broker Aon and co-author of an article in the second edition of The ABA Cybersecurity Handbook, says stand-alone cyber policies are a new addition to the insurance market.

It’s likely that many firms are already covered against some cyberincidents, at least partially, by their general or professional liability insurance, he says.

This means if there is a cyberbreach by a third-party vendor, for example, malpractice insurance should cover data loss in the provision of services. However, these policies can create coverage gaps, depending on the incident.

On account of these gaps, Kalinich thinks having a separate cyber insurance policy can help. The first benefit regards business interruption. The Rhode Island case “specifically illustrates the difference between general liability and professional liability in lost billings,” Kalinich says.

He says most general policies are silent about business interruption caused by a cyberincident, “and that’s where the cyber policy comes in for a law firm.”

Similarly, he says kidnap and ransom policies are beginning to see claims because of ransomware attacks, so insurers are excluding cyber-related ransom from this coverage.

Lastly, Kalinich says cyber-specific plans can cover investigation and remediation of an IT disruption, which can cost hundreds of thousands of dollars and will likely not be covered by general or professional liability plans.

“Cyber coverage should be an enhancement” to existing insurance policies, says Verne Pedro, an attorney at Merlin Law Group in Red Bank, New Jersey. “You want to make sure that all the policies that you have are working together.”

Beyond coverage found in traditional professional insurance, cyber policies also may cover related costs, such as paying fines from federal and state regulators, recouping public relations expenses, sending notifications to those affected by the breach, and hiring a breach coach to manage an incident’s fallout.

There is no definitive number of how many lawyers or law firms are covered by some form of cyber insurance, says Jim Rhyner, president of Navigators Pro, a division of Navigators Insurance Co., and co-author of an article in the second edition of The ABA Cybersecurity Handbook.

He surmises that 10 to 15 percent of law firms have stand-alone cyber insurance policies. However, according to Rhyner, underwriters are projecting 30- to 50-percent increases in coverage this year compared to last year, which is significant growth.

NO-COST COVERAGE?

Even with this growth in cyber coverage and premiums in the commercial industry, some noncommercial insurers covering attorneys’ cyber liabilities are passing on the coverage at little to no cost to their clients, such as the Attorneys’ Liability Assurance Society and the Oregon State Bar’s Professional Liability Fund.

At ALAS, an insurer owned by the law firms it insures, Scott Burns, senior vice president of member services, says he would explain to firms that “the most realistic and likely exposure to lead to loss for the firm would be a data breach or hack that would result in the loss of client data.” Most of those losses, he says, would be covered by the firm’s traditional professional liability policy.

That was more than enough for some firms. However, he says other firms want more comfort.

To meet that demand, the company added a cyber endorsement, which is like a rider, in 2015 at no extra cost. However, even with the new endorsement, he says cyberbreaches are not where ALAS sees claims.

“Cybersecurity is important, and the risk is there,” he says. However, “it’s not what causes our underwriting losses.” Burns says losses are led by other claims under professional liability coverage, such as lawyers’ mistakes and misconduct.

The Professional Liability Fund, the mandatory provider of primary malpractice coverage in Oregon, began to offer cyber coverage as part
of its excess insurance in 2013. At about $35 per attorney insured per year, the price beats most stand-alone policies, says Emilee Preble, lead underwriter at the PLF.

As of July 2017, there had been only eight claims under the new policy, according to a report by Preble. She says “most of those claims had to do with lost and stolen devices.”

These claim numbers may be unique to Oregon attorneys. The PLF’s underwriter, Beazley Insurance Company Inc., reported in a study earlier this year that 36 percent of more than 2,600 studied breaches across industries happened last year because of hacks or malware, while losing a device accounted for 6 percent of breaches.

Regardless of the types of breaches, Burns and Preble say clients of law firms are demanding that the firms have more cyber coverage. In Oregon, Preble says she sees clients pushing law firms to have higher cyber coverage limits than their standard excess policy.

Even with growing pressure from clients, there’s reason to be cautious before running out and buying an off-the-shelf plan. “It’s like the Wild West,” says Rhyner of Navigators Pro.

With each carrier writing its own policy, there is no standard. This means applications and fundamental terms, such as “cyberincident,” will vary from insurer to insurer.

Definitional conflicts are leading to litigation in some cases. In one example, Medidata Solutions Inc., which provides cloud-based services to scientists undertaking medical trials, was phished in 2014. This social engineering attack led to the wire transfer of about $5 million to the criminals.

The company had an insurance policy with crime coverage through Federal Insurance Co., which included computer and fund transfer fraud. The insurer, however, refused to pay, arguing that the phishing scam did not constitute a “fraudulent entry” of Medidata’s system because it was done through email and therefore did not meet the policy’s definition of computer fraud.

Judge Andrew L. Carter Jr. of the U.S. District Court for the Southern District of New York was not persuaded by this or other arguments made by Federal Insurance. He granted Medidata’s motion for summary judgment and awarded $5.8 million to the company in damages and accrued interest. The case is currently on appeal in the 2nd U.S. Circuit Court of Appeals at New York City.

Beyond definitions, prices will vary as well, possibly at a higher cost for lawyers.

“The legal sector is considered a higher risk than many others but not as high as some,” says Damian Caracciolo, vice president of the executive protection practice at Chiz Inc., a financial services company. “The cost is driven by the carrier’s cost per stolen record in that specific industry in the event of a claim.”

He says costs also will be affected by the type of data held by the firm, the firm’s primary practice areas, and how data is retained.

The size of a firm and number of attorneys covered also will affect costs, says Mike Tanenbaum, an executive vice president at insurance company Chubb, the preferred provider of cyber liability insurance for the ABA.

Naturally, the amount of coverage will affect cost as well, he says. Chubb, for example, has coverage limits that range between $5,000 and $100,000,000. However, Tanenbaum says, “as law firms’ cyber insurance buying patterns evolve, so does the coverage and evolution of limits.”

To ensure the best pricing, Caracciolo says it is important to get numerous quotes.

5 STEPS TO SUCCESS

Still, shopping for cyberinsurance can be overwhelming, says Judy Selby, a cyber insurance consultant and attorney based in Charlottesville, Virginia. To get a handle on this issue, she recommends five steps a firm can take to assess and choose a proper policy.

First, a firm has to know its liabilities and the threats it faces. This can be accomplished through internal or third-party threat assessments of the firm’s security. It also can be accomplished by filling out a thorough cyber insurance application required by many carriers.

Second, firms must assess existing insurance policies to make sure a separate cyber policy does not create overlapping coverage, which can generate trouble when trying to make a claim later, Selby says.

Third, the application forms should be filled out with a multidisciplinary team at the firm that can answer legal and technical questions accurately. The last two steps require the firm to pick the right policy for its needs and understand its obligations regarding disclosure, liability and notice.

As pressure mounts on firms to get cyber insurance, either due to growing threats or client demand, this extra effort can help make sense of this dynamic and fluid market.

Finding the right policy will be worth it, Selby says. Having the insurance provide support, such as a breach coach after an incident, alleviates a lot of problems. “It saves money; it saves time; it saves your reputation,” she says. “It’s better for everybody.”
Looking Ahead
ABA Techshow 2018 examined where the legal profession is heading—with a heavy focus on new and emerging technology
By Gerardo Alvarez and Jason Tashea

With a new and larger venue, ABA Techshow 2018 went beyond the usual focus on legal technology and provided sessions on leadership, team building and mindfulness.

At the Hyatt Regency in Chicago for the first time, the show paired panel discussions focused on mentoring female and minority lawyers alongside the traditional sessions examining workplace efficiency, as well as legal issues arising from old, new and emerging technologies.

Those technologies took center stage as multiple panelists and speakers talked in March about the ways lawyers can augment their practices by utilizing artificial intelligence, blockchain, virtual reality and the “internet of things.”

Referring to these emerging technologies as important rungs of the “fourth industrial revolution,” keynote speaker Dan Katz, associate professor and director of the Law Lab at the Chicago-Kent College of Law, argued that they hold the key toward restarting what he called a long-stalled trend of legal innovation.

Katz argued that the legal innovation agenda is not the coming onslaught of robot lawyers, contrary to popular media accounts. Rather, the future is a marriage between technology and humans, which he said is more powerful than either group alone. “To the legal innovators, I say let’s stay the course,” he said about looking toward the future.

Blockchain, for example, can make legal services more efficient and less costly by establishing automated smart contracts that don’t have to rely on human intermediaries to be enacted. According to David Fisher, founder and CEO at Integra Ledger, a legal blockchain consortium, lawyers have to first understand how blockchain functions before it can be effectively used in the legal industry.

“The first step is for attorneys to understand what it is because there’s a common misconception that blockchain is a new application,” Fisher said during his “Blockchain
Reaction: The Next Big Thing” presentation. “People are used to thinking in terms of new software, new apps ... but the reality is that just how you don’t go and buy the internet, you don’t go and buy a blockchain.”

This misconception has held back the development of new, efficient legal tools that implement blockchain—which Fisher said could make legal services more effective because blockchain establishes digital trust between two parties, does not necessitate a third-party intermediary, and is more secure.

ADVANCES IN DIGITAL DEVICES

Another emerging technology lawyers should be aware of is the internet of things. This is defined by a device’s connectivity to the internet and other devices, as well as the user data it collects. Given the ubiquity of these devices, as well as the incredible volume of information they collect, it was only a matter of time before they started affecting criminal and civil cases and raising novel legal issues.

“In some ways, it is like the early stages of e-discovery,” said Antigone Peyton, chair of the intellectual property and technology law practice at Protorae Law in Tysons, Virginia. “It’s the Wild West.”

A 2017 report from Gartner, an information technology research company, forecast the use of 8.4 billion internet of things devices in the world last year, including baby monitors, cars, digital assistants and refrigerators. For this year, 11.2 billion. By 2020, it forecast there will be 20.4 billion internet of things devices worldwide.

“A lot of the consumers that have them are unaware that their data is being collected,” said Bob Ambrogi, a legal technology blogger at LawSites. He added that lawyers have to be cognizant of the devices clients have and how to retrieve their data.

Meanwhile, advances in virtual reality mean legal education—and even litigation—could soon take place in cyberspace rather than in the physical world. Kenton Brice, director of technology innovation at the University of Oklahoma College of Law, said the college has launched the Oklahoma Virtual Academic Laboratory to provide students across the campus with educational virtual reality experiences.

He said practicing attorneys already have been taking advantage of such technology to simulate situations such as evidence presentation in mediation and arbitration, as well as discovery requests and responses. But he acknowledges that implementation in the classroom is a work in progress. “We’re still trying to figure out student adoption,” Brice said.
PAYING OFF

Pro bono representations often lead to paid work for lawyers who donate their time and expertise to nonpaying clients
By Marc Davis

Like many lawyers, attorney Charles Krugel chooses to perform a certain amount of pro bono work every year.

“It’s a task he loves—and one that has brought him recognition and acclaim. The Chicago labor and employment law specialist was awarded the Outstanding Volunteer Attorney of 2013 award by the Community Law Project of the Chicago Lawyers' Committee for Civil Rights.

There’s also been another benefit. Some of his pro bono cases have actually led to paid representations.

In one of his pro bono cases, Krugel worked 3½ years for a nonprofit without compensation and another 18 months as a paid attorney representing the same client.

“At first, this nonprofit needed legal assistance for its dissolution and separation and final payouts of its staff,” Krugel says. “Later, there was a civil action—mismanagement of funds. I was paid by the [Chubb] insurance company to handle this.”

This wasn’t a one-off. Krugel says several pro bono matters have spawned paid work for him.

“I sit on several boards of nonprofit organizations for which I do pro bono work, and this has also generated substantial paid legal work,” Krugel says. He adds that his pro bono efforts with the Community Law Project have led to additional paid work.

“They set up speaking engagements for me at Chicago’s city hall,” Krugel says. “As a solo practitioner with zero political connections ... being able to do presentations at city hall was great for my marketing.”

According to Rule 6.1 of the ABA Model Rules of Professional Conduct, attorneys have “a professional responsibility to provide legal services to those unable to pay” and are encouraged to perform at least 50 hours of pro bono legal services each year.

In April, the ABA released Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers, which notes that 81 percent of the nearly 47,000 attorneys surveyed thought providing pro bono services was either somewhat or very important.

