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BOOK SENSE

Thanks to Bryan A. Garner for “Booking the Dumpster,” May, page 26. Ironically, I got badly burned some years ago by good people at St. John’s University, alas without notice, deaccessioning our law library’s bound volumes of the ABA Journal. I had used them regularly, in the library, turning pages and jumping across multiple years to track legal profession, and especially bar association, developments, knowledge diffusion and “temper.” The books were invaluable to have in hard copy and lay out on big tables, so as to see trends, ads, photos and so forth. And then one day they were gone—apparently “dumpstered.” I wailed and was told they’re all on Hein Online—which is true, but impossible without printing laboriously and harming the environment in order to make into the experience of having the books. Plus, the aging original pages, especially the photos, had become, themselves, works of art.

John Q. Barrett
New York City

LIFE LESSONS

Relating to Akira Heshiki’s article, “Life, Lemons and Lemonade,” May, page 14, as a working mother with a family, there are times when everyone needs you. As a lawyer, it can be hard to admit our vulnerabilities, lest others think we are weak. During a similar time in my life, I was a partner at a law firm, and in the morning the hospice social worker called to discuss difficulties with my mother (an hour on the phone), and in the afternoon my youngest child’s fourth-grade teacher called to discuss trouble at school (another hour on the phone). Add to that an ex-husband, a boy friend, law partners who wanted more billables, etc. I made a point of dressing my best to feel like at least I looked like I was holding it all together, and I set my screen saver to scroll the phrase “Just keep swimming.” Taking care of yourself and accepting help is the best way to get through the hard times. I take time to appreciate the less difficult moments and have greater empathy for those who are struggling at any given moment.

Stella Edens Pederson
Kennewick, Washington

MAY ACCOLADES

Congratulations on producing a standout issue of the ABA Journal for May. I folded down the corner on five articles, two of which I shared via Slack with my colleagues. The lively, engaging and relevant pieces in this issue make me feel my ABA dues are well-spent.

Alex Lesman
New York City

EXAMINING NIXON

The excellent excerpt from Victor Li’s book, Nixon in New York, May, page 46, highlights the legal, political and personal success of his professional career following his loss in the presidential election of 1960. Richard Nixon was an excellent law student at Duke University and a fine lawyer in two small firms in California before his political success. His first firm in Whittier, California, was sued for legal malpractice in his first case; but it was not Nixon’s fault, as he was assigned a matter beyond his experience and he relied on the advice of an unscrupulous opposing attorney. John A. Farrell’s fine recent biography, Richard Nixon, The Life, highlights the criminal behavior of Nixon as president based in part on now-declassified tapes and memos of his closest aides. We should not forget that based upon his Watergate activities, including obstruction of justice, Nixon was disbarred by New York’s Appellate Division, First Department, in 1974, nearly two years after he was pardoned by President Gerald Ford.

Michael P. Friedman
La Quinta, California

CORRECTIONS

“Bad Samaritan,” June, page 16, should have stated that Georgetown University law professor David Hyman conducted a study comparing documented rescue attempts to nonrescues. Due to an editing error, Hyman’s work was mischaracterized. “Structure from a Chaotic Beginning,” June, page 14, should have referred to the arrest of Shane Correia’s sister and brother on murder charges. Due to an editing error, the text identified his brother-in-law.

“Leaving the Bench,” May, page 20, should have stated that the Republican Party controlled the Senate during two years of Barack Obama’s eight-year presidency.

“A View Toward the Future,” May, page 62, should have stated that Judy Perry Martinez chaired the Standing Committee on the Federal Judiciary from 2011 to 2012.

The Journal regrets the errors.
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President’s Message || By Hilarie Bass

Poverty Is Not a Crime

ABA works to curb disproportionate effect of excessive fines and fees on the poor

“It is fundamental that justice should be the same, in substance and availability, without regard to economic status.” Those are the words of former U.S. Supreme Court Justice and American Bar Association President Lewis Powell, Jr. in 1976.

But the sad reality is that in America today, economic status can determine the type of justice you receive. Not just due to the “justice gap” caused by underfunded civil legal aid offices that must turn away half of those seeking help. And not just because public defender offices are overwhelmed. But because a court system punishes people of lesser means by levying fees and fines on them that they have no hope of paying.

Every day, courts impose a range of financial obligations on individuals charged with criminal offenses or civil infractions. These can range from fines for low-level offenses like traffic tickets all the way up to fines for felonies. In almost every jurisdiction, there are numerous fees charged for using the justice system.

Many of these fees exist to raise revenue and fund the justice system. As the rate of incarceration grows, financially pressured state and local governments have turned to justice system payments for additional revenue.

The last Department of Justice survey on the issue in 2004 found that two-thirds of all prison inmates had criminal justice debts, up from 25 percent in 1991. Many experts believe the figure is closer to 85 percent today. Most inmates cannot come close to paying.

These policies perpetuate poverty, aggravate racial disparities because they disproportionately affect communities of color, and erode trust in the legal system. Unpaid fines can result in the suspension of driver’s and occupational licenses, and prevent people from finding employment and a way to pay.

Despite the 1983 Supreme Court ruling in Bearden v. Georgia which found that no one could be jailed for their inability to pay a fine, incarcerations for failure to pay are still common. National data on individuals jailed for inability to pay fines does not exist. But a 2014 survey conducted by National Public Radio, the Brennan Center, and the National Center for State Courts found that in Benton County, Wash., 25 percent of the people in jail for misdemeanors were there for nonpayment of fines and court fees. In Rhode Island, 18 percent of all defendants jailed between 2005 and 2007 were incarcerated because of court debt. Anecdotal evidence of failure-to-pay arrest is abundant.

This is not equal justice, and the ABA is working to fix it. First, we set up a Working Group on Building Public Trust in the American Justice System chaired by Rob Weiner. The group will propose a resolution for the House of Delegates in August opposing the incarceration of individuals simply because they are unable to pay judicially imposed fines and fees. The resolution will offer 10 guidelines to jurisdictions to help ensure that no one is jailed because they cannot afford to pay a fine or fee. They will call for mandatory “ability-to-pay” hearings, and offer alternatives to incarceration and substantial monetary penalties.

Second, the ABA — thanks to a grant from the Laura and John Arnold Foundation — has expanded a court monitoring program that began last fall in Nashville with a group of volunteers. The program, which expanded to New Mexico, Miami and Tallahassee, Florida, will observe courts to see if they are imposing fines and fees without considering a defendant’s ability to pay. We expect reports with results from New Mexico in early 2019 and from Florida in June 2019.

Instilling and maintaining trust in our justice system is imperative to the peaceful functioning of our democracy. Poverty, in and of itself, should never be criminalized. The ABA is committed to protecting against a two-tiered justice system: one for rich and one for poor.

As Justice Powell eloquently stated, “Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists.”

Follow President Bass on Twitter @ABAPresident or email abapresident@americanbar.org.
Changing the Status Quo

1881 Initiative aims to increase the number of female AGs

GENDER POLITICS IN AMERICA HAS COME FRONT AND CENTER SINCE HILLARY CLINTON LOST THE 2016 PRESIDENTIAL ELECTION and the Me Too movement sparked a national discourse. While women represent half of the U.S. population, the country is ranked 104th out of more than 190 for women’s representation in government, according to the Inter-Parliamentary Union, and representation at the state capital level is perhaps the most bereft.

Women make up one-fifth of Congress and 22 percent of mayors in cities with populations above 30,000. Eight of the current 50 state attorneys general are women: five of the 23 currently held Democratic seats and three of the 27 Republican.

Amid a broader push for female candidates at every governmental level, the Democratic Attorneys General Association has launched an initiative to elect more women to an underestimated position: state attorney.

Tatowin Means of South Dakota is the first indigenous woman to run for state attorney general.
Opening Statements

general. DAGA’s 1881 Initiative is named for the first year two women ran for—and lost—state AG seats. The goal is to ensure that by 2022 at least half the Democratic attorneys general will be women.

DAGA says by doubling female, elected Democratic AG seats “the people’s lawyer” will more accurately reflect the population. “If Democrats and the Democratic Party are really going to be this force for equality and equal representation, then we need to make sure we’re reflecting that within our own world,” says Lizzie Ulmer, DAGA’s communications director.

The initiative’s political team recruits and helps train candidates, including South Dakota’s Tatewin Means, former attorney general for the Oglala Sioux Tribe and the first indigenous woman to run for state attorney general. In the 2018 election cycle, the initiative is supporting at least 10 female candidates across the country.

The co-chairs, Massachusetts Attorney General Maura Healey and Oregon Attorney General Ellen Rosenblum, are providing extensive guidance. Recruitment events and a curriculum developed specifically for AG candidates are part of the early stage process to identify and highlight the opportunity to serve.

“The really hope it raises awareness for women who are attorneys, prosecutors who are already doing this work, who want to take their passion to the next level,” says A’shanti Gholar, political director at Emerge America, which collaborates with DAGA and provides training and networking for Democratic women seeking office.

Attorneys general interact with and impact the livelihood of every individual in the state through their influence on issues including consumer protection, the environment and civil rights. DAGA and the 1881 Initiative want to ensure women’s perspectives on all issues, especially equal pay and reproductive freedom, are represented at the state government level.

“To change culture we need to have more people around the table that look like and represent our broader society, and for far too long women and people of color have been shut out,” Healey says.

“How can you be the people’s lawyer and how can you hold yourselves out as lawyers for the people if you don’t have healthy representation within your ranks?”

For Healey, the 1881 Initiative can proactively change the status quo and counter systemic challenges that hinder equal representation in elected positions.

While the Republican Party does not currently have initiatives to promote female AG candidates, Arkansas Attorney General Leslie Rutledge says she’s committed to finding qualified candidates, regardless of gender.

“It’s important for women to seek public office at all levels of government, including the office of attorney general,” says Rutledge, chairman of the Republican Attorneys General Association. “It is important for women’s voices to be heard on all issues. We have to be fighters, and we have to fight on behalf of people in our respective states.”

Healey and Rosenblum say they are hoping to recruit more minority and diverse voices as AG candidates and promote women into other positions of governmental leadership.

“Women are still getting to the table and not all there yet,” says Rosenblum, recalling the impact of feeling like a minority when she began her role as attorney general six years ago. “We’re talking about changing the face of politics and creating a government that more accurately reflects the people it represents.”

—Caroline Rothstein
Following the Truth
Exonerated Texans help wrongfully convicted prisoners find freedom

CHRISTOPHER SCOTT SERVED 12 YEARS and seven months in a Texas prison for a murder he didn’t commit. During his time behind bars, Scott vowed if he ever got out he would dedicate his life to helping others in his position.