Despite this overwhelming majority, the study found respondents had provided an average of 36.9 hours of pro bono service in 2016—well below the aspirational goal of 50 hours per year set forth in ABA Model Rule 6.1

Additionally, the study noted that 20 percent of the responding lawyers had never provided pro bono services of any kind. Among the factors lawyers cited for not doing pro bono was that it conflicted with cases where time was being billed and it was too cost-prohibitive.

AIR AND ART ALTRUISM

By using pro bono representations to help generate paid matters, Krugel and others have managed to alleviate such concerns.

Pamella Seay has a busy professional life running a solo practice in Port Charlotte, Florida. Seay Law International specializes in immigration, airport and aviation law. She also teaches constitutional law and ethics courses at Florida Gulf Coast University and still devotes time to pro bono work.

“I do about 80 to 100 hours of various pro bono work annually,” she says. “And it often leads to paid work.”

Seay adds that her pro bono immigration work for clients in the Deferred Action for Childhood Arrivals program has resulted in several paying clients. “A construction firm knew of my immigration work and hired me to check on the legal status of their employees,” she says.

She also does volunteer work on a local government airport board. Because of her expertise in airport law, she was hired by the Transportation Research Board, a presidential advisory agency of the government. Seay was invited to submit a proposal to research and write a monograph on airport sovereignty and won the job.

Meanwhile, Richard Roth, an entertainment and business attorney, does pro bono work as part of a program run by the nonprofit Volunteer Lawyers for the Arts.

“I do a lot of copyright and trademark infringement litigation for struggling artists,” says Roth, founding partner of the Roth Law Firm in New York City. “My clients are usually actors, writers and lyricists.”

According to Roth, he has represented many authors, lyricists and songwriters who have accused other, more famous artists of stealing their work.

Roth’s work can really pay off if a pro bono client ends up making it big. “Some of them become successful and famous later, and they remember the work I did when they were struggling,” he says.
OPIOIDS, JUSTICE
COURTS ARE ON THE FRONT LINES OF A LETHAL CRISIS

IT’S NOT EVERY DAY that a criminal defendant hugs a judge. But in courts across the country, these are unusual times.

A judicial embrace is a hard-won moment of congratulations for people with addictions graduating from the Cuyahoga County Drug Court in Cleveland. After more than a year in the diversion program—battling addictions, fighting demons and reclaiming life—hugs and tears are inevitable as participants cross a sobriety threshold most never thought possible.

“It’s been an absolute ride, this drug court,” said one new graduate. “I was always a quitter, and today I choose to be a fighter. If you have the will, you can overcome anything.”

The cycle of overdose, arrest, jail and rehab has been difficult to crack as the opioid crisis scales up and out, consuming communities. But court diversion programs such as the one helmed by Judge David Matia are expanding, and the arbiter behind the bench has increasingly become an advocate on the sidelines. Local courts are pivoting from crime and punishment to carrot-and-stick—using more

By Liane Jackson
Paige Mahaffey hugs Judge David Matia on her last day in drug court.
humane, interventional approaches to deal with the defendants with addictions who are overwhelming their dockets.

This sort of crisis management is not the typical task of the judiciary, but it’s one that’s climbed courthouse steps across the country as judges nationwide have become first responders in the opioid epidemic.

“Drug court changes a judge,” says Matia, who was appointed to his position in 2008. “It changes your perspective on crime and punishment and rehabilitation. It has you question the ‘pounding the nail into the wood with a hammer’ approach we have toward criminal rehabilitation—it isn’t always effective. It changed my perspective on how I handle my criminal docket. The fulfillment of really making a difference can’t be replicated.”

Upon successful completion of drug court, graduates accept certificates; have their felony charges dismissed; thank their families, case managers and counselors; and they hug Judge Matia. It’s a proud moment for not just the graduates but also for families, friends and drug court alumni who pack the room for the March 14 ceremony.

“I was caught in the mindset of self-destruction,” one graduate said of his descent into heroin addiction, “riding a train to prison or death.” But through Cuyahoga County’s forward-thinking intervention system, he has escaped both—for now.

**ADDITION, USA**

Opioid addiction in America is a dizzying array of crisis and carnage. Drug overdose is the leading cause of death for Americans under age 50, according to the *New York Times*. Prescription opioid painkillers have been linked to more than 200,000 deaths between 1999 and 2016, according to the Centers for Disease Control and Prevention. And the CDC reports that 115 Americans die every day, on average, from an opioid overdose. So far, six states—Alaska, Arizona, Florida, Maryland, Massachusetts and Virginia—have declared some form of public health emergency in the wake of the opioid crisis.

Peddled by drug cartels and Big Pharma, opioids have seeped into America’s veins through street dealers, pill mills, online sellers and IV bags. Once the province of emergency rooms, prescription opioids have morphed into a drug-cabinet staple for millions of Americans. And the popularity of heroin, once widely viewed as a base and dangerous drug, has soared as its price plummeted and availability increased. Mexico and China are flooding U.S. markets with deadly synthetic opioids, and emergency responders and local governments are struggling to deal with the fallout.

“The U.S. represents 5 percent of the world’s population but 85 percent of the hydrocodone and 99 percent of the OxyContin consumed,” notes Dennis Wichern, who spent more than 30 years with the U.S. Drug Enforcement Administration before retiring in December as a special agent.

Opioid addiction is uniquely American. Other countries recognized the harm of prescription painkillers early on, with governments blocking the sale of a wide variety of opioids and other analgesics. But in many ways, courtesy of Big Pharma marketing, Americans are raised with...
the expectation that almost any pain—physical, psychic or emotional—can and should be escaped with a drug.

This belief was accelerated in 1996, when the American Pain Society introduced "pain as the fifth vital sign," giving it equal status with blood pressure, heart rate, respiratory rate and temperature.

For many in the U.S., pain is not only uncomfortable—it is inconvenient. And the pharmaceutical industry has made hundreds of billions of dollars off a collective desire to transcend pain. Because pills are cheaper than other therapies, insurance companies have been on board.

Thus began campaigns to push opioids on physicians and consumers as a "safe" means to manage patient pain, whether temporary or chronic, without disclosing these pills were actually addictive.

"I get asked, 'Why is heroin back?' " Wichern says. "Heroin never left. If you look at the history, people go from one drug to another, or they mix it."

"We don’t need to prevent the next drug; we need to give the kids the tools and power to prevent that first dose. Just about every Drug Enforcement Administration office across America is laser-focused on heroin and fentanyl addiction to save lives."

As black market demand for prescription pills like hydrocodone, Percocet and OxyContin has increased, these drugs have become prohibitively expensive on the street while heroin has gotten cheaper by the year.

According to the DEA, in many hard-hit towns, one 30-milligram OxyContin pill can cost up to $40; a bag of heroin can go for as little as $5.

Opioids have opened the floodgates for heroin; street dealers often mix it with the cheaper—and more dangerous—painkiller fentanyl. Heroin is also sometimes mixed with carfentanil, another synthetic opioid 10,000 times more powerful than morphine. It’s a drug used to tranquilize elephants. In the hands of people with addictions, these mixtures are frequently lethal.

"Eighty percent of new heroin users start with opioids," Wichern says, whether it’s recreational or prescribed. "Almost all heroin contains fentanyl, or it’s [pure] fentanyl on the streets.

Taking heroin now, with fentanyl involved, it’s like playing with a fully loaded gun."

BUFFALO’S BATTLE

Until recently, Buffalo City Court staff meetings had a grim daily ritual: reading the obits during the morning debriefing to determine whether any of the criminal defendants had overdosed or been killed. One day in spring 2017, administrators realized a startling number of heroin defendants were dying before their next court date, and they decided something had to be done.

"We were brainstorming and thought, ‘Why don’t we start treating people at the beginning instead of the end of the case?’ " says Judge Craig Hannah. "That approach had never been done before, but we felt we couldn’t sit idly by and not do anything."

Administrators quickly applied for and received a $300,000 grant from the U.S. Department of Justice’s Bureau of Justice Assistance to start the nation’s first dedicated Opiate Crisis Intervention Court.

The new tribunal’s stated mission—“Our goal is to keep you alive!”—is more than Law & Order, more ER. "We put their criminal case on pause while we focus on their medical case," Hannah explains.

It’s an approach that makes sense given what the court has been tasked to do: manage victims of a drug crisis of epidemic proportions. Buffalo had an estimated 268 opioid-related drug deaths in 2017, according to the Erie County Health Department, down 11 percent from 2016, but still more than double that of previous years.

The Opiate Crisis Intervention Court is a judicially supervised triage program that links participants with medication and behavioral treatments within hours of their arrest. The goal is intervention before adjudication—and quickly.

“We are cutting the red tape, cutting the lag time, getting the medical needs addressed immediately," Hannah adds.

"The best part about this is, because it gets so much attention across the board, no one has told us no when we asked them to collaborate with us. Before you heard horror stories that it could take two to three weeks to get a bed. Six weeks to meet with a doctor who prescribes methadone. But we can find one within a day or within hours."

"I know it’s a tragedy, but sometimes tragedy brings everyone together."

The program began May 1, 2017, intending to treat 250 people over a three-year period. So far, 215 participants have gone through the court.

It’s a rigorously monitored program that requires detox, medically assisted treatment, 8 p.m. curfews, wellness checks, counseling and daily appearances before Hannah for at least 30
consecutive days. Some call it a "get-tough" court, but Hannah calls the approach "tough love."

"I think the daily face-to-face time is the most important part of this," Hannah says. "Most have burned most bridges they ever had. They're within an inch of me, and we talk about their life, their treatment. Other people probably gave up on them, but I'm going to take them at the level they are. I don't want to judge them or preach at them. I want them to be a better version of themselves."

And after they get better, participants still must answer the charges that brought them to court in the first place, whether it's theft, trespass, assault, dealing. The next step is often drug court where, depending on the severity of the case, a defendant can enter a diversion program.

The opiate court has become a model for other heroin-overwhelmed jurisdictions, and they are setting up programs to treat addiction more like a disease and less like a criminal mindset.

CLEVELAND’S CHALLENGE

Jessica Mazzocco, 39, and her ex-husband were trapped in addiction for nearly a decade, and she admits to committing crimes to get money for drugs. Mazzocco overdosed four times that she can recall and was revived by emergency responders with the overdose antidote Narcan. Her ex died from a heroin overdose.

Since 2009, Mazzocco’s life has been a spiral of addiction to cocaine, pills, heroin and crack. She’s done everything for drugs: theft, prostitution, jail time. Homeless and with an outstanding warrant for possession and petty theft, in August 2016 Mazzocco turned herself in and entered the Cuyahoga County Drug Court. Nearly two years later, Mazzocco’s life is back on track: She’s engaged, has a new home, and is filing to regain custody of her kids, ages 8 and 14.

"It was like: ‘Why haven't I started doing this before?' It's the best feeling ever," Mazzocco says of the support and guidance she's received in the diversion program. Her mindset is now focused on sobriety. "I changed everything and everybody."

Corey Reis, 25, had a different path to addiction. He says he was first exposed to opioids at age 15 after a doctor prescribed pills when he fractured his hand. From there, he began experimenting recreationally with other drugs and heroin. Two years ago, he was arrested on St. Patrick’s Day for stealing his mother’s watch. It wasn’t the first time he caught a case. But this time, when he was released home on a personal bond, and immediately left the house to get a fix, his mother called the police. He was hauled before a judge and offered an option.

"I heard 'less jail time,' and I said OK," Reis recalls of the referral to the Cuyahoga County court. "Then I got here and they acted like they cared. You can tell they wanted what was best for me when, at times, I didn’t believe in myself."

The drug court participants have minimum biweekly appearances before Judge Matia, and they receive medication and residential treatment if needed, random drug testing and other social services. They are incentivized with rewards, including reduction of court costs and gift cards. Relapses happen, but participants are encouraged to tell the truth.

Court personnel collaborate with outside agencies and stakeholders to help people break the cycle of substance abuse and crime through daily structure, accountability and empathy. Matia says the common view of the judiciary as “umpires calling balls and strikes” fails to acknowledge the power of the courts to make a difference.

“We’re in a unique position to see what works and what doesn’t work in
society,” Matia says. “When a judge calls a meeting, people show up. Courts have the moral authority, and we’re in a unique position to bring about change.”

COST AND EFFECT

Ohio is at the epicenter of the opioid crisis in more ways than one. The state ranks second in overdose deaths nationwide, with the number of fatal drug overdoses in 2016 surpassing 4,100, primarily from opioids, an increase of more than 36 percent from 2015. And provisional data from the National Center for Health Statistics shows Ohio had a 41 percent rise in its overdose deaths from May 2016 to May 2017.