Scott was exonerated in 2009, after the actual perpetrator confessed to the crime. Walking out of prison gave Scott his freedom, his family and the chance to pursue his dream of assisting others who are wrongfully convicted.

“I was a brand-new baby again,” says Scott, recounting the day he became a free man. “Prison was an incubator. I couldn’t breathe or focus on life in there. So when I was freed, I had a big smile on my face knowing that after this I can make something good of my experience and do something worthwhile.”

The idea to start a “detective agency” that would investigate claims of innocence came to Scott while he was incarcerated. In 2011—two years after his release from the Coffield Unit in Tennessee Colony, Texas—Scott formed the House of Renewed Hope, a nonprofit organization that investigates the cases of inmates who say they’ve been wrongfully accused, with the goal of exoneration.

Scott’s work caught the eye of filmmaker Jamie Meltzer and became the focus of a new documentary, True Conviction, airing on PBS’ Independent Lens. Two other exonerees, Johnnie Lindsey and Steven Phillips, who each served more than 20 years in prison, partnered with Scott at the House of Renewed Hope. (Lindsey died earlier this year.) Funded by donations, the group receives hundreds of requests for assistance per week and works full time on at least four cases at once.

The True Conviction documentary shares the stories of the three exonerated men and follows them for five years as they pursue their quest to free others. The film focuses on two cases they worked on, including the conviction of Isaiah Hill, who was sentenced to life in prison on aggravated assault charges after refusing a plea bargain. With the help of Scott’s group, Hill was paroled in 2016.

According to Meltzer, it was necessary to follow Scott and his partners for a few years to build a dramatic and compelling story around the trio’s daily lives and investigations.

“I was most struck by the lack of bitterness and the desire to turn their tragic experience into something meaningful—that’s what the detective agency represented,” says Meltzer, describing the first time he visited Scott at a group therapy session for exonerees.

“Once I had that feeling sitting in that room, being surprised by how positive they were and how passionate they were about effecting change, that really inspired me to go along for the ride to make this film.”

—Jamie Hwang
IN EARLY MAY, A CROWD RALLIED at an Overland Park, Kansas, veterinary clinic to raise awareness of animal abuse. They also were there to celebrate the discharge of a plucky pit bull named Laggie who had been shot in the head and left to die.

A search for the shooter is now underway, and when police apprehend that person, they will have to answer to the authorities and to Tarzan. Or, rather, Tarzan the Lawman, the nickname of Kansas City litigator Tristen J. Woods.

Woods and his law partner (and fiancee) Lauren Sierra Kruskall founded the Jungle Law Group in January with the intent to advocate for animals in civil and criminal court, including Laggie (and her new foster family).

The duo also handles human cases such as traffic citations and car crashes—advertised through eye-catching billboards and TV commercials that have featured a loincloth-clad Woods and a fur-bikinied Kruskall swinging on vines, riding a tiger and holding a sloth.

Yes, they have backgrounds in the entertainment industry—she’s a former actress, model and professional NFL cheerleader; he’s had a recurring role on a daytime soap opera. Yes, they really practice law. And, yes, a reality show is in the works.

Tristen and Lauren, you moved to Kansas City—Tristen’s hometown—from Florida in January to open Jungle Law Group. Before you arrived, you launched billboards to announce you were “swinging into Kansas City,” and you’ve aired several commercials since then. Your ads are fun, but are they working? How’s business?

Tristen J. Woods: We opened in January, and it’s been crazy. We knew we’d be busy; we just didn’t think it would happen this quickly.

Lauren Sierra Kruskall: We had clients coming in, and our computers weren’t even up and running. They were all coming in from our billboards and the commercials.

I have to ask: Did the firm get a lot of crank calls in the beginning?

Tristen: We got a lot of crank calls.

You guys are huge animal lovers, and from the start, you knew that you wanted to create a firm that blended animal advocacy with civil and criminal work for humans. Tell me about that decision.

Tristen: I’ve been practicing law for several years, and I also have an LLM degree in human rights. I wanted to translate that into animal rights law.

Lauren: We’ve always done pro bono work with animals. At first, we thought the animal aspect of our firm would just be advertising and continued volunteering, but it has naturally evolved into an area of our legal practice. As attorneys we are advocates, so we are especially thrilled to provide a voice for animals—who often don’t get one.

By animal rights law, do you mean civil cases involving animals?

Tristen: Yes, that’s exactly what we do—abuse, neglect and negligence. We also want to work on legislation affecting animals. I am working with a Missouri legislator to get the charge of animal abuse recognized as a felony. We also want an animal cruelty registry in Missouri. It’s similar to a sex offender list—you go on it for two years with your name and the specifications of the crime—and it can help prevent an abuser from adopting. In the case of Laggie, our client is the family who adopted him. Once they find the alleged shooter, we’re going to help with the criminal case and try to recover damages in a civil case.

Tristen, you’ve been called Tarzan since high school because of your long hair, but how did you get the idea to translate that into a marketing theme for the firm?

Tristen: I have long hair and I dress flamboyantly, but so does everyone in Florida. When we decided to move to Kansas City, I knew it was something that...
would set me apart. I felt like I could make an impact here. And Lauren was like, “Let’s try a jungle theme and put the animals into it and see what happens.”

**How has the bar responded? Have you gotten any feedback from other lawyers in the community?**

LK: Because the campaign is so crazy and because of the animal rights thing, some lawyers probably thought that it wasn’t substantive. But the majority of the response has been incredibly positive.

TW: Yeah, they say, “You guys are pretty bold to do that.” But lawyers don’t have to be boring. We can be interactive. We can be social. We can get people involved, and we can have a sense of humor. But we can be serious and professional at the same time.

**What has been the biggest challenge of the firm so far?**

LK: Balancing it all. Starting a law firm is really hard anyway, even without the advertising and the appearances.

TW: Just this week, we’ve had two charity breakfasts, a magazine interview and a TV commercial shoot. We work with animal rescue groups, and we do a local TV show called *KC Live* where we bring on exotic animals, all rescues. We’re also holding a golf tournament at the end of June, with all the money going toward the rescue agencies that we support. We’re exhausted, but we’re finding out that to keep going, you have to be motivated and keep working every day to build the business.

**What’s a typical day like for y’all?**

TW: We get here about 8 a.m., and we go until about 12:30 on the human cases. Then, if we’re not in court in the afternoon, we lean toward the animal cases. We take cases through the night; our phones are open 24/7. If we have to meet someone at midnight, we’ll go together and do that. I work out with a trainer at 6 a.m. We have a reality show that’s starting soon, so I have to get ready!

LK: There will be loincloth scenes! (laughs)

TW: I am trying to get a bikini body. I have to keep up with her!

**Tristen, both your mother and your grandmother work for the firm. What’s that like?**

TW: It’s something else. My mom does the marketing, and my grandmother comes in and organizes. My mother had me when she was 15½ years old. She didn’t go to college; she raised me. She wanted to be a part of the business—maybe a little too much!

LK: His mom is so proud of him. He’s the first person in his family to go to college, which is something he’s humble about, but it’s a really big deal.

**What are your plans for the future? Do you think about opening other offices or branching out geographically?**

LK: We’re definitely thinking of expanding. It’s a pretty unique concept.

TW: We’d like to expand to neighboring states, and I’d like to concentrate on animal rights law while our other attorneys work on the civil and criminal cases. We would prefer not to delegate our animal rights cases because those are the ones we love. We’re the best lawyers for the animals.

—Jenny B. Davis

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**The ABA Standing Committee on the American Judicial System has initiated a collection of essays on the broad subject of judicial independence.**

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**Opening Statements**
Opening Statements

MY PATH TO LAW

Embracing the Possibilities

By Matthew Channon

Matthew Channon created the #mypathtolaw hashtag on Twitter in January. Our guest column celebrates the diversity of the legal profession through attorneys’ first-person stories detailing their unique and inspiring trajectories. Read more #mypathtolaw stories on Twitter.

I ALWAYS THOUGHT going to university and working as a lawyer was only an option for those who had money, and that going into the law profession depended more on family connections rather than hard work. I didn't have an expensive education, and I was sent to my local community school.

Many judges, senior lawyers and barristers in the UK are educated privately at fee-paying schools. This gives the impression to some young people (like me) who haven't had the same experience that these roles are unachievable for them.

I often suffered from a lack of confidence in my own ability while at school, thinking that I would never make it into the legal profession or make a success of my life. My confidence hit rock bottom on a number of occasions, and I dreaded taking exams. I often felt people had low expectations of me because of my own absence of self-confidence.

I continued to struggle on through school and then at a local college. I was often tempted to give up and felt other people didn’t have faith in my ability. This wasn’t true—one tutor encouraged me to apply to study for a law degree, and from then on things started to improve for me. I still realized it was hard to get a job in the UK legal industry, but I secured a good degree.

I went on to apply for a PhD and was accepted, but this was largely self-funded. To pay for my PhD, I worked evenings in a local pub and often didn't finish working until 6 a.m., a situation that often eroded my self-confidence further.

However, I am proud that I didn’t give up and I became a much stronger person after overcoming my own confidence issues. I am now an academic, researching the impact of driverless cars and also, importantly, working to inspire future generations of lawyers.

Now, I not only lecture students at the University of Exeter Law School but also go to local state schools to try to inspire future generations. I am passionate about showing those who do not come from traditional backgrounds that they can make it, that barriers can be overcome.

I am attempting to provide the inspiration that I really craved while I was at school. At the University of Exeter, we offer a program called Pathways to Law, run by the social mobility charity the Sutton Trust and funded by the Legal Education Foundation, which offers support to high-achieving students from nonprivileged backgrounds as they finish school and start the process of applying to university.

These young people, who will typically be the first in their family to attend university or live in areas with low progression rates to university, engage in academic and skills sessions, visits to local and national legal institutions and law firms and, in some cases, take part in visits to other local partner Pathways to Law universities.

The students also receive crucial help with the application process to university in terms of writing their personal statements and preparation for admissions tests and university admissions interviews.

In addition, Pathways to Law students benefit from gaining work experience in a legal setting and having a law undergraduate assigned to them to personally mentor them through the whole program. Over the four-year period that this program has run at Exeter, it has shown an increased number of state-school applicants, not only to the university itself but to other research-intensive universities across the UK.

EVERY PATH IS DIFFERENT

I’ve realized over the years that actually many lawyers, judges, barristers and academics come from all sorts of backgrounds and have had to overcome remarkable obstacles to get their roles. It is absolutely not the case that people are barred from privileged positions only because of their backgrounds, and we all
have to show the next generation the world of possibilities. Those of us who have had challenges on the way to working in the legal industry must speak up about their own experiences to inspire others.

I recently started a conversation on Twitter to find lawyers from different backgrounds to help me in my liaison visits to schools in the future. I was sure my own story wasn’t unique, but I received thousands of responses from lawyers across the world using the hashtag I created, #mypathtolaw.

People have told me their parents were heroin addicts, had mental health problems, that they worked all hours of the day and night to put themselves through higher education as a single parent holding down several other jobs. I wish I had been able to hear from people like this when I was on my way to reaching the legal profession—I would have found their advice and perseverance inspiring. People have to know their own situation is not a one-off.

The tweets show it can be challenging to come from a diverse background and work in the legal profession, but it is possible to succeed through hard work and the support of others.

Twitter is a great medium to start these sorts of conversations. Since my tweet, people have started regularly using the hashtag #mypathomedicine and even #mypathtohr to continue the conversation.

These truly inspirational stories show that nobody should be put off trying to get a job in the legal profession—those of us who have gotten here have to show it is possible to do well whatever your childhood experience. We have to speak up about our own journeys and backgrounds to show that every path is different.

Matthew Channon is a lecturer in law at the University of Exeter and researches the law of autonomous vehicles.

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**Hearsay**

**78%** Female lawyers in legal departments, particularly GCs, make less than their male counterparts, at 78 percent of the average total compensation, according to a new study from executive search firm BarkerGilmore. The study, based on a random sample of nearly 2,000 in-house counsels in the United States, also found gaps in average total pay at managing counsel and senior counsel levels. Women at these levels made 90 percent and 89 percent, respectively, of similarly situated male attorneys. Despite the disparity in total compensation, in 2018 female in-house counsels received a base pay increase equivalent to that of male in-house counsels—3.8 percent.

*Source: law.com (May 8)*

**Survey Says**

A new regional analysis of law firm geographic profiles and growth reveals bigger may not be better when it comes to national and international footprints. According to the study, in 2009, international firms generated three times what the average Am Law firm did in revenue while national firms generated 1.6 times the average. But by 2016, revenue for international firms dropped to 2.6 times the average and national firms to 1.3. During the same period, the percentage of Am Law 200 firms categorized as international or national increased from 19 to 30 percent of law firms.

*Source: law.com (April 17)*

**Supreme First**

Justice Neil M. Gorsuch has hired a woman thought to be the first Native American law clerk at the U.S. Supreme Court. Tobi Merritt Edwards Young, originally from Midwest City, Oklahoma, and a citizen of the Chickasaw Nation, starts her clerkship with Gorsuch this month, at a time when the court has been criticized for a dearth of diverse candidates. She was general counsel to the George W. Bush Presidential Center and is the first female graduate of the University of Mississippi School of Law to clerk for the court.

*Source: chickasaw.net (April 13)*

**Leader of the Fee World**

President Donald Trump’s re-election campaign spent more than $1 out of every $5 on attorney fees this year as he contends with the ongoing special counsel investigation, lawsuits and a legal challenge from an adult film actress. Of the $3.9 million his committee spent in the first quarter of 2018, more than $834,000 went to eight law firms and the Trump Corp. for legal fees, according to new Federal Election Commission records. The Trump campaign’s total spending on legal fees is nearly $4 million since he took office, with Jones Day receiving the largest share—about $348,000.

*Source: washingtonpost.com (April 15)*

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*Illustration by Bob Fernandez/Shutterstock.com. Photograph by Grant Miller.*
Alabama resident Gary Wright II was among the gay rights activists who waged a hard-fought campaign for the right to marry in the state. The 46-year-old Navy veteran was part of a class of plaintiffs who obtained an injunction from Senior U.S. District Judge Callie V.S. Granade in Mobile, who ruled in early 2015 that the state’s refusal to allow same-sex couples to marry violated the constitution. In June of that year, the Supreme Court ruled on Obergefell v. Hodges, which invalidated all state bans on same-sex marriages on constitutional grounds.

But the battle in Alabama didn’t end with that decision. Instead, probate judges in at least seven of the deeply conservative state’s 67 counties are simply refusing to issue marriage licenses to any couples, same-sex or heterosexual. Instead, those judges tell people who want to get married to go to other counties.

For Wright, who faced death threats after he sued for the right to marry, the development is especially vexing.

“There’s no reason to inconvenience us like that,” Wright says.

He adds that, despite the court battles, same-sex couples still haven’t been able to achieve equality in the state. “It breaks my heart because we were so close, and the rest of the country has moved on,” he says.

Faced with the impasse, lawmakers in the state are considering revamping the marriage procedure by abolishing licenses altogether.

Instead, a bill proposed by Republican Sen. Greg Albritton would require couples who wish to marry to file an affidavit with their local counties.

“If we don’t change it, there will be some additional lawsuits out there,” Albritton says. “I would just as soon solve it ourselves rather than go through an additional, costly court battle.”

Lawmakers in Indiana, Kentucky, Missouri and Montana have introduced similar measures.

A WAY OUT

Supporters argue that the bills could protect public officials who say their religious beliefs prevent them from signing their names to same-sex marriage licenses. The most famous example is Kim Davis, the clerk in Rowan County, Kentucky, who was jailed for five days for refusing to comply with a federal judge’s
order to issue marriage licenses to same-sex couples.

Albritton's bill (SB 13) would require all couples who wish to marry—heterosexual and same-sex—to sign affidavits stating that they meet the legal requirements for marriage, including that they’re willing, competent, of age (either 18 or 16 with a parent’s consent), and not married to anyone else. The couples would then record the affidavits with the probate judge, who would be mandated to accept them—provided the affidavits include all required data. At that point, the couple would be married.

The bill would also abolish a requirement for a ceremony. Currently, probate judges may solemnize marriages. The ones who have stopped issuing licenses also don’t perform ceremonies for any couples in the state.

Since 2015, Albritton has introduced the bill every year, but it hasn’t passed despite widespread support in the state Senate, where lawmakers this year voted 19-1 in favor of the measure.

The senator says he plans to reintroduce the bill next year, despite the prior lack of momentum. “We have a difficulty, and I’m trying to find the easiest, simplest way to resolve it,” Albritton says. “Change is difficult, especially when you’re dealing with an emotional, traditional matter such as this.”

Albritton says he got the idea from a similar bill proposed in Oklahoma in 2015, which passed in that state’s House but stalled in the Senate. The proposal has drawn backing from some social conservatives, such as Washington County Probate Judge Nick Williams, who hasn’t issued any marriage licenses or performed ceremonies in more than three years.

“It gets us out of the position of having to participate in something we totally disagree with,” Williams says.

Even with Albritton’s bill, county officials would have to participate in the marriage to the extent of filing the affidavit. But some opponents of same-sex marriage say that filing a document is different than signing a license.

“It looks like I’m approving of something if I sign my name to it,” Williams says.

“No one’s happy with the situation the way it is,” adds A. Eric Johnston, counsel to the Alabama Citizens Action Program, which fought in court to preserve the state’s ban on gay marriages.

He says that while he doesn’t wholeheartedly support Albritton’s proposal, it could protect probate judges who think that issuing a license means they endorse the marriage.

“The word license carries with it the idea that the person doing it is approving of it,” says Johnston.

Albritton’s proposal “gives them an out.”

Williams and other probate judges who refuse to grant licenses contend that they need not do so given the wording of Alabama’s current law, which says, “Marriage licenses may be issued by the judges of probate of the several counties.”

The officials emphasize the word may, arguing that it gives them discretion about whether to issue licenses.

LEGITIMIZING DISCRIMINATION?

But others say that the probate judges are vulnerable to being sued. University of Alabama law professor Ronald Krotoszynski says that even policies that appear neutral can be unlawful if done for a discriminatory purpose.

He says that if the officials are refusing to issue licenses “because of antipathy toward same-sex couples,” they may be acting unconstitutionally.

Randall Marshall, executive director of the American Civil Liberties Union of Alabama, says the organization has considered suing, but no plaintiffs have come forward so far.

Wright suggests this isn’t surprising given the political climate in the state; 81 percent of voters approved a 2006 referendum banning same-sex marriage.

“It has always been my belief that all we need is a brave couple ... to be a plaintiff in one of those counties,” he says. Currently, Wright says, most couples are going to a nearby county for a license.

Marshall says that Albritton’s bill is “totally unnecessary,” adding that it could lead to unforeseen consequences. “In the rush to solve a problem that really isn’t a problem, the legislature could, in fact, create more problems,” he says.

The proposed bill would change “a well-developed system of law in Alabama and elsewhere and replace it with a different kind of procedure,” he says.

Suzanne B. Goldberg, a professor at Columbia Law School, criticizes Albritton’s proposal as “a symbolic effort to support those who reject marriage equality for same-sex couples.”

“It is difficult to see this as anything other than a legislator’s effort to legitimize disapproval of same-sex couples,” says Goldberg, who also is director of the Center for Gender & Sexuality Law and a longtime advocate for LGBTQ rights.

Some have questioned whether marriages formalized under the proposed procedure will have the same recognition—for purposes of benefits, adoption, even divorce—as the current system.

But some observers say there’s no realistic chance that officials from other states, or the federal government, would refuse to recognize marriages performed in accordance with Albritton’s proposal. “An affidavit would be filed with the state that would entitle them to all of the rights of marriage,” says Yale Law School professor William Eskridge, a longtime advocate for the legalization of same-sex marriage. “I don’t see any reason why any state wouldn’t recognize that.”

He adds that even though the proposal would still require officials to perform the action of filing affidavits, doing so is relatively passive compared to conducting marriage ceremonies.

“It seems to me this is not a big deal,” Eskridge says of Albritton’s proposal. “As far as I can see, they’re not changing marriage, simply creating a new process by which people get their marriages recognized by the state.”

The Docket
The Docket

Solitary for Kids

Angry parents find little legal recourse when schools put their kids in ‘seclusion rooms’

By Lorelei Laird

The first clue that a teacher had been shutting Cecilia and Kevin Wilson’s son, Ryleigh, into a school closet appeared on Facebook.

The first-grader frequently had emotional outbursts in fall 2012. Administrators at Mint Valley Elementary School in Longview, Washington, often asked the parents to take him home. During a particularly bad incident on Halloween that year, they arrived at the school to find Ryleigh being restrained by the principal, as the child screamed and hyperventilated. After that, the Wilsons say Ryleigh resisted going to school and became afraid to be left alone.

They began to understand his behavior when another Mint Valley parent posted pictures of the school’s “isolation booth” to Facebook in November of that year. The booth was a closet-size, lightless, windowless room with padded walls. The pictures circulated among Longview parents, and when Ryleigh heard his parents discussing it, he said he’d been shut into it multiple times that fall. On Halloween, it was because he left his seat without permission.