It’s fitting then that all federal lawsuits brought by cities, counties, Native American tribes and states over the opioid crisis have been consolidated in the U.S. District Court for the Northern District of Ohio.

Judge Dan Polster is overseeing about 400 lawsuits in the multidistrict litigation and has focused on finding ways to resolve the cases this year—a Herculean task by any measure. The federal MDL is in addition to countless cases filed against pharmaceutical industry players in state courts across the country.

Polster has admonished the parties to come up with a plan to resolve damages and reduce the number of pills on the street. During a Jan. 9 hearing, he acknowledged that the judicial branch was not the typical forum to lead the resolution of a national crisis.

“Ideally, this should be handled by the legislative and executive branches, our federal government and our state governments,” Polster said during proceedings for In re: National Prescription Opiate Litigation. “They haven’t seemed to have done a whole lot. So it’s here.”

Paul Hanly Jr., a New York City-based shareholder with the national law firm Simmons Hanly Conroy, serves as co-lead plaintiffs counsel on the MDL, where he represents the interest of 180 government entities. Hanly has similar lawsuits pending in state courts on behalf of dozens of counties across the U.S.

“The fact of the matter is the courts in many, many circumstances are sort of the last hope to fix a problem,” Hanly says. “And they can fix a problem because juries can send a message to corporations that will for certain change their behavior.”

Plaintiffs in the MDL allege manufacturers should have marketed powerful opioids as safe, effective and nonaddictive drugs for the treatment of chronic pain, and that the defendants banded together to deceptively market the safety and efficacy of the drugs. Pharmaceutical companies and distributors are accused of dumping these pills in vulnerable areas of states such as West Virginia, New Hampshire and Ohio, knowing they were being abused. There are claims for failure to properly track, report and prevent the illegal distribution and use of the drugs. Suits brought by state, county and municipal governments are seeking damages for money spent on opioid treatment programs, health costs and law enforcement expenses, retroactively and prospectively.

“This is almost certainly the largest and most complex piece of litigation in the history of our country,” says Hanly. “Between 2001 and 2018, the epidemic cost $1 trillion; and by 2020, two years plus from now, if it’s unabated, it will cost another $500 billion. It’s huge, and one of the issues that has to be dealt with is where the money is going to come from.”

There are dozens of defendants in the MDL, with the most prominent being Teva Pharmaceutical Ltd., Johnson & Johnson, Endo Health Solutions Inc., Allergan and the 800-pound gorilla, Purdue Pharma, maker of OxyContin. Purdue previously settled a criminal case and civil lawsuit in 2007 for $634 million after pleading guilty to a felony charge of misbranding with the intent to defraud and mislead.

Hanly represented the plaintiffs in that case. He says the verdict against Purdue turned out to be “pocket change” and a “slap on the wrist.”

“We actually were naive and kind of thought what we had gone through was an aberration and that Purdue was an outlier in terms of pharmaceutical company conduct,” Hanly says of the case. “We really didn’t see it as what it actually was: What was happening back then was the infancy of what has become a very mature epidemic.”

The opioid cases are reminiscent of the lawsuits against the tobacco industry that ended with a $246 billion settlement. But attorneys involved in the opioid litigation say that number is a drop in the bucket compared to the damages possible in the MDL. Defense teams point to a big difference in the cases that may be part of a strategy to try and mitigate damages: Tobacco inherently causes health degeneration, whereas opioids, when used appropriately, do not.

“When you have people who are illegally or improperly doing drug shopping or buying pills off the black market and abusing pills in a way they’re not supposed to, to what extent do they have culpability in their own conduct?” asks Adam Fleischer, a partner at Chicago insurance defense firm BatesCarey, which recently launched an opioid coverage task force.

“The problem with this theory is how are you going to separate the wrongful conduct of the plaintiff from the wrongful conduct of the defendant?”

“I heard ‘less jail time, and I said OK. Then I got here and they acted like they cared. You can tell they wanted what was best for me when, at times, I didn’t believe in myself.”

Corey Reit
For the hardest-hit states and counties, there’s plenty of blame to go around, but first responders are consumed with the day-to-day management of the opioid epidemic, which has been like battling the Hydra monster. Financial resources and human capital are depleted on repeated Narcan resuscitations, treatment services, law enforcement and court costs. It’s a punishing battle on all fronts, and successes can be short-lived.

“Giving people Narcan over and over isn’t the goal,” says Kim Bailey, a professor at Chicago-Kent College of Law. “We’ve got to get away from these Band-Aid approaches; we need to get to the root level of what’s going on with these epidemics. We need to have a holistic approach that looks at economics, better schools, public health, mental health resources. But in order to do that, you need money.”

Last October, President Donald Trump declared the opioid epidemic a national emergency and vowed to “liberate our communities from the scourge of drug addiction.” He assembled a commission headed by former New Jersey Gov. Chris Christie, which issued a report with 50-plus recommendations and a dire warning that mandated police. Law enforcement departments across the country received grants to purchase high-tech weapons, with money based on the number of arrests. Police were incentivized to act, with the support of many communities ravaged by the effects of drugs, poverty and violence. Now, in comparison, in many middle-class, mostly white jurisdictions such as Gloucester, Massachusetts, heroin users carrying drugs or needles can walk into a police station and be diverted to treatment instead of the lockup.

Professor Ekow Yankah of the Benjamin N. Cardozo School of Law says the changing landscape of addiction has prompted novel responses and new rhetoric. “There’s something weird if you know the joblessness rates in the African-American community, know the history, but when drug addiction hit that community, it was ‘What is wrong with our community; why are you pathological?’” Yankah notes. “Whereas in Rust Belt communities, it’s ‘Of course they’re turning to drugs; they don’t have any hope or ambition.’”

“Most new heroin users are young white men with low incomes,” Wichern says. Still, no demographic has been spared, and he adds that “rates of heroin use have doubled in women.”

**FEDERAL TACTICS**

While users caught with drugs may be quickly ushered to diversion in many parts of the country, there has also been a movement to seek tougher prison sentences against drug dealers and others deemed culpable for overdose deaths, particularly at the federal level.

In a continued rollback of bipartisan sentencing reform measures, Attorney General Jeff Sessions has directed his prosecutors to seek the harshest penalties available, reviving mandatory minimums that warehoused minority drug offenders behind bars.
justice policy has always mainly been a during the war on drugs, but criminal rhetoric [from Sessions] like we heard Grassley of Iowa. 

October by Republican Sen. Chuck Grassley of Iowa. 

Without parole. The ABA supports offenses and end juvenile life sentences to violent crimes and serious drug offenses. Those who commit nonviolent offenses, narrow the scope of mandatory minimum sentences rather than a public health model. 

Judge Matia is critical of the federal government’s response to the epidemic thus far. “There are simple things they could do, they’ve chosen not to do,” he says, such as eliminating the waiver doctors need to prescribe the opioid addiction treatment Suboxone. 

Back in Buffalo, there’s nothing judgmental about Judge Hannah’s approach to addicted defendants. He tells them: I’ve been in your shoes. “I tell everyone the only difference between you and me is time. That was Day One of their recovery, I’m in year 20. The journey starts with the first step.” 

A former prosecutor who describes himself as a recovering cocaine addict, Hannah is familiar with all sides of the debate. “We locked up a generation of people and never got them the tools to succeed when they got out of jail. So they reoffended,” he says. “We had the wrong attitude toward addiction: That locking them up was making people safe. But you were locking them up and the problem was still there.” 

Hannah’s goal is to meet the problem head-on and “make sure the person walks out of here a lot better than they came in.” Opiate court participants get bus passes and social services. They are linked with educational resources to complete degrees or move on to community colleges. Families are reunited; medical needs are handled. Graduates are grateful to have someone on their side: Hannah officiated at the marriage of two participants, and one asked him to be the godparent of a child. “I tell people I don’t do legal work anymore,” he says. “I’m touching people’s lives, and I feel like this is a lot more important.” 

**OPIOID FAMILY COURT CASES INCREASE**

As a juvenile court judge for Montgomery County, Ohio, Anthony Capizzi sees the devastating trickle-down effect of opioids firsthand. “We have so many younger adults who have children using, abusing and, in many cases, dying from the opioid epidemic that we saw a dramatic increase in the number of children in foster care,” says Capizzi, also the president of the National Council of Juvenile and Family Court Judges. “We are running out of foster beds, placements for children all over the country.” 

Though the problem is bad in Montgomery County, where the opioid overdose death rate was the highest in Ohio in 2016, the crisis is nationwide. The Centers for Disease Control and Prevention says the rate of babies born addicted to opioids increased by 400 percent from 2000 to 2012. There are no federal statistics on opioid-driven child removals, but child welfare agencies in Vermont, Minnesota and Ohio cite opioids as a driver behind increased removals in those states. A 2011 study also found that opioid abuse was associated with increased domestic violence. 

Capizzi believes families can and should stay intact whenever possible. The majority of children who go into foster care are never reunited with their parents, he says, and even parents struggling with addiction don’t want to hurt their kids. So in 2016, he started Family Treatment Court, aimed specifically at helping parents achieve the sobriety they need to stay with their children. 

It’s not a short program. Parents spend six months to a year in Family Treatment Court, which requires them to take random drug tests as often as daily, attend treatment multiple days each week, and submit to home visits two to three days a week. The program involves therapists, the school system, mental health providers, domestic violence workers and others, which Capizzi calls "wraparound services.” The judge acknowledges it can be hard to get government funding. He started his program independently, then used his initial success to get outside grants. But in 18 months, he says, his program has had very few failures and no deaths by overdose that he knows of. There are ups and downs, but he says it’s kept at least 200 children with their parents. 

Capizzi, who has made opioids a focus of his time as council president, says his strategy can be used nationwide. “The council is trying to train judges on how to use your leadership capabilities to bring together all the stakeholders,” he says. “We believe, with appropriate training, we can make a big difference and save more children and more families.” 

—Lorelei Laird
ABA MEMBER OFFERS TO SMILE ABOUT
DON’T MISS LENOVO’S JUNE SALE EVENTS

Enjoy sizzling summer savings of up to 40% off select Lenovo computers and accessories during the VIP Sale Event, June 1-10. Plus, don’t forget to treat the dads and grads in your life with a new tablet, laptop and more during the June 11-17 sale event.

LEARN MORE AT AMBAR.ORG/LENOVOJUNE

DOES YOUR CREDIT CARD OFFER 20,000 TRAVEL BONUS POINTS?

No matter where you go this summer, get rewarded by earning points for everything you buy, including airfare, car rental, hotel and more, with the Bank of America® Travel Rewards credit card. You’ll get 20,000 bonus points after making at least $1,000 in purchases in the first 90 days of account opening.

LEARN MORE AT AMBAR.ORG/TRAVELBONUS

BANK OF AMERICA HOME LOANS

Is this the summer you finally tackle your list of home improvement and renovation projects? Bank of America has lending specialists committed to helping you understand your options for financing home improvements and other needed expenses with a home equity line of credit.

LEARN MORE AT BANKOFAMERICA.COM/ABAHOMELOAN

Bank of America, N.A. Equal Housing Lender AR57TX05

SAVE ON FATHER’S DAY AND GRADUATION GIFTS

Celebrate the dads and grads in your life with the perfect gift from Harry & David, 1-800-flowers.com, Stock Yards and more. ABA members save 15% on flowers, gourmet chocolates, steaks, chops and more.

LEARN MORE AT AMBAR.ORG/DADGRADGIFT
Time’s Up

As the Me Too movement continues to shed light on sexual harassment and assault, sparking changes in various industries, the legal and judicial systems have been slow to adapt.

IN THE BEVERLY HILLS LEGAL COMMUNITY, HUGS ARE AS COMMON AS HANDSHAKES. When plaintiffs personal injury lawyer Paul Kiesel was recently at the courthouse, he says, he hugged at least six people. A former president of the Los Angeles County Bar Association, he hugs judges too.

But he’s stopped hugging people at his office, Kiesel Law, given the many recent, public accusations of sexual harassment involving high-profile figures. The discussion has its own hashtag, #MeToo, in which victims share their own experiences with sexual harassment or assault. People who work for Kiesel, he says, shouldn’t be expected to tell him that hugs make them uncomfortable. Instead, it’s his responsibility to modify his behavior.