Washington state law at the time permitted isolation rooms to be used only with parental permission as a type of therapy for special education students. Ryleigh was not in special education, and the Wilsons hadn’t even known the booth existed before the Facebook pictures. They and four other families, who also were unaware of this practice until the Facebook posts, sued the district in 2015.

The parents lost. Their attorney Tara Lawrence of Portland, Oregon, says the plaintiffs were stunned by the verdict. Advocates for disabled students say this kind of loss is not unusual. Though isolation of juveniles is forbidden in federally funded mental health care facilities, as well as in federal prisons, no similar provision exists for schools. State laws, if they exist at all, are a patchwork. Some apply only to disabled students, some to all students, and other causes of action have had only mixed success. Juries unfamiliar with the needs of disabled students may defer to teachers’ judgment.

“It’s hard to win these cases, legally,” says Mary Griffin, a lawyer and education program director of the Washington Autism Alliance & Advocacy. “I’ve always thought it was bias. But … this Mint Valley thing was very disturbing because she still didn’t win when she took out all the kids that had [disability diagnoses].”

NOT A TIMEOUT

Disabled students are disproportionately affected by seclusion policies. According to the U.S. Department of Education Office for Civil Rights, special-needs students were just 12 percent of all students in 2013-2014, but they represented 57 percent of those put into seclusion. Black kids were also overrepresented; they were 19 percent of the student population with individualized education plans, which were authorized by federal disability rights law that year, but were 36 percent of those secluded.

Seclusion is not considered a timeout or a moment in a quiet area. The Department of Education defines seclusion as involuntary confinement in a space that the student is prevented from leaving. Using that definition, a 2014 report from the U.S. Senate Health, Education, Labor and Pensions Committee said research has found there’s no therapeutic benefit to the practice. State laws, school policies and IEPs often authorize seclusion as a last resort in an emergency or permit it as a way to calm highly emotional students.

But in practice, the Senate report found that it can be misused, with students sent to isolation as a punishment, sometimes for long periods or repeatedly over the course of a semester.

“Anecdotally, [we] just hear stories of kids being secluded for shockingly minor behaviors,” says Annie Acosta, director of fiscal and family support policy for the Arc, a Washington, D.C., disability rights organization.

As with Mint Valley, the Senate report found that many schools don’t tell the parents when they’re using seclusion—even when the law requires it. But like the Wilsons, those families will still notice the effects.

“I think just the violation of one’s autonomy and civil rights by being held against their will is a really traumatic experience for a lot of kids,” says Acosta. This may be particularly acute for children whose disability prevents them from speaking because they can’t tell anyone.

Seclusion also subtracts from instructional time, which can be significant if done frequently. It’s also not a long-term solution to the problem behavior.

In fact, Seattle education attorney Katherine George says it can backfire.

“In some cases, removing the kid to isolation in response to disruptive behavior encouraged the behavior, because it removed the kid from whatever was bothering him or her,” says George, who helped write a Washington state law limiting the use of isolation and physical restraints.

The legal recourse for those families is limited, attorneys say.

Families may sue over violations of state law, but 16 states permit nonemergency seclusion, according to a report compiled by attorney and parent advocate Jessica Butler. Disability rights laws apply under some circumstances, but families using the most directly appropriate law, the Individuals with Disabilities...
Education Act, must usually exhaust their administrative remedies before suing. As a result, plaintiffs often end up using tort law and constitutional claims. The Mint Valley plaintiffs cited unreasonable seizure, due process violations and unconstitutional policies under the Fourth and 14th amendments, as well as negligence, outrage and the right to an education guaranteed by the Washington state constitution. The results of those lawsuits have been mixed.

The challenge, Acosta says, is that “it has to shock the conscience, and unfortunately courts don’t quite see these cases as doing that.”

SAFETY MATTERS

Congress has considered addressing isolation in schools several times in the past decade. The Keeping All Students Safe Act, introduced several times from 2009 to 2014, varied, but the 2014 version would have banned seclusion and permitted families to sue over violations.

The bill never passed, but it was considered long enough to attract some opposition. One opponent was AASA, the School Superintendents Association. Advocacy director Sasha Pudelski says the association opposes using seclusion as discipline, but prefers to leave regulation to the states. “It’s not clear that one state’s policy is better than another state’s policy, for a variety of reasons,” she says. “Given the very few number of students that this impacts, it’d be inappropriate to craft federal policy around it.”

Though the number of students affected may be small in proportion to the total number of students enrolled in the nation’s schools, it’s still significant.

The Department of Education reported nearly 29,000 incidents of student isolation during the 2013-2014 school year, the most recent data available. Total school enrollment last year was 50.7 million.

Deborah Rigsby, program director for lobbying and federal legislation at the National School Boards Association, says seclusion is a tool for ensuring everyone’s safety, which her organization’s members would like to draw on when appropriate. She emphasizes that seclusion would be discussed with parents when creating an individualized education plan and revisited yearly when the IEP is reviewed. “Our goal is the safety of students and school personnel,” she says.

But parents have a right to reject IEP conditions they don’t agree with, and Griffin does not recommend that most parents sign IEPs authorizing seclusion.

Legally, she says, “it becomes what the school’s supposed to do.” Acosta agrees, noting that there’s no educational value in seclusion. “We at the Arc don’t believe that this should be allowed in the IEP, because the IEP is about learning,” she says.

They do agree with Rigsby that training—and adequate funding for that training—is important in a special education context. Acosta says there’s a pervasive lack of training on special education, and the misuse of seclusion is just one way that it shows up.

Griffin also thinks the misuse may arise when school personnel resist changing the way they’ve always handled misbehavior. In the case of disabled kids, they may also not realize that special-needs students are genuinely different. “Society tends to see these behaviors as poorly behaved children from parents who don’t know how to control their children,” she says.

But disability advocates say that behavior is often related to the disability. That may be true for Ryleigh, now 11, who was eventually diagnosed with ADHD.

He’s also been diagnosed with post-traumatic stress disorder and severe anxiety, which the complaint says were caused by his trips to the booth.

He has still not returned to public school.
Guilty Conscience

Court rules lawyers cannot defy their clients’ wishes to argue for their innocence, even if admitting guilt could save their lives

By Mark Walsh

A recent Supreme Court decision addresses a dilemma that would challenge any lawyer—how to respond if a client refuses to confess to a capital crime when the lawyer believes such a strategy may be the only way to avoid a death sentence.

The May 14 decision in McCoy v. Louisiana looked to English common law, the American Bar Association’s Model Rules of Professional Conduct and the court’s own precedents for its holding. The Sixth Amendment, the court said, guarantees a defendant the right to choose the objective of their defense and to insist that their lawyer refrain from admitting guilt, even when the lawyer’s view, based on experience, is that confessing guilt provides the defendant the best hope to avoid the death penalty.

Writing for a 6-3 majority, Justice Ruth Bader Ginsburg said, “with individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage or to maintain his innocence, leaving it to the state to prove his guilt beyond a reasonable doubt.”

A DIFFICULT POSITION

Some legal observers say the decision was an important reminder to the legal community of a fundamental concept.

“The lesson we have to remember is that the final judgment on critical decisions of the representation are decisions of the client,” says Lawrence J. Fox, a visiting lecturer at Yale Law School and former chair of the ABA’s Standing Committee on Ethics and Professional Responsibility and the Section of Litigation. “This is such an important principle, having it re-established in this context will make sure lawyers remember it.”

Writing in dissent, Justice Samuel A. Alito Jr. said that the majority came up with “a newly discovered constitutional right,” but that defendant Robert L. McCoy’s situation involved “a freakish confluence of factors that is unlikely to recur.” Still, the decision may be a factor in other cases, he said.

“When guilt is the sole issue for the jury, is it ever permissible for counsel to make the unilateral decision to concede an element of the offense charged?” Alito said. “If today’s decision were understood to address that question, it would have important implications.”

There’s at least one thing on which the majority, the dissent and other interested observers would seem to agree—that McCoy’s defense attorney, Larry English, “was placed in a difficult position,” as Ginsburg put it.

McCoy was charged with first-degree murder in the 2008 killings of three people in Bossier City, Louisiana. McCoy, then 34, had abused and threatened to kill his wife, who was under police protection. On the night in question, McCoy’s mother-in-law called 911 from her home.

“She ain’t here, Robert. I don’t know where she is. The detectives have her,” Christine Colston Young said on the call. Moments later, a gunshot was heard and the line went dead. Police arrived to find Young and her husband, Willie Ray Young, mortally wounded, along with Gregory Lee Colston, the son of McCoy’s wife.

McCoy fled, but police recovered a vehicle of his with a cordless phone handset from the Colstons’ home and a Walmart receipt for .380-caliber bullets. McCoy was arrested in Idaho while hitching a ride in an 18-wheeler. Police found a .380 handgun behind McCoy’s seat, and a ballistics expert identified it as the murder weapon.

Prosecutors had other evidence linking McCoy to the slayings, including surveillance footage of him buying the bullets.

McCoy claimed he was in Houston on the night of the killings and was the victim of a far-flung conspiracy that included the police and officials in Louisiana and Idaho. Psychiatric experts found McCoy competent to stand trial, and he refused to plead guilty by reason of insanity.

McCoy clashed with his appointed public defenders repeatedly before deciding to represent himself. But in 2010, his parents hired English to represent him. English concluded the evidence against McCoy was overwhelming and counseled him to make a plea deal, which McCoy refused.

Two weeks before trial, English told McCoy that he
planned to concede to the jury that his client committed the murders in hopes of getting mitigation at the penalty phase. McCoy was furious, English later testified, and was “completely opposed” to admitting guilt.

The trial judge held that it was too late for McCoy to fire English, and the trial proceeded in 2011. In English's opening statement, he said, “There is no way reasonably possible that you can listen to the evidence in this case” and not conclude that McCoy was “the cause of these individuals’ deaths.” McCoy objected and then, with the jury removed, complained to the judge that English was “simply selling [him] out.”

English said McCoy lacked the mental capacity to form specific intent, as was required for first-degree murder. He told the jury that even though McCoy had been judged competent, his client was “crazy” and the charge should be second-degree instead.

McCoy took the stand in his own defense, repeating his conspiracy theory and Houston alibi, which Ginsburg in her opinion called “difficult to fathom.”

In his closing argument, English reiterated that McCoy was the killer. The jury found him guilty of first-degree murder on all three counts. At the penalty phase, English urged mercy in view of McCoy's “serious mental and emotional issues.” The jury voted for death.

HAVING HOPE, HOWEVER SMALL

The Louisiana Supreme Court affirmed the trial court’s decision that defense counsel could concede guilt despite the defendant’s opposition. It held that such a concession was permissible because the lawyer believed that admitting guilt gave McCoy the best chance to avoid a death sentence.

Several other state courts of last resort had reached different conclusions on the Sixth Amendment question, however, and the U.S. Supreme Court took up an appeal from McCoy, by then represented by other lawyers, to resolve the question.

Ginsburg, in an opinion joined by Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan, stressed that trial management on matters such as what arguments to pursue and what objections to raise “is the lawyer’s province.” But some decisions “are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf and forgo an appeal.”

“Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case,” Ginsburg said. “But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.”

The court held that the error in McCoy’s case was structural, and thus he must be granted a new trial. Ginsburg cited, among other things, ABA Model Rule 1.2(a) that says a “lawyer shall abide by a client’s decisions concerning the objectives of representation.”

The ABA had filed an amicus brief on McCoy’s side, as had Fox at Yale Law School, on behalf of the school’s Ethics Bureau and 10 law professors from various institutions. “There is a tendency among lawyers, including yours truly, to convince the client we know what's best,” Fox says. “But at the end of the day, we're the agents and the client is the principal.”

Andrea D. Lyon, former dean of Valparaiso University Law School and a former public defender, says in capital cases such as McCoy’s, the defendant’s life is at stake. “That doesn’t mean I’ve never pushed a client” toward a particular strategy, she says. “But there is a difference between pushing and overriding.”

Alito’s dissent, which was joined by Justices Clarence Thomas and Neil M. Gorsuch, said the majority’s holding will be limited to “cases involving irrational capital defendants who disagree with their attorneys’ proposed strategy yet continue to retain them.”

But in cases in which guilt is the sole issue for the jury, Alito said the decision could present difficult questions for defense lawyers, such as whether they can concede elements of a crime as part of broader defense strategy or whether admitting guilt of a lesser included offense over the defendant’s objection would always be unconstitutional. “These are not easy questions,” but at least they’ll arise infrequently, said Alito, a former federal prosecutor. Erica J. Hashimoto, a law professor at Georgetown University whose writing on the autonomy of criminal defendants to control their cases was cited by Ginsburg in her majority opinion, says similar questions may arise more frequently than Alito believes. “The lawyer can exercise his or her judgment, but there are some decisions that are just so fundamental that they just have to be up to the client,” she says.
In his book *Cruel and Unusual: The Supreme Court and Capital Punishment*, Michael Meltsner writes about a young Anthony Amsterdam. A federal prosecutor in the District of Columbia in the early 1960s, Amsterdam was arguing a Fourth Amendment case before the U.S. Court of Appeals for the District of Columbia Circuit.

The legal issue was whether the police had waited long enough after knocking before entering an apartment to execute a search—specifically whether a delay of about 25 seconds was sufficient time to allow for the occupants to answer the door before breaking it down.

Amsterdam began his argument with the formulaic: “May it please the court ...” Then he stopped. He remained respectfully silent. According to Meltsner, during the silence, “the few seconds seemed an eternity.” The judges became uncomfortable and were about to break in themselves when Amsterdam finally commenced his argument: “That was the length of time that the police waited before they broke into the defendant’s apartment.” The silence worked, and Amsterdam won the appeal.

More recently, in 2015 President Barack Obama eulogized the Rev. Clementa Pinckney and eight parishioners who were assassinated by Dylann Roof at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. Roof later told police he was attempting to foment racial hatred and start a race war.

Obama delivered his speech to a church audience of grieving parishioners and to a vast, live national media audience. The stakes couldn't have been higher; it was a historic speech at a dangerous cultural moment and attempted to mark the occasion as an inflection point of cultural transformation.

Obama's speech was a church eulogy ennobling the lives of the fallen. But it was equally a political argument acknowledging our dark legacy of slavery as our country's original sin, identifying slavery as the reason for the Civil War and recognizing the legacies of slavery and racism that remain in our society to this day. This included the pain inflicted by the continuing celebration of the Confederate flag.

He also addressed society's need for gun control and the need to address systemic injustice within the criminal justice system based on racial and economic bias.

How did Obama connect all these remarkably diverse subjects? He employed a poetic lyricism that built purposefully toward a crucial, eloquent and reflective silence. For models, Obama drew on the church sermons of Martin Luther King Jr. and the battlefield Civil War speeches of Abraham Lincoln. Like King, Obama broke his speech into stanzalike sections and call-and-response musicality. Like King and Lincoln, Obama used strategic pauses and silence to mark crucial transition points in his performance.

The core theme of Obama's eulogy was grace—our need to receive grace and honor it in our lives and our actions, as it was received and honored through the lives and the deaths of Pinckney and the parishioners. Obama put it this way: “We don't earn grace. We're all sinners. We don't deserve it. But God gives it to us anyway.” He personally reworked his speechwriters' initial drafts on his long, yellow legal pads, drawing a recurring inspirational refrain from the lyrics of his favorite hymn, “Amazing Grace.”

Obama's speech concluded with a dramatic and reflective 13-second silence, transitioning into his heartfelt yet slightly off-key singing of the first stanza of “Amazing Grace.” He then delivered a powerful crescendo—calling out the names of the dead, accompanied by PowerPoint images of the departed.

**SILENT IMPACT**

The precise timing and use of prolonged “live” silences were crucial to the successes of Amsterdam's and Obama's presentations and crucial to the impact of the arguments they were making.

For Amsterdam, the silence enabled the judges to grasp viscerally the length of time the police waited uncomfortably on one side of the apartment door while not knowing what might be waiting for them on the other, in a way his words alone could not.

For Obama, the use of pauses and silence was more complex. The pauses provided musical beats in stanzalike sections. In the vocabulary of narrative theory, the shorter silences were like ellipses (spaces in time) building to the final silence that allowed the audience to reflect on his words and sink into shared emotion.

The final silence provided a handoff, or transition forward, to Obama's rendition of “Amazing Grace,” and then quickly sequenced to calling out the names of the dead, providing an emotional ending on a King-like evocation of religious community and redemption.

Rappaport provides an overview of the cognitive theory explaining how silence works on listeners and readers. He presents captivating illustrations from practice and popular culture: Johnnie Cochran’s use of poetics and pauses in his closing argument on behalf of O.J. Simpson; Supreme Court Justice Ruth Bader Ginsburg’s decision to remain silent and forgo writing a concurring opinion in Obergefell v. Hodges; the late Justice Antonin Scalia and Bryan Garner’s advice to attorneys on how to use the lowly pause in oral arguments; and an Illinois federal district court judge’s admonition: “When you’re winning, shut up! If you keep on talking, I just might change my position.”

Borrowing from popular culture, Rappaport revisits the memorable silence used by fictional lawyer Jake Brigance in the climactic closing argument of John Grisham’s A Time to Kill—a 20-second silence engaging jurors’ imagination with a clever Amsterdam-like twist.

He also discussed Don Vito Corleone’s equally masterful use of silence in a scene from The Godfather: The young Corleone is approached by a landlord who has offended him by evicting a woman from her apartment and refusing Corleone’s request to allow her to return. The landlord has learned that Corleone is a powerful mobster.

The landlord now says he has changed his mind. He is met by Corleone’s silence. Uncomfortable, the landlord sweetens his offer—the woman, her son and the dog can return, and he will keep the rent the same instead of raising it. More silence. The landlord, now fearful, lowers the rent.

Rappaport’s accessible and engaging article also reintroduces readers to classical rhetoric, suggesting how varieties of intentional silences may be named, tamed and incorporated into lawyers’ toolkits, supplementing intuitive choices in an analytical framework when making strategic decisions about how, when and whether to use silence.

For example, Amsterdam’s and Obama’s eloquent silences are illustrative of what Rappaport labels “aposiopesis,” from the Greek phrase ‘aposiōpaein,’ meaning ‘to become totally silent.’

Rappaport observed: “Such stoppage in midsentence can show respect for the audience, or trigger surprise or other emotion, or just serve as a transition. ... Used sparingly, aposiopesis is an effective rhetorical tool, like the live news report from Herbert Morrison describing the Hindenburg disaster, when he stopped speaking completely as the airship burst into flames.”

Perhaps the most profound example, he said, “aposiopesis is employed by the Lord in Genesis: ‘And the Lord God said, “Behold, the man is become as one of us, to know good and evil. And now lest he put forth his hand, and take also of the tree of life and eat, and eat and live forever.” ’ God can take liberty with how often to use aposiopesis, but a lawyer’s resort to aposiopesis should be infrequent, for only then does it have impact.”

CODA

Both Amsterdam and Obama made bold, high-stakes rhetorical choices in their eloquent and daring use of aposiopesis—prolonged silences expressing a purposeful, artistic intentionality that moved their audiences beyond the literal meanings of their spoken words.

Were these special cases? Yes. Do successful lawyers typically employ various silences as strategic rhetorical and storytelling tools in the same fashion, although perhaps in less dramatic situations? Yes, of course you do. ■

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.
Lawyers Must Inform Current Clients of Material Errors

By David L. Hudson Jr.

Lawyers have a duty to inform current clients of material errors committed by them during the course of representation, according to a recently released ethics opinion from the ABA’s Standing Committee on Ethics and Professional Responsibility. However, the opinion also says that lawyers do not have to inform former clients of such material errors.

Formal Opinion 481 explains that this duty to current clients is rooted in Rule 1.4 of the ABA Model Rules of Professional Conduct, which governs a lawyer’s duty of communication. That rule requires lawyers to promptly inform clients of any decision or circumstance for which a client’s informed consent is needed. It also requires a lawyer to “reasonably consult” with the client about the means of achieving the client’s goals during representation and keeping the client “reasonably informed” about the progression of the case.

According to the committee, the “guiding principle” of Model Rule 1.4 is reflected in language in Comment 5 of the rule: “The lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.” This means that a lawyer cannot “withhold information from a client to serve the lawyer’s own interests or convenience.”

A CLARIFICATION CONUNDRUM

The opinion acknowledges that “determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum.” It explains that the duty of informing clients of errors applies when the error is considered material.

The opinion explains that an error is material if “a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.”

“Many obviously material errors arise,” says Keith Swisher, a professor of legal ethics at the University of Arizona’s James E. Rogers College of Law. “For errors potentially on the borderline [between material and nonmaterial], the committee’s two-part definition of materiality is fairly expansive and will therefore better protect clients.”

“Many obviously material errors arise,” says Keith Swisher, a professor of legal ethics at the University of Arizona’s James E. Rogers College of Law. “For errors potentially on the borderline [between material and nonmaterial], the committee’s two-part definition of materiality is fairly expansive and will therefore better protect clients.”