“When I had a meeting of all my associates last week—I have six women associates—we said the words air hug to each other. Normally I would think nothing of giving them hugs, as I do to my guy associates all the time. But people now are becoming more careful,” says Kiesel.
The awareness that one's behavior may make colleagues uncomfortable, along with the willingness to stop the conduct in question without resentment, is what's needed to decrease sexual harassment at work, say employment lawyers who spoke to the ABA Journal for this piece.

In fact, these lawyers say that self-regulation is a must because the justice system has not proven to be a hospitable venue for victims of sexual harassment or assault. An overall lack of gender diversity within the judicial system—in particular, an overwhelmingly male judiciary—the high costs of litigation, and certain legal rules to prevent disclosure that have the practical effect of protecting the accused can all act as deterrents to victims seeking redress in our nation's courts.

Unfortunately, self-awareness and proactive change have been rare and a significant reason why few people have success with sexual harassment lawsuits, while repeat harassers frequently remain in their jobs. If individuals can't recognize that their own conduct makes people uncomfortable, these lawyers say, it's unlikely they will identify it when others do it, unless they are directly affected.

"Nobody wants to believe that people do these things, so it's easier to deny the accuser and call her a liar. We have to have the conversation in a more effective way with employers who are well-intentioned, especially now, but don't know how to overcome that dynamic," says Robin Runge, an adjunct professor at George Washington University Law School and a member of the council of the ABA Section of Civil Rights and Social Justice. Her work focuses on creating programs to address domestic violence, workplace harassment and sexual violence.

Fear of losing their jobs, and career opportunities, keep employees from reporting sexual harassment, Runge says. When someone does complain, she adds, the accused almost always denies the allegation, threatens to quit and characterizes the accuser as a liar or emotionally unstable.

"If the victim complains, many employers will conduct an investigation, but often that investigation will not result in any changes," says Runge, who previously served as director of the ABA Commission on Domestic & Sexual Violence.

ABA ACTION

The American Bar Association has tried to tackle this issue head-on. In February, the ABA's House of Delegates adopted a resolution urging that all employers adopt and enforce policies to "prohibit, prevent and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation and the intersectionality of sex with race and/or ethnicity." (See “ABA Entities Offer Resources to Address Sexual Harassment,” page 51.)

Under the resolution, such policies should apply to everyone in the workplace, provide alternative ways to report policy violations—including ones that do not involve the accused party—and prohibit retaliation against complainants and witnesses. It also calls for communication "regarding the existence, resolution and any consideration paid for the settlement of claims to the highest levels of the entity."

Perhaps tellingly, this is the first ABA resolution to deal with sexual harassment since 1992—the year after Justice Clarence Thomas was appointed to the U.S. Supreme Court despite Senate confirmation hearings where

“We have to have the conversation in a more effective way with employers who are well-intentioned.”

– ROBIN RUNGE

Not So Mandatory?

3 BigLaw firms ended use of mandatory arbitration clauses—a hallmark of sexual harassment claims—in employment agreements

Like many things these days, it all started with a tweet. On March 24, Harvard Law School lecturer Ian Samuel tweeted out select provisions of a leaked copy of a mandatory arbitration agreement from Munger, Tolles & Olson. According to the tweets, summer associates working for the firm had to waive their right to sue the firm in court and, instead, submit any claims they might have, including sexual or racial discrimination, to arbitration instead.

"I think this is the grossest thing I've ever heard. Munger ought to be ashamed," wrote Samuel, who didn't return a call seeking comment.

At a time when the Me Too movement has scrutinized the thought of mandatory arbitration for sexual harassment claims, Samuel argued that the policy was meant to shield the firm from exactly those types of claims. One of his posts in that thread was retweeted nearly 600 times and picked up by several media outlets. The backlash toward Munger Tolles was instantaneous. The day after Samuel’s tweet, the law
Anita Hill testified that he harassed her when she worked for him at the U.S. Department of Education and the Equal Employment Opportunity Commission.

Much has changed since then, including women practicing law in more areas, says Stephanie Scharf, chair of the Commission on Women in the Profession. A commercial litigation partner at Chicago’s Scharf Banks Marmor, she adds that, unfortunately, there’s still a small percentage of female attorneys in very senior roles. If there were more women in those positions, she says, sexual harassment might decrease.

“One reason may be that women will be less willing to overlook it,” Scharf says. “Another reason is that when more women are in senior positions, people are more likely to have the day-to-day experience of working with women who are not seen as objects or targets for sexual harassment.”

NO ANSWER

Courts may exacerbate the situation. Chief Justice John G. Roberts Jr. made that very point late last year. During his annual report, he observed that recent months had “illuminated the depth of the problem of sexual harassment in the workplace” and announced an evaluation of the issue of sexual harassment as it pertains to the federal judiciary.

A Federal Judicial Center analysis found that when an employer made a motion for summary judgment in employment discrimination cases, the motion was granted in full or in part in more than 70 percent of the cases.

The study is from 2007, but little has changed, says law professor Suja Thomas, co-author of the book Unequal: How America’s Courts Undermine Discrimination Law. She points to a 2012 study of the U.S. District Court for the

“"When I had a meeting of all my associates ... we said the words air hug to each other. ... People now are becoming more careful.”

— PAUL KIESEL

firm announced on Twitter that it would no longer require any employee to sign a mandatory arbitration agreement. That same day, Orrick, Herrington & Sutcliffe also announced on Twitter it was ending its arbitration agreements for any employees, including associates. Skadden Arps Slate Meagher & Flom dropped its arbitration agreements for nonpartners after reviewing its policies in response to the MeToo movement, according to a Law360 article.

Orrick spokeswoman Jolie Goldstein says the firm was already reviewing some human resources policies because of the movement. The Twitter conversation about Munger Tolles then motivated Orrick to announce its policy change faster.

"While we believe arbitration offers significant positive attributes for employees, we decided it would be best to give our employees the choice to opt in to arbitration if the employee decides to proceed that way," Goldstein says.

Munger Tolles co-managing partners Brad Brian and Sandra Seville-Jones didn’t respond to emails seeking comment. Neither did Skadden spokeswoman Melissa Porter.

It is unlikely that Munger Tolles meant for its arbitration agreement to target sexual harassment claims specifically, says Michael Weber, who represents law firms in employment matters. The vast majority of firms use alternative dispute resolution provisions, and they very commonly apply to sexual harassment claims.

“It started over the last 20 years and I think it’s increased in popularity since then,” says Weber, a shareholder in Littler Mendelson in New York City, explaining that the confidentiality of arbitration is the main perk. “These kinds of suits could be damaging to a lawyer’s reputation and law firm’s reputation.”

But in some situations, confidentiality of arbitration can be a problem. “We happen to be in a moment it’s become clear the current system for remedying sexual harassment claims is woefully inadequate,” says Leah Litman, a professor at the University of California at Irvine School of Law.

Because arbitration is private, a female attorney being sexually harassed couldn’t learn about similar arbitration cases to corroborate her claims through other victims, Litman explains. It’s also harder for a sexual harassment claimant in arbitration to protect herself against retaliation.

“You can’t go public and demonstrate to colleagues, clients and peers that you are being retaliated against for a sexual harassment claim,” Litman says. “It could chill employees from talking about the underlying mistreatment.”

Weber says that as the MeToo movement spreads further into the legal industry, more lawyers might voice concerns with their firms’ arbitration policies, which could spur firms to end mandatory arbitration. On the other hand, Litman cautions it’s too soon to tell whether this could become a trend.

—Angela Morris
Northern District of Georgia, which found that when an employer filed a summary judgment motion in sexual harassment cases where the plaintiff had counsel, 94 percent of the claims were dismissed.

“These are incredibly factually intensive cases, and of course fact disputes should go to a jury. The problem is that federal judges are taking the place of juries and deciding what they think is evidence,” says Thomas, mentioning a 2016 Federal Judicial Center study that found 75 percent of Article III judges are male.

“Our studies show that if a woman is added to an appellate panel, the panel is more likely to find against a summary judgment motion in a sex discrimination claim,” says Thomas of the University of Illinois.

Given the likelihood of having a sexual harassment lawsuit dismissed, many employment lawyers won’t represent a plaintiff unless there are multiple witnesses willing to say that the accuser harassed them too. Describing it as “Bob Packwood syndrome,” in reference to the former Oregon U.S. senator who resigned in 1995 following sexual harassment allegations from staff, Jocelyn Burton says that people who want to bring a sexual harassment lawsuit have been told by lawyers that there must be between five to 10 others also targeted by the accused.

“I'm hoping that as a result of Me Too, people realize that [sexual harassment] is a lot more pervasive than they think it is—and are more likely to believe women,” says the Oakland, California, employment lawyer. “But there are a lot of stereotypes that play into who gets believed and who doesn’t.”

And even if the plaintiff finds an attorney, he or she frequently must pay costs to get past summary judgment, rather than the attorney taking the case on a contingency-fee basis. Pretrial costs can be as high as $100,000, says Rebecca Pontikes, a Boston employment lawyer who represents plaintiffs. She doubts that many sexual harassment plaintiffs will have immediate success in court, despite increased negative attention toward high-profile men accused of sexual harassment.

“They're fighting Goliath if they go to court,” she says. “The rate in which my phone rings may increase, but I don't think the rate in which people actually get into court will change.”

It’s also hard to find an attorney to take sexual harassment charges brought in mandatory arbitration, says Roberta Liebenberg, co-chair of the ABA Presidential Initiative on Achieving Long-Term Careers for Women in Law.

“Our studies show that if a woman is added to an appellate panel, the panel is more likely to find against a summary judgment motion in a sex discrimination claim.”

— SUJA THOMAS
“There are studies around arbitration, in terms of fairness, and you're limited in your discovery,” says Liebenberg, a partner with Philadelphia’s Fine, Kaplan and Black. She adds that some arbitration awards may not be big enough to interest most attorneys.

“I don't think arbitration should be prohibited, but it shouldn't be mandated,” she says. “Women should have the opportunity to take a case to court and avoid arbitration.”

CULTURE CHANGE

Employers may take a harder look at sexual harassment in their workplaces “because they don’t want to be the next Harvey Weinstein. But most plaintiffs aren’t Gretchen Carlson,” Pontikes adds, referring to two entertainment figures associated with high-profile harassment accusations.

Weinstein, an Academy Award-winning filmmaker accused of sexual misconduct by more than 80 women over four decades, with some of the accusations including sexual assault, was forced out of the Weinstein Co. after the New York Times and the New Yorker wrote about the allegations. The Weinstein Co. declared bankruptcy March 19, in addition to releasing employees from their nondisclosure agreements. Carlson, a former Miss America and Stanford University graduate, was fired from her job hosting the Fox News Network’s The Real Story shortly before she sued then-chairman and CEO Rogers Ailes for sexual harassment. Twenty-First Century Fox Inc. settled the lawsuit for $20 million in September 2016.

Besides Weinstein and Ailes, figures recently accused of sexual harassment include AlterNet executive editor Don Hazen, actor Kevin Spacey, recently retired 9th U.S. Circuit Court of Appeals Judge Alex Kozinski and President Donald Trump. The news articles around those allegations

ABA Entities Offer Resources to Address Sexual Harassment

Resolutions

Resolution 302, introduced by the Commission on Women in the Profession, the Section of Litigation and the Section of Civil Rights and Social Justice, urges all employers to adopt and enforce policies that prohibit, prevent and redress “harassment and retaliation based on sex, gender, gender identity, sexual orientation and the intersectionality of sex with race and/or ethnicity.” The ABA House of Delegates adopted it in February.

An amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct states that harassment or discrimination in the practice of law “on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socio-economic status” amounts to professional misconduct. Adopted by the House in 2016, it was sponsored by the Standing Committee on Ethics and Professional Responsibility, the CRSJ section, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the women’s commission.

Policies

A model workplace policy on employers’ emergency responses to domestic, sexual or dating violence and stalking is offered by the the Commission on Domestic & Sexual Violence.

The CRSJ section, Labor and Employment Law Section, women’s commission, Young Lawyers Division and the CDSV together created a Sexual Harassment and Assault in the Workplace Working Group. The group is drafting a model policy advocating for improved domestic and international laws regarding sexual harassment and assault.

Publications

Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession, published by the ABA women’s commission. In April, the commission was in the process of designing an online toolkit as a companion piece for the publication.

The Judges’ Journal, scheduled to be published in November, will focus on sexual harassment.

Student Lawyer’s March issue includes a piece by Leah Litman, a University of California at Irvine law professor, focusing on the lack of gender parity in the legal profession—and what can be done about it.

Podcasts

The series On the Ground, sponsored by the CDSV, is working on three episodes focused on the Me Too movement’s resurgence and expansion.