Some ethics experts question whether the definition provides sufficient guidance and have concerns that it may create more problems. “Despite the committee’s laudable goal of providing more specific guidance and its conclusion that the standard for determining what is material is an objective one, I think lawyers may still struggle, practically, with what is material error,” says Ellen Murphy, who teaches professional responsibility at Wake Forest University School of Law.

Leslie C. Levin, a professor at the University of Connecticut School of Law, sees problems with the definition. “The problem with the first definition of ‘material’—which is the ‘harm or prejudice’ component—is that the opinion notes don’t give much meaningful guidance to help the lawyer determine how much harm or prejudice triggers the duty to inform. The opinion says it wants to give lawyers more specific guidance, but then really doesn’t provide it.” She also questions...
she questions whether lawyers will self-disclose such errors when many lawyers do not comply with Rule 8.3, which requires lawyers to report violations by other lawyers that raise substantial questions about that other lawyer’s fitness to practice.

“In essence, that part of the opinion is articulating an interpretation of Rule 1.4 that is unlikely to be followed by many lawyers,” Levin says. “This creates its own set of problems. It also potentially creates disincentives for lawyers to reflect back on their mistakes. If lawyers know they have an obligation to reveal certain errors to clients, even if they caused no harm, will they want to think reflectively about those errors?”

The opinion explains that if there is such a material error, the attorney must inform the client promptly. Whether an attorney has time to correct the error first before telling the client depends on the individual facts.

DIVIDED EXPERTS

While the opinion says attorneys have the duty to inform current clients, “nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients,” Levin says. “Had the drafters of the Model Rule intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule.”

Experts are divided on whether lawyers should have the responsibility to inform former clients. “I agree with the committee’s practical approach that it would not be reasonable to require lawyers to disclose material errors discovered years—or even months—after the representation has ended,” says Murphy. “This makes sense based on the nature of law practice today.”

However, Swisher believes lawyers also should have a duty to inform former clients. “The opinion is indeed somewhat surprising in this regard,” he says. “Using its own words, the committee could instead have interpreted the duty to communicate, and the duty to take steps to protect the client during the representation’s closure or succession, in the spirit of client protection and the purposes of legal representation.”

He explains such an approach could have led the committee “to conclude that even former clients should be informed of the lawyer’s materially erroneous work product.” Swisher says “fiduciary-based arguments for a duty to report could extend to technically former clients; and in any event, attorneys will ordinarily discover an error—especially under the committee’s commendably broad definition of materiality—before the representation ends.”

“THE OPINION SAYS IT WANTS TO GIVE LAWYERS MORE SPECIFIC GUIDANCE, BUT THEN REALLY DOESN’T PROVIDE IT.”

— LESLIE LEVIN

“FOR ERRORS POTENTIALLY ON THE BORDERLINE, THE COMMITTEE’S TWO-PART DEFINITION OF MATERIALITY IS FAIRLY EXPANSIVE AND WILL THEREFORE BETTER PROTECT CLIENTS.”

— KEITH SWISHER
Practice

Can a Town Be a Museum?

A case may hinge on the precision of definitions lawyer lexicographers conjure for the court

By Bryan A. Garner

Last month, we saw that lexicography—the art of defining words for a glossary or dictionary—is an especially challenging task. In dictionary circles, it’s thought to take not only a special aptitude but also a great deal of training.

Yet all legal drafters are lexicographers in the sense that they’re expected to draft definitions in transactional documents, rules, regulations and legislation. Then, of course, judges must interpret these definitions in light of how the defined terms are actually used in a given legal instrument.

In patent drafting, there’s actually a doctrine that “every patentee may be his own lexicographer.” The U.S. Court of Appeals for the Federal Circuit has said so in many cases, with slightly varying formulations.

The question I’d like to pose here is whether the usual meaning of a word being defined carries into a legal definition. This question arises with some frequency in litigation.

As a simple example, if we say “dog means cat,” does that mean that the sequence of letters d-o-g refers only to felines—that the word itself is an empty vessel to be filled with the defining words? Or are we saying that cats are deemed to be dogs, as well as all canines themselves (the ordinary meaning of dog)?

Granted, careful drafters distinguish between means and includes in preparing definitions. The latter simply stipulates that something else is embraced by the definiendum (the term being defined) in addition to whatever its ordinary sense is. So if the idea were to mean both dogs and cats, a more careful drafter would write: “Dog includes all cats” rather than “Dog means cat.”

On the other hand, you could just say dogs and cats when that’s what you’re referring to. An age-old recommendation in legal drafting circles holds that you mustn’t give counterintuitive definitions—even with includes. There’s a perhaps apocryphal story about a government regulation that once stated, “The term milk includes all citrus fruits.” That’s bad drafting. It would have been worse, of course, to say, “The term milk means citrus fruits.” Would that mean that milk, as we commonly understand it, would be excluded?

MUSEUM MAUSOLEUM

Let’s consider an actual case—one decided a few years ago by the 3rd U.S. Circuit Court of Appeals at Philadelphia. It involves one of the most beloved sports heroes of all time, Jim Thorpe.

Thorpe (1887–1953) was the Sac and Fox Nation member who became a renowned athlete as an Olympic track star, football player and baseball player. Shortly after he died (intestate), the members of his tribe gathered in his native Oklahoma to hold a traditional, two-day funeral rite. It was abruptly halted when Patsy, Thorpe’s third wife, arrived with law enforcement officers to take Thorpe’s body somewhere else.

After a year of negotiations, Patsy entered into an agreement with two small towns in Pennsylvania, where Thorpe had attended college. In exchange for the famous athlete’s remains, the two towns consolidated into a single borough under the name “Jim Thorpe.” The borough owned the land where the mausoleum would be located, and it would maintain the site. Thorpe had actually never been to the place chosen as his final resting place, and he had reportedly told family members other than Patsy that he wanted to be buried in Oklahoma. Yet Patsy was legally authorized to make the final decision, and Pennsylvania is what she chose back in 1954.

After the funeral there, many tribal ceremonies took place at the mausoleum. Family members visited the site over the years, and the Jim Thorpe Area Sports Hall of Fame worked to improve it.

In 1990, Congress enacted the Native American Graves Protection and Repatriation Act, which gives tribes the power to request repatriation of cultural items, including human remains, if they are possessed or controlled by a federally funded museum.

Some 57 years after Thorpe’s death and 20 years after enactment of the graves protection act, Thorpe’s son John, from his second marriage, sued to exhume Thorpe’s body and return it to the Sac and Fox Nation. The evidence showed that John had waited so long because his sister opposed moving the body, and he couldn’t act till after she died. The trial court granted John’s request and, on summary judgment, ordered an exhuma- tion and repatriation to Oklahoma.

The question on appeal came down to whether the borough of Jim Thorpe, Pennsylvania, qualified as a museum. That brings us to the statutory definition of museum: “any institution or state or local government agency (including any institution of higher learning) that receives federal funds and has possession of, or control over, Native American cultural items.” That’s pretty broad. Let’s stipulate that the
borough receives federal funds. Is it a museum? The borough is certainly an institution that receives federal funds. By its very terms, the definition embraces universities and colleges. If a university can be a museum, surely a borough can be as well.

Yet should we disregard the ordinary meaning of museum altogether and consider only the defining words? Shouldn’t there be some consideration of preservation and curatorship for public exhibitions?

In our book Reading Law: The Interpretation of Legal Texts, Justice Antonin Scalia and I take the position that there is a presumption against counterintuitive definitions “because the word being defined is the most significant element of the definition’s context.” We opined, “While it is true that drafters ‘have the power to innovate upon the general meaning of words at large free from all legal restrictions,’ they do not have the power to do so free from the presumption that they have not done so.”

Hence, after the book’s publication, we both applauded the 2012 Connecticut Appellate Court decision in Germain v. Town of Manchester. The court ruled that a hand-held scanner must be holdable by hand despite the absence in its definition of any criterion that it must in fact be hand-held. After all, hand-held was in the term being defined.

The textualist argument I’m suggesting about the word museum in Thorpe v. Borough of Thorpe seems not to have arisen before the 3rd Circuit. The court conceded that on a literal reading of the statute, the body would have to be exhumed.

But the court instead adopted a purposive approach, relying on legislative history stating that “digging and removing the contents of Native American graves for reasons of profit or curiosity” needed to be curbed. The idea was to reverse the practice by which at least 100,000 Indian remains had been “dug up from their graves for storage or display by government agencies, museums, universities and tourist attractions.”

That last part, quoted by the court, gets close to the definitional point: We’re talking about museums.

The 3rd Circuit relied on the absurdity doctrine to overturn the order for exhumation and repatriation, making a powerful point about the limitless nature of the definition. If interpreted literally, the definition “could include human remains buried in accordance with the wishes of the decedent’s next-of-kin.” But more: “Literal application would even reach situations where the remains of a Native American were disposed of in a manner consistent with the deceased’s wishes as appropriately memorialized in a testamentary instrument or communicated to his or her family.”

Based on a “clearly absurd result ... contrary to Congress’ intent to protect ... burial sites,” the court held that the borough wasn’t a museum under the Native American Graves Protection and Repatriation Act.

The result was correct, in my view, but it could have also reached on textualist grounds without resort to legislative history or absurdity. As a piece of purposive reasoning, however, it’s an excellent opinion. Although this question of definitions might seem arcane, it comes up again and again.

PUBLIC VS. PRIVATE

One more example: A few years ago, a blind inmate in a Florida state prison sued a private prison-management corporation for discriminating under the Americans with Disabilities Act. The ADA prohibits a “public entity” from discriminating against disabled people. The issue was whether the private company, which contracted to run state prisons, qualified as a public entity. The statute defines public entity as “any department, agency, special-purpose district or other instrumentality of a state or states or local government.”

Can a private company become a public entity by virtue of contracts? It might arguably be “an instrumentality of a state.” The Atlanta-based 11th Circuit, in Edison v. Douberty, held no: A private corporation can’t be a public entity, mostly based on all the other definitional words suggesting a governmental unit. But it might well have added that public entity itself, by its plain meaning, excludes private corporations in the absence of a clear directive to the contrary in the definition.

So, as you can see, there are two possible answers to the question posed at the outset: (1) the definiendum is an empty vessel whose content is solely determined by the defining words; or (2) the definiendum brings to the definition its own ordinary meaning in addition to whatever the defining words stipulate.

Neither approach could be called more textualist or purposive than the other. My own conviction in such matters is that the second approach is generally the better choice. Why? Even though lawyers can be their own lexicographers, we can’t entirely trust their skill at the harmless but demanding drudgery of defining words. ■

Bryan A. Garner, the president of LawProse Inc., is a law professor, grammarian and lexicographer. His most recent book is Nino and Me: My Unusual Friendship with Justice Antonin Scalia.
Lawyer Loneliness

Facing and fighting the ‘No. 1 public health issue’

By Jeena Cho

It can be lonely being a lawyer. We often spend long hours working in isolation. Even in law school, with almost 200 other students around me, I felt the sense of loneliness keenly. I saw my fellow classmates as competition. We were pitted against each other and graded on a curve, meaning my classmates’ success directly affected my own.

Shasta Nelson, the author of Frien intimacy: How to Deepen Friendships for Lifelong Health and Happiness, says loneliness is the No. 1 public health issue. Research shows that our relationships have more impact on our health than any other factor—including diet, exercise or even smoking. Nelson says, “The lonelier we are, the more wear and tear our bodies experience as a result of any stress in our lives.” Former U.S. Surgeon General Vivek Murthy is also sounding the alarm on the loneliness epidemic.

CONTRIBUTING FACTORS

Nurturing relationships requires intentionality. Carving out time and fostering genuine human connection takes effort. Many lawyers struggle with lack of control over time, which makes it more challenging to nurture connections with loved ones.

Rachel Lynn Foley, a solo bankruptcy practitioner in Independence, Missouri, experienced loneliness because as a solo she does not have the opportunity to strategize or share ideas with other lawyers. “You may have strategy sessions with other solos,” she says, “but oftentimes we guard our thoughts and our questions because business is cutthroat and you do not wish to expose yourself or reveal you do not know as much as you think others think you should know.” Foley also says she believes she was the only person in the entire class who was lost or confused. She thought that “if I belonged in law school that I wouldn’t feel this way.”

Chelsea Brown, a recent graduate of Emory University School of Law, is an “aspiring public defense attorney, hoping to work in the Atlanta area.” Looking back on her law student experiences, she says, “There is little to no collaboration allowed in law school. And as a result, already independent by nature, students isolated themselves even more.” Brown also says she believed she was the only person in the entire class who was lost or confused. She thought that “if I belonged in law school that I wouldn’t feel this way.”

“As a black student, I continued to feel on the outs with my white colleagues, and that particular feeling of loneliness persisted beyond my first year,” Brown adds. The sense that you do not belong is a major contributor to feeling loneliness and isolation.

ACTING AGAINST ISOLATION

There’s no easy solution for breaking the cycle of isolation and loneliness. It’s difficult to reach out and connect with someone when you’re feeling lonely.

Mark Perlmutter, a lawyer turned therapist in San Francisco, says the first step toward breaking the loneliness is to name the problem. The next step is to extend ourselves—that is, make an effort to reach out to people with whom we might want to be friends. Perlmutter emphasizes that these steps can be difficult, but adds: “There is nothing more powerful to combat loneliness than the knowledge that we are not alone in our loneliness.”

Lawyers can make it a priority to connect with other people and find activities that help break up the day. Fry explains: “If you don’t train yourself to integrate buffers during times of low stress, the crisis periods will become much harder to manage.”

Examples of small activities that can be implemented fairly easily include taking a walk around the block, meeting a friend for lunch, walking to the...
coffee shop, calling a friend you haven’t spoken with in a while, talking with people you encounter during the day such as the grocery store cashier, and smiling at someone you pass while walking on the street.

Omar Ha-Redeye from Fleet Street Law in Toronto keeps loneliness at bay by varying his work, “including public speaking, attending conferences and teaching at university. This nontraditional approach to practice helps mitigate against some of the isolation as a sole attorney.”

Foley makes a point to stay involved in groups where she can interact with opposing counsel in a nonaggressive manner. “From that involvement I am allowed to walk through real-world scenarios and see both sides. The interaction is generally more relaxed.” Attending bar functions also helps Foley break up the day. She says, “I will also attend any court function or bankruptcy CLE offered in the area—not necessarily to obtain more knowledge but to have a chance to interact with others, if only for a brief moment.”

WHAT FIRMS CAN DO

Law firms can focus on building relationships within the firm to facilitate more connection. This is undoubtedly challenging given the constant pressure to bill more hours. However, Fry says she thinks genuine connection with co-workers is critical not only for building the most productive teams but also to help cultivate purpose and meaning within the firm.

Fostering a culture of mentorship and regular, constructive feedback can help build those bonds. The value of feedback, mentoring and building relationships is often overlooked because they infringe on billable time. However, research heavily supports the role all of these activities play in increasing productivity and collegiality, and decreasing loneliness and isolation.

WHEN TO GET HELP

Some signs that loneliness and isolation have become problematic include not being able to focus on tasks, lack of communication with clients or being unable to meet deadlines. Other signs include anger, irritability, negative thinking, hopelessness, sadness and the inability to enjoy activities that would typically bring great joy.

Fry suggests seeking help if you feel this way consistently for two to three weeks. She adds, “While seeking help is often seen as a weakness in the legal community, I prefer to think of seeing a professional as a strength—an opportunity to grow, learn about yourself and ultimately feel more empowered.”

Perlmutter says these problems are difficult to deal with in any event, but particularly so when faced alone. We need support from friends and trusted colleagues to get us through such difficult times. Foley shares these words of wisdom, which are important for lawyers to remember: We must put ourselves first, and sometimes that means reaching out and asking for help. Nowhere in the ABA Model Rules of Professional Conduct does it require that we sacrifice our health and well-being to zealously represent our clients. We must take care of ourselves before we may effectively take care of others.

Visit jeenacho.com/wellbeing for a guided meditation on working with feelings of loneliness.

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.
Imagine this (not-so-outlandish) scenario: Your law practice has suffered a data breach. Your email accounts, computers or networks have been compromised and your confidential data is no longer confidential. It doesn't matter how it happened—whether it was a cyberattack, a phishing scam or simply human error. If you are the victim, then you have to respond and protect yourself, your firm and your clients from further harm. If your client was victimized, you might get a frantic call seeking advice.

The best and most effective way to avoid a worst-case scenario is to have a structure already in place to deal with and respond to cyberincidents. Failure to prepare is preparation for failure, and lawyers must invest time toward incident response planning before a breach occurs. Planning for a data breach may seem less fun than preparing for a serious traffic collision, but it comes with benefits that include knowledge, prevention and better response. Contemplating the consequences of a serious cybercrime allows us to properly allocate time and money toward avoiding it.

Good incident response planning and good cybersecurity go together and are continual processes. Planning starts before the breach—just like driver's education starts before the imminent traffic accident. When it is time to take emergency evasive action, you already should know how to use the steering wheel and brake. After the collision, you should know what to do, including whether you are allowed to leave the scene or must notify the police.

The threats and risks are clear: Our profession makes us targets, and we have special duties of confidentiality and competence. Attorneys are subject to frequent cybercrime
attacks, email accounts are breached, and we are solicited to move money for cyber-criminals. Law firms have been breached, their secrets exposed to the world or used for insider trading—the Panama Papers, the Paradise Papers and other events speak to that. Knowledgeable lawyers can protect themselves and their clients.

BREACH RESPONSE OVERVIEW

For background, consider the computer security incident-handling steps from the National Institute of Standards and Technology, outlining four cyclical phases of incident response beginning before the commission of a cybercrime: preparation; detection and analysis; containment, eradication, and recovery; and post-incident activity.

The NIST cybersecurity framework also envisions a continual process through identifying operations, assets and data; protecting on a risk-prioritized basis; detecting cybersecurity events; responding to them; and recovering from them.

These are helpful frameworks for information security professionals, and this article adapts them for your incident response planning.

PREPARE FOR THE CYBERCRIME

Before disaster strikes, develop foundational knowledge and improve your cybersecurity posture in your personal and work lives. To get started, read my article in the ABA's September/October 2017 GPSolo magazine, “Cybercrime and Fraud Protection for Your Home, Office, and Clients.”

Develop an incident response plan. Perform risk analysis, evaluate threats, consider probabilities and potential harms, and think about how you would respond. Ask three questions to address the critical information security concepts of confidentiality, integrity and availability.

1. What confidential information do I store, where is it, and what would happen if it were stolen? Think data breach.
2. What harm could a hacker do by tampering with my systems, including by hacking my email account and sending emails as if he were me?
3. What information and systems are essential? What if I could no longer access them? Consider a ransomware attack.

Think about your incident response procedure and whether it is periodically reviewed, practiced and updated. If nothing is written down, consider getting started with a list, plan or call tree.

Which people are required to respond to an incident, inside and outside your organization? Identify them and their roles and responsibilities ahead of time, and ensure the team can contact one another in a crisis. They should include: designated incident handler; legal counsel; public relations; information technology; digital forensics investigation and recovery; insurance; and law enforcement and other government agencies.

DETECTING A BREACH OR FRAUD

When anomalies occur, we have to know about them and determine whether they are merely an event or a serious incident. We are all important sensors, whether or not we work in a large organization that has tools and personnel dedicated to detecting and preventing a data breach—and especially in smaller organizations.

Attorneys and our clients may need to rely upon our wits, knowledge, communication skills and the ability to review and configure our applications. Again, this starts before the breach. Checking the settings for our applications is as important as turning the lock on our door or setting the burglar alarm. If we fail to do this properly, our tools are ineffective.

We should periodically review the security and privacy settings for our email and cloud accounts and configure them to alert us when there is suspicious activity. We have to discern genuine alerts from fraudulent phishing attempts and be aware of suspicious behavior from our devices and the people we communicate with. Yes, people, too. After all, people can be easily impersonated, and their email accounts can be easily hacked.

Pick up the phone and have a verbal conversation when in doubt. This improves security, combats social engineering, and builds personal relationships. We should warn our clients of fraud risks, including business email compromise and bank wiring scams.

IMMEDIATE STEPS

Consider containment, mitigation, eradication and investigation. Stop the crime from getting worse, minimize further damage, and preserve evidence. Get the attackers and infections out of your system so you can resume normal operations.

There will be tension related to the competing needs to (1) contain a
Business of Law || SPECIAL EDITION

Most states have data-breach reporting laws, requiring notification to law enforcement, the state attorney general, and individuals whose personal information was accessed or stolen (potentially customers, clients and employees).

If you already notified some of these parties as a mitigation step, now is the time to ensure legal obligations are complied with. Look to the laws of your home state and to other states where you operate or have clients.

If a law firm is breached, be mindful of fiduciary duties owed to current and former clients. There can be a conflict between the attorney’s self-interest (in preserving the legal practice and avoiding a claim) and the client’s interests. This would make it difficult for the attorney to provide unconflicted advice to the client about how to proceed.

After the crisis has passed, with the benefit of hindsight and new experience, take time to improve defenses and incident response procedures. Many skip this step, exhausted from the incident or wrongly thinking lightning never strikes twice in the same place. Cybercrime is attracted to weak cybersecurity and fraud defenses, like lightning, are attracted to tall, conductive objects.