Webinars

The CRSJ section, women’s commission, CDSV and YLD have created a six-part series of webinars about sexual harassment and assault in the workplace.

Continuing Legal Education

Three events are scheduled for the ABA’s annual meeting, which takes place July 27 through Aug. 7 in Chicago. One, co-sponsored by SOGI and the Office of Diversity and Inclusion, focuses on best practices following the update to Model Rule 8.4. Another, sponsored by the CRSJ section, focuses on sexual harassment and assault in the workplace. A third program, “#MeToo and the Judiciary,” is sponsored by the Judicial Division’s JD Diversity Program.

—Stephanie Francis Ward
may make it easier for people to believe someone who says they were sexually harassed, says Joe Sellers, a Washington, D.C., employment partner with Cohen Milstein Sellers & Toll who has filed class action complaints against companies including Kay Jewelers, Walmart and Chipotle.

He also says that businesses are adding more training programs targeted at preventing sexual harassment in light of the increased attention. That won’t be meaningful, he adds, unless the training leads to work environments where employees can express what makes them uncomfortable without fear of retaliation.

“I think the best conditions that are likely to reduce the prospects of harassment are where people can have a free discussion about these things,” says Sellers, mentioning as an example asking a colleague to a meal outside the office. The person making the invitation may not mean anything by it other than discussing career issues, Sellers says, and may make multiple requests.

“Is that sexual harassment? Probably not, but you might be putting pressure on someone to engage in a social interaction that they don’t want to,” he says, adding that in a good work environment the person receiving the invitation would feel comfortable saying that he or she preferred to keep career discussions in the workplace, without any value judgment or the risk of being perceived as ungrateful.

“You want to create a workplace where people can be comfortable talking about what makes them uncomfortable,” Sellers says.

As hard as it is for people in professional jobs to report sexual harassment, the stakes are often higher for workers in hourly wage positions, who frequently have a greater risk of getting fired, Sellers says.

“We all know that if you complain about sexual harassment and you are fired, that’s unlawful,” he says. “Workers can say, ‘That’s fine, but I have no paycheck.’ For women in low-wage jobs that’s a powerful deterrent, and it’s much easier to put up with it or leave.”

Gerald Pauling, a Chicago-based employment partner with Seyfarth Shaw, provides nonharassment and behavior training to employees at all levels, and does “executive coaching” with management and executives. One approach, he says, is presenting people with harassment situations that would personally affect them. Another is talking about how engaging in harassment can harm someone’s career.

“It’s not so much ‘Hey, do you realize that your behavior bothers other people?’ Most of us are not that forward-thinking. It’s more: ‘Do you understand the types of situations these behaviors create, and what it looks like at the end?’” Pauling says.

He adds that sexual harassers are not necessarily people who are the best revenue generators or those with the impressive industry connections. But many display narcissistic tendencies, Pauling says, and seek out work environments where they won’t get caught, or people won’t object to their behavior.

“We’re talking about people who are savvy and experienced businesspeople, who have achieved success by being adept at reading people and navigating their way through an organization. We’re seeing individuals who engage in these behaviors strategically,” Pauling adds.

CRIMINAL COURTS TOUGHEN UP

In criminal law, training has made a significant difference in prosecutions related to sex crimes, and it helps that more women are police, lawyers and judges, says Josh Marquis, the Clatsop County, Oregon, district attorney. He mentions a conviction this January of a former high school wrestling coach and Coast Guard officer, who in a bench trial was found guilty of inappropriately touching a 17-year-old girl who was his foster child, and having sex with her friend, who was 15. The conduct in question was from 2005, and the defendant had no prior convictions.

“It was really tough because sometimes the assumption was that these are evil teenage girls,” Marquis says. “I think the Me Too movement has opened people’s eyes and moved things a little farther down the road.”

Jennifer Drobac is a professor at Indiana University’s Robert H. McKinney School of Law whose scholarship focuses on consent, sexual harassment and sexual exploitation. She notes that younger people have,
oftentimes, had comprehensive sex education, giving them a better understanding of affirmative consent than older people.

She also says that some lawyers and judges aren’t familiar with an evolving understanding of sexual equality and cultural norms—even if they’re aware of Me Too—and are skeptical of changing dynamics. People with that skepticism also tend to be sympathetic to the accused, Drobac says.

“They basically still have this notion that [sexual assault] complaints are easy to make and hard to prove. That’s just not accurate. Complaints are hard to make. There are some false complaints, and they certainly make media headlines when they happen. But there’s not a problem really with false complaints. The problem is with the lack of complaints, because it’s really tough to bring these cases. Women know that,” Drobac says.

Credibility assessments are an issue in sexual harassment allegations too, says Leslie Vose, a Kentucky employment lawyer who represents plaintiffs and defendants. “I think there’s an inherent skepticism about people who complain, so people that complain about sexual harassment start with a little bit of an uphill battle,” says Vose, a partner with Lexington’s Landrum & Shouse.

She fears a backlash from the Me Too movement. Vose graduated from law school in 1978, and at that time in Kentucky it was still common for bar association events to include poker games and alcohol consumption. She was the first female lawyer her law firm hired, and bosses didn’t think she should be in that environment. “I’ve worked way too hard to have access to golf tournaments and poker games to have a climate where because I’m a woman I can’t be invited, because it may be misconstrued,” says Vose. “If men can find an excuse not to include us, trust me, they will. Not all men—lots of men are awesome—but a lot of them are much more comfortable without us.”

Liebenberg says she’s already hearing of a backlash, especially from young female associates. “It’s that men don’t want to take women on the road with them, go out to dinner or have one-on-one meetings with the door closed because they are fearful their actions can be misconstrued,” she says. “We must be really vigilant to speak against it, and if we see it we need to call our colleagues out.”

When asked how she would do that, Liebenberg says she would ask the partner in question directly if he was choosing to not work with a female associate because he feared being accused of sexual harassment. “Whoever is overseeing assignments needs to be trained on this,” she says. “This is a new aspect of training we need.”

Reactions to sexual harassment allegations tends to be industry specific, and responses include cost calculations, says Nicole Page, a partner with Reavis Page Jump in New York City, which represents employees and employers in the resolution of employment issues. She’d like to see financial penalties for companies that allow repeat sexual harassers to remain in their positions, as well as limiting non-disclosure agreements in employment contracts to trade secrets and other legitimate business concerns.

“Companies don’t agree to settlements because they feel bad that something happened. They are paying for silence,” Page says. “Let companies pay huge fines or lose tax breaks. If they’re going to keep somebody around who is a predator or a harasser, why aren’t they made to pay more?”

She thinks there have been more public, high-profile sexual harassment allegations in media and entertainment because both industries have women in leadership roles. Page is unaware of many high-profile sexual harassment accusations in law, and she says...
that may be because very few women have significant leadership positions in the industry.

**NEED FOR DIVERSITY**

Many lawyers have the perception that sexual harassment is no longer a significant issue in the profession, says Wendi Lazar, who was appointed to the ABA's Commission on Women in the Profession in 2015. She also chairs the commission’s committee on sexual harassment and gender-based bullying. A partner in Outten & Golden's New York City office, Lazar was also involved in the February resolution adopted by the ABA House of Delegates.

Based on a variety of experiences, including representing lawyers in employment disputes and work on a 2016 amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct, to prohibit discriminatory harassment while practicing law, Lazar knows that while sexual harassment may be less prevalent than gender discrimination in the legal profession, it's still a problem.

She mentions a report published this year that surveyed 2,827 attorneys working at law firms or as in-house counsels in 2016. Approximately one-quarter of the women surveyed reported that they had experienced workplace sexual harassment in the form of unwanted romantic or sexual attention or touching. Seven percent of white men surveyed, and 11 percent of the men of color, reported such sexual harassment.

_You Can't Change What You Can't See_ was sponsored by the ABA women’s commission and the Minority Corporate Counsel Association, and prepared and written by the Center for WorkLife Law at the University of California's Hastings College of the Law in San Francisco.

It also found that among the lawyers surveyed, 9.6 percent of the women of color and 13.2 percent of the white women reported that they had lost work opportunities because they rebuffed sexual advances at work. Meanwhile, 5.3 percent of the men of color and 3.2 percent of the white men reported they had lost work opportunities after turning down sexual advances at work.

“Sexual harassment is different than gender discrimination. It’s usually behavior that’s aggressive in certain settings, and done by people who believe that they can use sex to marginalize someone to make them feel small, uncomfortable and vulnerable,” says Lazar, who was the executive editor on a recently updated women’s commission manual that focuses on initiatives for legal employers to effectively respond to sex-based harassment. Titled _Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession_, the manual was first published in 2002.

In many cases, when someone’s behavior makes people uncomfortable, there’s a tendency to not say anything because we don’t want to embarrass the person exhibiting the behavior, Lazar adds. That results in more protection for the harasser than the person who is being harassed.

Also, Lazar says, she doesn’t buy “he said, she said” excuses to not fire people accused of sexual harassment, particularly at law firms.

“At law firms, I think everybody knows who the harasser is, and generally they are protected to the degree that a firm can protect them, as long as it stays within the confines of the firm,” Lazar says.

> “If men can find an excuse not to include us, trust me, they will. Not all men—lots of men are awesome—but a lot of them are much more comfortable without us.”

— LESLIE VOSE
NEW BOOKS FROM THE ABA LAW PRACTICE DIVISION

The Lawyer’s Guide to Collaboration Tools and Technologies
Smart Ways to Work Together, Second Edition
Product Code: 5110824
List Price: $89.95
Law Practice Division Member Price: $59.95

The Lean Law Firm
Run Your Firm Like The World’s Most Efficient and Profitable Businesses
Product Code: 5110821
List Price: $79.95
Law Practice Division Member Price: $49.95

Fastcase
The Definitive Guide
Product Code: 5110820
List Price: $69.95
Law Practice Division Member Price: $49.95

Microsoft Office 365 for Lawyers, Second Edition
Product Code: 5110823
List Price: $49.95
Law Practice Division Member Price: $39.95

Macs in Law
The Definitive Guide for the Mac-Curious, Windows-Using Attorney
Product Code: 5110822
List Price: $79.95
Law Practice Division Member Price: $49.95

The 2018 Solo and Small Firm Legal Technology Guide
Product Code: 5110819
List Price: $89.95
Law Practice Division Member Price: $63.95

How to Draft Bills Clients Rush to Pay, Third Edition
Product Code: 5110818
List Price: $34.95
Law Practice Division Member Price: $25.95

The Millennial Lawyer
How Your Firm Can Motivate and Retain Young Associates
Product Code: 5110816
List Price: $29.95
Law Practice Division Member Price: $19.95

Positive Professionals
Creating High-Performing Profitable Firms Through the Science of Engagement
Product Code: 5110817
List Price: $44.95
Law Practice Division Member Price: $33.95

The Ultimate Guide to Adobe Acrobat DC
Product Code: 5110815
List Price: $79.95
Law Practice Division Member Price: $49.95

The Full Weight of the Law
How Legal Professionals Can Recognize and Rebound from Depression
Product Code: 5110814
List Price: $59.95
Law Practice Division Member Price: $44.95

Order Today
ShopABA.org
(800) 285-2221

Facebook: @ABAPublishing
Twitter: @ShopABA
LinkedIn: ABAPublishing
Creating Your Own NICHE

BUILDING A NICHE LAW PRACTICE CAN TAKE A LOT OF WORK AND EVEN A BIT OF LUCK, BUT THE REWARDS COULD BE SUBSTANTIAL by Danielle Braff
ike many students struggling to cope with the staggering costs associated with attending law school, Candace Moon decided to take on a side job as a bartender. Moon, who graduated from the Thomas Jefferson School of Law in 2007, could have worked in any number of bars in San Diego slinging whatever variant of Budweiser, Miller or Amstel was on tap. Instead, she got a job at Hamilton’s Tavern, a dive bar that turned into a craft beer bar.

At first, it was just a job—and a side one at that. But after meeting a winery attorney at a local bar association event, she had a lightbulb moment. “It triggered the thought that I knew a lot of brewers but no brewery attorneys,” Moon says.

It struck her as odd that there seemed to be so few attorneys who specialized in the complicated alcoholic beverage industry, which is highly regulated at the state and federal levels. After she attended a national craft beer conference, she realized many areas of the law are implicated.

So Moon took classes on alcohol trademarks, law and the business; attended industry events; and increased her craft beer knowledge.

“I started speaking at craft beer industry events and slowly started gaining clients,” Moon says. “After about three to four years, I had a full-time practice of virtually only craft breweries.”

Moon had found her niche. That niche took her so far that she soon reached the point where she couldn’t
take the business much further on her own, and the practice was becoming so big that the majority of her time was spent running her firm rather than working with clients.

“About the same time I had some personnel leave and Dinsmore & Shohl reached out,” says Moon, who joined the firm as a partner in August 2017 and works out of its San Diego and Denver offices. “It seemed like the perfect solution to both alleviating my frustration at just running an office, as well as the opportunity to take what we’d been able to accomplish in California to other states.”

FINDING YOUR FOOTING

It’s no secret that the legal world is oversaturated with eager, experienced and capable attorneys, making it difficult for individual lawyers to stand out from the pack.

For one thing, fewer jobs are available for lawyers, making the ones available highly coveted and sought-after. According to a recent study from the National Association for Law Placement, the number of jobs found by 2016 graduates was down by more than 2,000 compared with 2015.

Other numbers were somewhat deceiving, showing rising levels of employment. But they were due to smaller class sizes and fewer people choosing to be lawyers.

The overall employment rate for 2016 law grads was up by almost one full percentage point, to 87.5 percent of graduates for whom employment status was known, compared with 86.7 percent for 2015 law grads.

Further, 67.7 percent of 2015 graduates were able to find work requiring bar passage—a slight increase from 66.6 percent in 2014. For the second year in a row, the actual number of legal jobs snagged was lower in every sector except large law firms of more than 500 lawyers.

Even if lawyers are able to find employment, chances are they’ll face vicious competition for clients and work. A new study by Citibank reports that expense growth outpaced revenue growth within the law firm industry, and firms aren’t expected to do much better this year because competition for business has never been more fierce.

Meanwhile, according to a 2017 study by Altman Weil, because of decreasing demand for legal services, 52 percent of law firms’ equity partners aren’t as busy as they’d like to be. In a quarter of firms, even the associates don’t have full workloads.

Part of this is because there are simply too many lawyers competing for the same work. In the Altman Weil study, 61 percent say overcapacity is diluting the firms’ profitability, and 88 percent say they have chronically underperforming lawyers.

Many attorneys are realizing if they want to get a job, score clients or start a solo career, they’re going to have to differentiate themselves from other lawyers also clamoring to get noticed.

There’s one quick way to do it: Find your own niche. The more specialized the niche, the more that clients will go to you specifically rather than someone else.

“Lawyers who have a niche are in high demand,” says Jamy Sullivan, Dallas-based executive director of Robert Half Legal, a staffing service that specializes in lawyers. “Demand for candidates with the hottest skills and backgrounds exceeds
the current supply, which is intensifying competition, so lawyers who have a niche area of specialization are very marketable.

Specializing also benefits the client, according to Moon. “Every industry has a need and its own special nuances that make it different,” she says. “Those nuances are where a niche attorney becomes so valuable.”

Once you become valuable, you’ll become known as the “fill-in-the-blank attorney.”

“I attend many more craft beer industry events than I do legal events,” Moon says. “I feel comfortable saying that the California breweries see me as part of their industry.”

But simply calling yourself a niche attorney doesn’t make you one. It often takes a lot of hard work, extra education and even some luck to get to where you become the fill-in-the-blank attorney.

FLYING HIGH

The first step is choosing a niche. When making the choice, it should be within a topic you love because hopefully you’ll immerse yourself in that niche for many years to come, says Josh Horn, co-chair of the cannabis law practice and a partner at Fox Rothschild in Philadelphia.

He actively sought out cannabis law after he took a trip to Colorado four years ago, just after marijuana was legalized there. Previously, Horn had been a commercial litigator focused on securities and financial services.

“My wife suggested that I should consider becoming a cannabis lawyer because it was obviously here to stay,” Horn says. “Although my main focus had been representing financial advisory companies, individual advisers and counselors in FINRA [the Financial Industry Regulatory Authority] examinations, my interest in the cannabis space was piqued, and I saw the opportunity to expand upon my practice.”

After his trip to Colorado, Horn became a voracious reader on the subject, studying cannabis books and laws from around the United States. To keep up with the ever-changing marijuana trends, Horn set up news alerts; and he reviewed (and still reviews) about 50 stories daily on the subject. He also created an interactive survey tracking relevant laws on the books in more than 25 states and the District of Columbia.

“Because cannabis law was, and still is, such a new area, there is no leading treatise to rely on,” Horn says. “When I set out to master it, I had to create my own curriculum.”

His most helpful books include Weed the People: The Future of Legal Marijuana in America by Bruce Barcott and Cannabis: A History by Martin Booth.

Eventually, valuable resources popped up, such as the Cannabis Law Journal (Horn is on the editorial board) and the National Cannabis Bar Association, which had its first meeting this year. After the Pennsylvania medical marijuana law passed, Horn joined the effort to help the state’s Department of Health craft regulations by attending a conference called the Marijuana Medical Regulatory-palooza.

Now, Horn concentrates on all aspects of cannabis law, including assisting clients seeking licenses to grow, process and dispense cannabis for medical use or “adult use.” He markets his practice as a frequent speaker at CLE classes, as well as industry-specific conferences on matters such as cannabis and the workplace.

“Getting involved with the marijuana business market has absolutely brought in more clients, and it’s an exciting time to be part of this industry experiencing such growth,” Horn says.
According to law firm consultancy Edge International, marijuana law was projected to be one of the fastest-growing practice areas in 2017. Additionally, several large law firms, including Duane Morris, Foley Hoag, Riker Danzig and Horn’s firm, Fox Rothschild, have created legal cannabis practice groups in the last few years.

Jorge Espinosa, an intellectual property lawyer and partner at Espinosa Martinez in Miami, agrees that lawyers should find their niche in an area they already love, “so that you’re combining your hobby with law.” A 1988 graduate of the University of Miami School of Law, he took advantage of previous knowledge to find his niche. Before going to law school, he worked as a self-taught computer programmer.

“At my first law firm job, I realized that I needed a niche to stand out and become partner,” Espinosa says. “So I gradually took over doing all of their IP work.”

Greg Reigel, an aviation partner at Shackelford, Bowen, McKinley & Norton in Dallas, says, “With so many lawyers out there, focusing on a niche rather than a more general practice area helps to limit the competition.”

“If the niche is something of a personal interest, it makes the niche practice area more fun,” Reigel adds.

At the time, there weren’t many attorneys in his area, but Reigel joined the few aviation legal organizations he could find and attended related conferences and CLEs so he could meet other attorneys practicing aviation law. He also studied and researched aviation law issues by reading cases, regulations and everything else he could find.

Next, it was time to market himself as an aviation law specialist. So Reigel created a law blog and began to write posts and articles to publicize his expertise in aviation law. And all of these efforts have resulted in business.

“Being in the organizations and attending conferences allowed me to meet people and make connections, which eventually factored into my joining Shackelford as a partner,” Reigel says.

**GO WHERE THE OTHERS AREN’T**

It never occurred to Caitlin DiMotta to become a lawyer. She had always wanted to be a ballerina. But after high school, when she was helping a friend complete 501(c)(3) paperwork to establish a nonprofit dance theater, she started to think more about her niche rather than becoming a dancer. But that was until she was told at age 22 that she’d need a hip replacement soon.

DiMotta decided to hang up her ballet shoes and, remembering her interest in the law, take the LSAT. She figured if she couldn’t pursue her art, she could help other artists navigate the complicated and intimidating legal world.

She got her chance after she graduated from the University of New Mexico School of Law in 2006. She moved to Seattle with her husband, an aspiring comic book writer; and shortly after arriving in town, she befriended Ed Brubaker, who’s written comic books starring the likes of Batman, Captain America, Catwoman and Daredevil. He asked DiMotta to look at his contracts. She did, and he told others about her work. Pretty soon a niche was born.

Few comic book attorneys exist, although the genre tends to be a mix of literary publishing and movie exploitation, so there’s a real need for lawyers, DiMotta says.

“It felt very organic, beginning with a dearth of lawyers servicing a particular community—comics—and my being in a unique position to help that community in a personal way,” says DiMotta, who is now an attorney at Katz Golden Rosenman in Santa Monica, California. “I would even say that now my practice has broadened because comics have become so mainstream, and so many comics are being adapted for television, film and video games.”

It’s also incredibly helpful to have attorneys refer their cases to other lawyers, says Lawrence Buckfire, the Southfield, Michigan-based president and lead trial attorney at the Buckfire Law Firm.

“ Niches are necessary due to the level of competition in the legal profession,” Buckfire says. “Every aspect of law has niches, ranging from lawyers who specialize in wrongful conviction lawsuits to attorneys who specialize in LGBT divorce.”

Buckfire’s niche area involves cases of child lead-paint poisoning. He heard lawyers in other states were litigating these types of cases, and the topic interested him as well. So Buckfire attended a national conference about child lead-paint poisoning, and then he began to market himself as a pro because there were no lawyers in Michigan handling such cases at the time.

“Specializing within that practice area allowed me to be retained by a larger number of clients due to less competition in the area of specialization,” he says. “It really is just identifying a need in the market that is not already fully saturated.”

Similarly, Debra Tsuchiyama Baker became an environmental lawyer in the 1980s when environmental laws were in their infancy. She was a new lawyer at her firm, and she has stuck with the task of wading through the federal registers and technical regulations.

“In my case, that was very fortuitous, since I was able to become an expert in a new area of law that did not exist before—at a particularly early stage in my career as a new lawyer,” says Baker, suggesting that other newbies are open to novel areas of law that might not seem that interesting at first glance.

Baker got herself up to speed by working with experts and consultants about the technical com-
ponents of environmental law. “Today, many environmental lawyers have science and technical backgrounds, but back in the 1980s it was not as common,” she says. “We learned by doing and as we went along.”

Since then, she’s handled some of the nation’s largest environmental matters for some of the largest corporations and public entities, including Dell Inc., the Port of Houston Authority and Texas A&M University.

“Finding a niche has definitely helped me as a lawyer, as clients will seek out those who are demonstrated as having extensive knowledge in a particular field,” says Baker, managing partner at Baker Wotring in Houston.

Indeed, sometimes the least-saturated markets are the ones on the cutting edge. Adam Grant, a partner at Alpert Barr & Grant in Encino, California, started his career in general business litigation. But he decided to go a completely different route when an idea occurred to him in 2009 as he was training for an Ironman long-distance triathlon.

He realized (as his fitness tracker was simultaneously counting his every move, including heart rate and calories burned) many phone apps track interests, friends, contacts, activities and location. While web browsers and certain sites already had been tracking information via computers, wearables and phone tracking had just started when Grant had his bright idea.

“I was thinking, ‘This will be interesting: You’re dealing with something much more powerful than your regular computer,’” Grant remembers saying to himself as he swam, his tracker confirming his instincts. He realized this new field would have major jurisdiction issues. “Not many laws dealt with mobile devices,” Grant says.

The field he foresaw checked off both categories: It was a new, growing industry, and it lacked attorneys. Grant immediately got to work.

He began to research mobile app and digital-privacy trade organizations, spending time going through the applicable laws on digital privacy. Grant also took some courses through the International Association of Privacy Professionals and was active in other similar organizations. He educated himself on the topic through seminars and other cases he found. Once he deemed himself to be knowledgeable, he presented and wrote articles.

“I’m prolific in writing articles about this, and I’ve presented at conferences across the country,” Grant says. He also works with financial institutions to secure their banking and online privacy needs, and those banks consult

“Today, many environmental lawyers have science and technical backgrounds, but back in the 1980s it was not as common. We learned by doing and as we went along.”

— DEBRA TSUCHIYAMA BAKER
with him for legal advice and lectures.

Grant further separated himself from other mobile app and digital privacy lawyers by sticking with his smaller firm. Although larger firms that have digital privacy practices exist, few law firms his size specialize in this.

“The vast majority of companies that have data breaches who have digital privacy concerns are small and medium businesses,” Grant says. “They don’t have the resources to have all the security that the large businesses do, and my abilities are perfectly within their realm of need.”

Because Grant provides the same services that the larger digital privacy firms do, he attracts many of the small and medium-size companies, he says, recommending other attorneys first consider their specialty, then examine that niche from all angles and sizes to see how their emerging firm will fit.

FORMING A GAME PLAN

According to Robert Half Legal’s 2016 salary guide, lawyers who have niche backgrounds and skills are wanted, but the competition is growing. Nevertheless, the study reported if niche lawyers choose their specialties carefully, they’ll still be noticed and desired.

Additionally, the study reported, those who have expertise in high-growth areas such as commercial law and specialized health care receive higher-than-average starting salaries, signing bonuses and multiple offers.

That’s because superskilled, highly specialized attorneys remain a rare breed. According to a Robert Half Legal survey from 2017, about 67 percent of law firms said finding skilled legal professionals is somewhat or very challenging.

Companies are trying to reduce their reliance on outside firms and increase their efficiencies by hiring niche lawyers, so they don’t have to continually hire expensive outside lawyers, says Sullivan of Robert Half Legal.

“We’ve seen demand for specialized expertise increasing in many markets, and this trend should continue to intensify in the months ahead,” Sullivan says.

For those still unsure about what to specialize in, Sullivan has some suggestions.

“Consider your strengths and weaknesses, as well as your previous education and work experiences,” she says. “A business degree, for example, may help you to better understand areas of law dealing with corporations; while a science background, such as a biology or geology degree, may be useful in a career in environmental law.”

But in addition to thinking about interests, also consider region and how your expertise will be received. Perhaps intellectual property or insurance defense would be good fits for your town, she says. Next, figure out how to move from an idea to a plan.

“Ask people within your professional network or attorneys you meet at conferences or industry events how they selected their specialization and what they enjoy most about their work,” Sullivan says. “Also, check with them about skills, certification and other qualifications they believe are needed for someone to excel in their areas.”

Danielle Braff is a freelance writer based in Chicago.
Asking for Mercy
ABA groups launch a clemency information clearinghouse for death penalty cases
By Lorelei Laird

Three years ago, ABA attorneys decided to address a major gap in resources for lawyers who defend capital cases: clemency information. Defendants who have exhausted their direct appeals and habeas petition rights often ask governors for mercy—but there wasn’t a lot of information available about how to do that effectively.

“In every state that we studied, there were insignificant resources for and attention paid to clemency, leaving it ... too hollow to be comfortable for our profession,” says Misty Thomas, director of the Death Penalty Due Process Review Project. Thomas notes that the ABA has no position on the death penalty—but “if we’re going to have the death penalty, every single stage should be robust and meaningful.”

Too few training programs have been geared toward the clemency stage, says Emily Olson-Gault, director and chief counsel of the ABA Death Penalty Representation Project.

“In the capital defense world, there is a huge focus on training defenders to represent their clients in court ...
proceedings, but clemency often gets short shrift and is often more of an afterthought,” Olson-Gault says. “It’s critically important that lawyers have the training and resources to effectively advocate for their clients in clemency—just like in every other part of a capital case.”

Thomas’ and Olson-Gault’s entities teamed up with the ABA Commission on Disability Rights. And in 2015 the ABA Board of Governors approved a grant for a project to gather clemency resources.

The Capital Clemency Resource Initiative launched in March at the URL capitalclemency.org. It offers state-specific information about clemency in death penalty states, plus past petitions, court decisions, academic papers and ABA policy on the subject.

The initiative also offers training materials, including a book written for the project titled *Representing Death-Sentenced Prisoners in Clemency: A Guide for Practitioners*. Laura Schaefer is the primary author of the book and a staff attorney for the Death Penalty Representation Project. She says it’s a manual exclusively for lawyers who defend capital cases, including pro bono lawyers the project recruits and trains. ABA staff distribute the book upon request.

Another goal of the website is to educate, Schaefer says. “One part of what we are trying to do is increase public understanding of the clemency process in capital cases ... and how it’s supposed to catch wrongful sentences,” she says.

**CONSIDERING CLEMENCY**

Clemency is a catchall term for pardons, commutations and other acts of mercy from state executive branches. Thomas says most death penalty prisoners ask for their sentences to be commuted to life. These requests—which in some states are automatic—often go through governors, state parole boards or both, and one hurdle for practitioners is knowing what the process is. Another, she says, is that lawyers must adjust their strategies for an audience that may not have a strong legal background.

Thomas says there are good reasons to consider those requests. In some cases, prisoners with intellectual disabilities or mental illness were convicted before advances in brain science cast doubt on their culpability. For prisoners who have been on death row for decades, age-related disability can also be an issue, as it is in an Alabama case the U.S. Supreme Court took up in February. In the case, inmate Vernon Madison can no longer remember the 1985 murder he was convicted of due to dementia and a stroke.

The heavy involvement of disability issues in these cases is one reason the Commission on Disability Rights was part of the project. Death row inmates “may have disabilities that affect their culpability, including but not limited to autism, bipolar disorder, intellectual disability, learning disability and schizoaffective disorders,” says Amy Allbright, director of the commission.

And the rate of clemency grants for death penalty defendants seems to have grown in the past few years, Schaefer says. Clemency-related matters put the brakes on about five executions last year. And in February, Texas Gov. Greg Abbott granted clemency to inmate Thomas Whitaker on the eve of his execution, which Schaefer says is “almost unheard of.”

“It is key that attorneys and governmental decision-makers involved in the capital clemency process are aware of how these disabilities may affect culpability,” Allbright says.

And the rate of clemency grants for death penalty defendants seems to have grown in the past few years, Schaefer says. Clemency-related matters put the brakes on about five executions last year. And in February, Texas Gov. Greg Abbott granted clemency to inmate Thomas Whitaker on the eve of his execution, which Schaefer says is “almost unheard of.”

“I think we’re starting to see an upward trend in capital clemency grants, which means that being prepared to represent someone zealously in that process is all the more important now,” she says.
Lend Me Your Ears
Podcasts have become a way for ABA entities to educate and entertain
By Lee Rawles

Lawyers’ time is extremely valuable. So why would a busy attorney devote nonbillable hours to a podcast?

“It’s a very efficient way to receive information that’s targeted to a specific topic,” says Elisa Poteat, a host of National Security Law Today, a podcast produced by the ABA Standing Committee on Law & National Security. “You can pick up books and spend hours trying to read through them or spend 35 minutes hearing from one of the nation’s foremost practitioners.”

National Security Law Today, which launched in September, is one of several podcasts produced by ABA entities. Poteat co-hosts the podcast with fellow national security attorney Yvette Bourcicot, an adviser to the standing committee.

Poteat says she advocated for the committee to create a podcast for two main reasons: to make the topic of national security law more accessible to the uninitiated and to promote the expert discussions that take place at the committee’s public events.

“It’s one of the few podcasts in this space that features lawyers with experience as opposed to pure opiners,” Poteat says. As an example, she points to a November episode with Mark S. Zaid, a Washington, D.C., attorney who has a practice focused on national security law. “Whistleblowing and leaks were all over the news, and we were able to interview one of the world’s leading practitioners,” Poteat says. “People tend to throw around the term whistleblower, but whistleblower is a legal definition, and it was incredibly helpful to have Mark on to explain it.”

VETERAN VOICES
The ABA’s access to lawyers who have deep expertise also has been key for On the Ground, another recently launched podcast produced by the ABA Commission on Domestic & Sexual Violence and funded by a grant from the Office on Violence Against Women at the Department of Justice.

On the Ground’s first season provided advice from experienced practitioners in the field to young attorneys just beginning their practices. Its second season launched in April and features interviews with judges.

Anya Lynn-Alesker, managing attorney for the commission, is the host and closes each episode with the slogan “Clear law, full heart, can’t lose.”

Lynn-Alesker says since the commission was founded, about two months after the Violence Against Women Act was signed in 1994, its objective has been “to elevate the bar of attorneys who represent domestic, dating, sexual and stalking violence victims and survivors.”

The commission has provided training and support through in-person, multiday institutes, teleconferences and, more recently, webinars.

“So we have been talking about our future and strategic planning and what we think we should be doing as we move forward in trying to support the field, and we looked at the year...
and realized it was time to join the podcast movement,” Lynn-Alesker says. “I do think that Serial and some of those larger podcasts were an inspiration, in that you can have more substantive conversations and that they can captivate people.”

A GROWING MARKET
Podcasts as we think of them have been around for at least 15 years, although the number of people listening has surged since 2014—the year the true crime podcast Serial debuted. The publicity generated by its first season led to a retrial being ordered in March for Adnan Syed, who’d been convicted of the murder of Hae Min Lee.

There’s no single equivalent to Nielsen TV ratings for podcasts, so an exact picture of the market is difficult to compile. But advertisers are taking notice of the rise in listeners.

Laurence Colletti, an attorney and executive producer for Legal Talk Network, a podcasting company, says a PricewaterhouseCoopers study shows podcast ad revenue has gone up from $69 million in 2015 to an estimated $220 million for 2017.

The ABA Journal began experimenting with audio publishing in 2010 and now produces three programs in partnership with Legal Talk Network. Asked and Answered, the Journal’s longest-running podcast, addresses topics such as building a practice, navigating the changing legal market and creating work-life balance. Modern Law Library (hosted by the author of this article) features books that could be of interest to lawyers and interviews their authors. The Legal Rebels Podcast hosts discussions with pioneers who set the stage for today’s innovations and people who are changing the legal profession.

STUDENTS IN THE STUDIO
That changed profession will one day be in the hands of current law students, and the ABA Law Student Podcast is for them. Produced by the ABA Law Student Division in partnership with Legal Talk Network, the program is an eclectic combination of current topics in the news and advice for students deciding which areas of the law they want to focus on.

Colletti says the law student demographic was a natural fit for Legal Talk Network because they tend to be tech savvy and enjoy listening to podcasts on mobile devices.

“I was absolutely blown away by the early candidates for hosts and continued to be blown away by the hosts as they graduate and move on,” Colletti says. “The students who volunteer to be part of the Law Student Division are so incredibly professional. Way more so than I was in law school! It blows me away, what they’re willing to commit to, how much time they put in, and how much they care about what they’re doing.”

The ABA Law Student Podcast is currently hosted by Caitlin Peterson, a 3L from the Washington and Lee University School of Law, and John Weber, who graduated in May from the University of Louisville Brandeis School of Law. They also are members of the ABA House of Delegates, representing the Law Student Division.

“My experience as a host has been great so far, in that it has helped me use a lot of talents I might not otherwise be using in law school,” Peterson says.

Weber says his time as a host has made him want to continue podcasting, even after he and Peterson turn over their duties to their successors, who will be elected at the ABA Annual Meeting in August.

“I’ve been able to speak with some wonderful guests, people that I might not otherwise be able to get on the phone, and pick their brains about some really cool topics,” Weber says.

LISTENING LONGEVITY
Although not all ABA entities that have podcasts update regularly, episodes can have information that remains valuable long after the recording.

“We still get residual listens from episodes that are years upon years old. It’s kind of funny,” Colletti says. “Every now and again, we’ll get this little extra punch of listens on an old episode out of nowhere, because as current events evolve people want to learn more about an issue. And so they’ll look something up.”

Peterson sums up how she sees value for the ABA in creating and listening to podcasts.

“To me, a podcast is worth the time to host if it is helping foster skills in its host that can be applicable in real life, and it is worth the time to listen to if it is providing information valuable to its audience, either professionally or personally,” she says. ■

For links to these and other ABA podcasts, go to ABAJournal.com.
A Capitol Effort

ABA Day lobbying focused on protecting the Legal Services Corp. and student-loan forgiveness program

By Rhonda McMillion

More than 300 bar leaders from around the country traveled to Washington, D.C., this year to lobby on issues of critical importance for the legal profession. They focused on two programs that have been targeted for elimination by the Trump administration: the Legal Services Corp. and the Public Service Loan Forgiveness Program.

ABA Day, coordinated by the Governmental Affairs Office and now in its 22nd year, featured hundreds of visits in which participants met face-to-face with members of Congress from April 10 to 12.

“Any chance a lawyer gets to come and participate in democracy directly as we do here on ABA Day is a wonderful and exciting opportunity,” says Patricia Lee Refo, chair of the ABA Day planning committee. “Whatever team jersey we wear back home we leave behind, and we bring our ABA team jersey here and lobby in a bipartisan way on issues that impact the American justice system.”

NONPARTISAN PRIORITIES

Despite the administration’s proposal to zero out funding for the LSC, the program received a $25 million increase for fiscal year 2018 that brought its funding to $410 million.

ABA Day participants emphasized, however, that 86 percent of low-income Americans receive inadequate or no legal help for their civil legal problems. They urged Congress to restore the program’s funding level to at least the inflation-adjusted fiscal year 2010 level of $482 million.

They pointed out that LSC funds provide support for legal services offices in every congressional district to assist numerous populations, including domestic violence victims, veterans, seniors, rural residents, women and natural disaster victims.

The PSLF program was established in 2007 to provide loan forgiveness for qualified borrowers who have made 120 timely payments on their federal direct loans while employed full time in public service jobs for at least 10 years. But it has been caught up in larger discussions about higher-education affordability as Congress considers reauthorization of the Higher Education Act.

Without the PSLF, employers would be unable to fill lower-paid positions serving the public—such as legal aid attorneys, public defenders or prosecutors—because of the staggering amount of student debt most new lawyers have when they graduate. ABA Day participants urged Congress members to let the program continue to function as envisioned until there has been an opportunity to assess the program’s impact.

Attendees added a last-minute lobbying item to their list after the Department of Justice announced April 10 that it was pausing an ABA-supported program that assists people in immigration detention facilities, so that a cost-benefit analysis can be performed.

The Legal Orientation Program provides instruction on legal rights, individual orientations, self-help workshops and pro bono referrals to 53,000 people annually. A 2012 DOJ analysis found the program saved taxpayers $17.8 million per year.

On April 25, the DOJ reversed its decision and said it will not suspend the program’s funding while the review takes place.

APPRECIATING ADVOCATES

This year’s Justice Awards, recognizing members of Congress for their support of the LSC and their leadership in the pursuit of justice for all, were presented to House Minority Leader Nancy Pelosi, D-Calif.; Rep. Brian Fitzpatrick, R-Pa.; Senate Majority Whip John Cornyn, R-Texas; and Sen. Dianne Feinstein, D-Calif.

During the awards presentation, Pelosi thanked the association for its ABA Day advocacy. “We stand with you,” she said, praising the ABA’s “steadfast commitment to an independent judiciary.”

ABA President Hilarie Bass told ABA participants that the impact of their efforts “will extend far beyond your engagement during ABA Day” and help the association “forge lasting relationships that can be called up when other important issues arise.”
CLASSIFIED/PRODUCTS & PROFESSIONAL SERVICES

DOCSNEXAMINATION

CRITICAL CARE RN investigates and summarizes complex medical reports, $60/hr. Save time and money. Experienced, responsive, reliable. New clients save 30% with this advertisement.
949-291-3553
louise@medrecordinvestigation.com
medrecordinvestigation.com

MEDICAL EXPERT

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

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

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

NURSE PRACTITIONER LEGAL CONSULTANT
Medical summaries, litigation support, experienced, low cost. 732-928-2735
markusmedicallegal.com

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

INSURANCE EXPERT WITNESS
Nationwide
Robert E. Underdown, ANI, SIA, AIC, ARM
The Insurance Archaeologist™
Agent Standards, Bad Faith Claims
Claims Handling, Coverage Opinions
Insurance Industry Standards
Life Insurance Suitability Opinions
www.Insurance-Expert.com
Call for complimentary consultation 480-216-1364

INCOME OPPORTUNITIES

DISSATISFIED?
Non-practicing attorney has found proven way to develop a 6 figure residual income with no boss, employees or business debt. Leave message at 615-219-5420 for more details.

Residual Income Business for your graduate. Your contacts generate a substantial and long-term income. www.wholesaleconference.com/aba.html

FOREIGN INVESTORS seeking partnership. If interested, contact me: charlesbankshopping@gmail.com

MPA LEGAL
MONTGOMERY PSYCHIATRY & ASSOCIATES
William C. Freeman, J.D., M.D.
(334) 288-9009 ext 207 • www.mpa1040.com
We Know the BRAIN and We Know the LAW
FORENSIC PSYCHIATRIC CONSULTATION
PSYCHO-LEGAL ASSESSMENTS OF VARIOUS COMPETENCIES

Michael D. Pukter
111 E. Galena Blvd
312-226-1760
773-477-1950
mpukter@lawpe.com
www.lawpe.com

SOME KIDS CAN’T READ!
VOLUNTEER ONE HOUR/WEEK AT SCHOOLS WITH MOST FREE-SCHOOL-LUNCH STUDENTS CALL: 612-588-1723

NEXT LEVEL COMMERCIANTIALS
100 Spots $1,600
Web/TV Marketing
For firms offering affordable lawyer fees $100-150/hr.
8 1 3 – 3 3 3 – 1 2 8 8

TV COMMERCIALS

ATTENTION LITIGATORS!
TRIAL READY™
Trademark For Sale / Licensing Opportunity
The name says it all
415-531-0253

ATTENTION LITIGATORS!
TRIAL READY™
Trademark For Sale / Licensing Opportunity
The name says it all
415-531-0253

COURT DIRECTORY ONLINE™
A free online guide to the nation’s federal, state and county courts. The courts at your fingertips!
CourtDirectory.com

SMARTPHONE LAW REPORT™
A free report that chronicles the emerging law and legal issues dealing with the smartphone and social media.
Smartphone-Law.com

TRAVEL

Visiting England? Qualified lawyer and Oxford graduate offers walking tours of Legal London and/or Oxford.
www.underhilltours.co.uk

DID YOU KNOW WE'RE ON INSTAGRAM?
Follow us for recent work from the creative minds behind the design at the ABA Journal
@ABAJOURNAL
ABA Notices

NOTICE BY THE SECRETARY: NOMINATING COMMITTEE MEETINGS
The Nominating Committee will meet in conjunction with the 2018 Annual Meeting in Chicago on Sunday, Aug. 5, beginning with the business session at 9 a.m. in the Crystal Ballroom B/C, West Tower, Lobby Level at the Hyatt Regency Hotel. Immediately following the business session, the Nominating Committee will hear from candidates seeking nomination at the 2019 Midyear Meeting. This portion of the meeting is open to Association members. If you have questions regarding the foregoing, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

Mary L. Smith, ABA Secretary

NOTICE BY THE SECRETARY: MEETING OF THE MEMBERSHIP
Pursuant to Section 6.11, the Secretary hereby gives notice to members of the American Bar Association that the meeting of the membership will be held in conjunction with the Nominating Committee Business Session and Coffee with the Candidates Forum, Sunday, Aug. 5, at 9 a.m. in the Crystal Ballroom B/C, West Tower, at the Hyatt Regency Hotel in Chicago.

Mary L. Smith, ABA Secretary

MAIN STATE DELEGATE VACANCY ELECTION
Pursuant to Section 6.3(e) of the ABA’s Constitution, the state of Maine will elect a State Delegate to fill a vacancy due to the passing of Wendell G. Large. The term will commence immediately upon certification by the Board of Elections and expires at the conclusion of the 2020 Annual Meeting. The deadline for filing petitions is Monday, July 9. For rules and procedures, go to ambar.org/MaineVacancy. If you are interested in filing or have questions, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

IS YOUR DATA SECURE?

Monthly in the ABA Journal: The magazine takes a year-long look at how cybersecurity issues can sting or save your law practice. And check for coverage online at ABAJournal.com

Cybersecurity & the law: A joint production of the ABA Journal and the ABA Cybersecurity Legal Task Force
CONGRATULATIONS to Keith F. Houston of Houston for garnering the most online votes for his cartoon caption. Houston’s caption, below, was among about 100 entries submitted in the Journal’s monthly cartoon caption-writing contest.

“Then I said, ‘Judge, you don’t have the guts to hold me in contempt.’ ”
—Keith F. Houston of Houston

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, June 10, with “June Caption Contest” in the subject line.

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

ABA Free CLE Series

Need to finish your required CLE?

THE ABA FREE CLE SERIES FEATURES

Nationally recognized speakers
Timely and trending topics
Convenient access
Earn up to 18 hours of free CLE credit every year*

ABA Members have exclusive access to past programs available on-demand for 90 days!

Enjoy ABA’s Free CLE Series at 1:00 PM ET on the third Monday of the month.

*Please note that some states may not approve specific programs, formats, or topics for credit. View CLE credit information for your jurisdiction at ambar.org/mandatory_cle.

LEARN MORE at ambar.org/freecle
Curt Flood Loses ‘Reserve Clause’ Challenge

In October 1969, the St. Louis Cardinals completed a blockbuster trade with the Philadelphia Phillies. The seven-player deal included two major stars at the pinnacle of their careers: Dick Allen of the Phillies and Curt Flood of the Cardinals.

Allen—a former rookie of the year—had hit 32 home runs the prior season. Flood, a centerfielder and .300 hitter, was a two-time World Series champion during seven seasons with the Cards.

But for Flood, the notion that a 12-year veteran could be bartered without his permission violated a basic personal right. Although he stood to make $100,000 with the Phillies (about $668,000 today), he decided to refuse the move and sit out the 1970 season.

Flood had been active in the civil rights movement of the 1960s, and his letter to Bowie Kuhn, Major League Baseball commissioner, echoed that experience: “I do not feel that I am a piece of property to be bought and sold irrespective of my wishes.”

Kuhn—although sympathetic—refused, and Flood filed suit against the commissioner, the presidents of the two major leagues, and the 24 teams that existed at the time.

Flood received scant public support from other players. To many, baseball’s “reserve clause” allowing total team control of a player’s career seemed virtually inviolable. Baseball’s hold on the American imagination and its iron-listed control of player contracts had allowed it to survive the 1919 Black Sox scandal, the Great Depression, segregation, franchise relocations and two major U.S. Supreme Court decisions.

In 1914, when challenged by a newly formed league, American and National League owners responded by buying off most of the emerging competition. When the owner of the Baltimore Terrapins won an $80,000 judgment under the Sherman Antitrust Act of 1890, baseball found relief at the Supreme Court. In a perplexing 1922 opinion in Federal Baseball Club v. National League, Justice Oliver Wendell Holmes Jr. ruled that baseball—where teams from various cities crossed state lines to play before paying audiences—couldn’t be considered a product of interstate commerce.

Likewise, when the Newark Bears, a New York Yankees farm club, disbanded in 1950, one of its promising pitchers refused reassignment to a lesser minor league squad. When George Earl Toolson demanded a chance to negotiate with other teams, he was met at the Supreme Court with a one-paragraph, 7-2 decision reiterating Federal Baseball.

So in 1972, with the support of the Baseball Players Association, Flood was attempting to rekindle the antitrust issue before a historically skeptical high court. Although his lawyer, former Justice Arthur Goldberg, argued that the clause violated not only antitrust laws but 13th Amendment prohibitions against peonage and involuntary servitude, the response was all but assured.

On June 19, 1972, in an opinion that began with a nostalgic list of his favorite players, Justice Harry Blackmun reaffirmed his love of baseball and the court’s love of its antitrust exemption. But he expressed hope that the reserve-clause anomaly could be cured through labor negotiations.

That happened in 1975, when a federal arbitrator ruled that two players unilaterally signed by their teams to one-year contracts could become free agents. After a brief court challenge, team owners resolved the issue in a new labor contract with the players union, introducing free agency into the landscape of player compensation.

By then, Flood had retired from baseball. He bought a bar on the island of Mallorca in Spain, where he stayed until illness forced his return to the United States. He died in 1997. A year later, Congress enacted the Curt Flood Act of 1998, formally removing the reserve clause from baseball’s antitrust exemption.

Last year, after more than 40 years of free agency, 36 Major League players made $20 million or more.
Supporting law-related causes.
The charitable contributions of our members help fund law-related research, educational, and public service projects of importance to the profession and the public. Thanks to their generosity, ABE has awarded grants totaling more than $284 million to date.

Exclusively for ABA members.
ABE offers group insurance plans from New York Life.² Our rates are based on a long history of favorable claims experience with ABE members, which results in lower premiums for you.

10- and 20-Year Level Term
Valuable protection at affordable rates you can lock in for 10 or 20 years.

5-Year Banded
Solid insurance to help safeguard you and your family or supplement what you have.

50+ Multi-Benefit
Designed for maturing members, simplified issue makes qualifying easy.

QuickDecision℠
Apply online – no medical exam – just basic questions about you and your health.

For details,³ visit abendowment.org or call us at 1-800-621-8981.

¹ Dividends are not guaranteed.
² Underwritten by New York Life Insurance Company, NY, NY. Policy form GMR.
³ Including features, costs, eligibility, renewability, exclusions and limitations.

© 2018 ABE, All Rights Reserved. LIFEAD18
More doing, less digging.

Only Thomson Reuters Practical Law Connect™ gives you direct access to expertly curated Practical Law® know-how and Westlaw® resources, all organized around your task at hand, so you can level the playing field. The fearless confidence that only comes from trusted answers.

Request a FREE TRIAL at legalsolutions.com/practical-law