Preparation and planning will help you respond effectively to a data breach or a cybercrime and perhaps prevent one from occurring. Your incident response plan should be part of a broader cybersecurity program, which starts with improving your knowledge and awareness.

John Bandler is the founder of the Bandler Law Firm in New York City, which helps firms, businesses and individuals with cybersecurity, cybercrime investigations, litigation support and other areas. He is the author of the ABA-published book Cybersecurity for the Home and Office: The Lawyer’s Guide to Taking Charge of Your Own Information Security, which includes sections on incident response planning and procedures.

Consider legal duties of notification to the government and victims. Most states have data-breach reporting laws, requiring notification to stakeholders will want to know how and why it occurred, and businesses, and help apportion fault or liability.

An impartial and objective investigation can learn helpful facts to further the criminal investigation, determine root causes and security weaknesses, and help apportion fault or liability."

- John Bandler

those to or from the criminal.

Containment may require disconnecting infected devices from the network and internet and possibly turning them off (realizing some evidence may be lost). Ultimately, you will decide whether the device should be forensically imaged for evidence, can be properly cleaned or should be destroyed.

Containment and eradication include regaining exclusive control of cloud accounts and making sure that intruders don’t have access. Review the settings in cloud accounts, check recent logins and security settings, change passwords, enable two-factor authentication, and contact the provider.

Notification of law enforcement and potential victims can be an important mitigation step, even if it is not yet legally required. If funds have been stolen, notify the bank and law enforcement immediately, including the FBI. There is a chance the funds can be recovered if you work fast. If an email account was hacked, criminals might attempt social engineering frauds based on information within the account. So warn potential victims to alert them to this risk.

Recovery means getting the systems and business back to normal operation. This might require reconnecting to the network, restoring backups, setting up new computers, and properly testing them. An impartial and objective investigation can learn helpful facts to further the criminal investigation, determine root causes and security weaknesses, and help apportion fault or liability.

Further, when funds are stolen or businesses are damaged, stakeholders will want to know how and why it occurred, and business and legal decisions should be grounded in accurate information. Attorney-supervised investigations may have the additional benefit of being legally privileged.
Being green is bringing green to a handful of law firms. ‘Sustainable,’ ‘green’ and ‘socially responsible’ aren’t buzzwords typically equated with law firms. But attorneys around the country are using their sustainable efforts to draw business by attracting clients seeking lawyers who embrace this greener lifestyle.

At Perlman & Perlman, a boutique law firm headquartered in New York City that has six partners, the practice revolves around responsible organizations, and it tries to use its business to do good in the world.

“We’re values-driven—everyone here could make more working at a bigger firm, but we choose to be here because we want the firm to represent our personal values,” says Allen Bromberger, a partner at Perlman & Perlman.

Bromberger says his firm has always recycled, it has generous personnel policies, and it is always looking to make the office even more sustainable. But it’s one thing to tell clients that the firm is socially responsible, and it’s another thing to prove it to them.

So he turned to B Lab, a Berwyn, Pennsylvania-based nonprofit founded in 2006, which certifies for-profit companies that choose to hold themselves accountable in the social responsibility field.

Just like Etsy and Warby Parker, Bromberger’s firm went through a complicated self-assessment application to become a B Corp, or benefit corporation. This included examining job creation, their corporate responsibility, the effect on the community, and the overall impact of the companies on their stakeholders.

Perlman & Perlman made the decision to become a B Corp in 2009, and it was certified in 2011. Every two years it has to recertify, but the hard work is worth it in many ways, Bromberger says.

“We use the B Corp logo throughout our marketing materials, mostly to indicate our values orientation to the outside world,” Bromberger says. “For people who know B Corps, this branding is an attractor.”

Perlman & Perlman partner Karen Wu agrees, adding that being a B Corp forces the firm to live its values. She notes that she strives to send, receive and maintain documents electronically instead of on paper, and that members of the firm try to minimize use of disposable plastic items such as cups or plates.

“As a firm that focuses on serving nonprofits and socially responsible businesses, I think it is important that we operate with strong values,” she says. “I appreciate that the B Corp certification standards provide us with a structured approach to continuously evaluate our impact on people, the environment and the community.”

Meanwhile, the strict B Corp audit and renewal process is also useful in keeping the firm honest and forces it to regularly think about how it does business, according to Bromberger.

“Being a B Corp signals to other values-driven businesses that your law firm speaks that same language, shares the same values, and meets the most rigorous standards for business as a force for good,” says Jay Coen Gilbert, co-founder at B Lab.

‘WALK THE WALK’

When you speak the same language, you’re more likely to pay more for services, according to a 2015 Nielsen survey, which reported that consumers are looking at websites to learn about the prospective businesses’ practices before hiring.

Of those surveyed, 66 percent say they would pay more for organizations that the B Corp certification standards provide us with a structured approach to continuously evaluate our impact on people, the environment and the community.”

-Walker the Walk-
that were socially responsible, and more than half say they are influenced by key sustainability factors, such as a company being environmentally friendly or being known for its commitment to social value. Personal values were more important to them than personal benefits, such as the cost of the service or the convenience.

But while more than two-thirds of senior executives say their companies are more committed to corporate citizenship than they were three years ago, the public doesn’t agree, skeptically saying that about one-third is doing better, according to Nielsen.

It takes a third party to justify the efforts.

“It’s important for me to be valued and to walk the walk,” says John Montgomery, founder of Lex Ultima, a law firm and consulting company in Point Reyes Station, California, dedicated to helping businesses transition more seamlessly into B Corps.

His office is energy-efficient—using 100 percent renewable power. He has an on-demand water heater, LED lights and a low environmental footprint. Being a B Corp simply verifies his efforts.

“As a startup lawyer, the economic data shows that businesses that adopt principles of sustainability outperform their conventional peers,” Montgomery says.

“Not only did this make sense from a social and environmental perspective but it also made sense from a business perspective,” he says of his one-man firm.

PROS VS. CONS

Still, being a B Corp isn’t good for every firm, says Regina Robson of boutique law firm Robson & Robson just outside Philadelphia. The firm started the process to become a B Corp but elected not to proceed.

She says being a B Corp presents some unusual challenges, particularly for small or midsize firms. “Assessing performance requires a continual time commitment and attention to operations,” Robson says.

An annual report rating performance in a number of categories is required, and firms can earn points in various assessments either via their own work (doing pro bono work is a plus) or servicing clients who are benefit entities or who are engaged in socially responsible endeavors, Robson says.

“Consequently, a firm whose clients are engaged in water conservation, sustainable sourcing or serving underserved communities might be able to consider the client’s activities in their own assessment,” Robson says. “Firms with a more traditional client base would not have such an advantage.”

Also, she says, firms that rent office space may have little or no leverage in ensuring their office isn’t harmful to the environment.

Still, for those who have been able to get certified as a B Corp, the pros outweigh the cons.

“Some clients sought the firm out because of its status,” says Doug Singer, whose former firm, Falcon & Singer, had been certified as a B Corp.

He says his new firm, Singer Law in White Plains, New York, is going through the certification process. “Most importantly, it communicated to other businesses that the firm didn’t just talk the talk: The firm lived it every day,” he says.

Do As I Say

Good news for lawyers who hate transcribing by hand—there’s a growing list of automatic tools on the market

By Ed Finkel

When legal technology company Everlaw announced in December it was adding automatic transcription for audio and video to its cloud-based e-discovery platform, it became the latest in a growing crop of transcription tools for lawyers to use in their day-to-day work.

Everlaw automatically converts depositions, voicemails and other multimedia to text, analyzing files as they are processed and removing the need for litigation support teams to play back entire files or send them to outside services for transcription. Instead, they can quickly search, annotate and navigate the transcriptions.

The 8-year-old cloud-based provider of e-discovery tools has “a whole team watching lawyers in the wild, seeing what they do,” says Jon Kerry-Tyerman, vice president of business development at Everlaw, adding that the company spent a lot of time looking into what lawyer needs still had to be addressed.

In developing the automatic transcription tool, he adds, Everlaw realized “if you have a case with 10,000 voicemails and you have to figure out what they’re talking about, it’s a nightmare to have to sit there and listen to it.”

TRANSCRIPTION SERVICES ABOUND

For many in the legal field, the most popular option continues to be Nuance’s Dragon software. Nicole Black, a lawyer and legal technology specialist at MyCase, says lawyers have a number of options for transcription. But she hears about the Dragon software the most. Most often it’s used for dictating memos or letters.

“It’s designed for that purpose: speech to text,” she says. “When I was practicing, that’s what I used it for, to dictate a memo or letter. It makes the most sense to dictate, especially
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seeing it on the screen—you can follow your train of thought better.”

Nuance released the 15th version of the Dragon software in late 2016. The company has been pushing forward with artificial intelligence to improve word recognition, so users no longer have to spend time at the outset recording themselves and then adjusting the transcription. Thus, the product can “learn” their accents and other speech inflections, says Rick Brown, senior director of product management at Nuance.

“I would dictate it right into the email, and when I was done, I would proof it and send it. It takes a fraction of the time it would take if I were to sit down and use my keyboards.”

Greg Baumgartner, a personal injury attorney in Houston, uses Dragon for emails, documents, “almost everything,” he says. When he first tried Dragon more than 10 years ago, he didn’t find it very useful. But now, “the accuracy is just shocking,” he says.

Baumgartner recommends Dragon Anywhere, a mobile app on iPhone and Android, for anyone who dictates a significant amount into their phone. Another recent competitor for Dragon is London-based Trint, which

“Cloud Concerns Dissipate”

Trint hasn’t marketed heavily to the legal sector yet but plans to do so after upgrading its cybersecurity features this year and hiring a team member focused exclusively in that area, Kofman says. “We understand the very real concerns,” he says.

Dragon has cloud-based and on-premises versions; neither Boggio nor Baumgartner expressed significant concerns about the product’s cybersecurity. Black at MyCase says she finds the product trustworthy in that regard and says transcription products that operate in the cloud would be subject to the same ethical standards as emails and other content in cyberspace.

“Anytime you outsource the handling of client confidential data to a third party, you have to vet that third party,” she says. “You need to ask them a series of questions: Who are their employees? How do they vet employees? Where is the data stored? Who has access? How often is the data backed up? Is there geo redundancy?”

When Everlaw opened its doors in 2010, many people were suspicious of the cloud, Kerry-Tyerman says. But in the past couple of years he’s seen the conversation shift from “Why would I do that?” to “How do I do it?”

But, he adds, “You still have to do it right. The kind of data we’re hosting is incredibly sensitive. It is, in many ways, like a gold mine for hackers.”
Under Questioning

The Chicago police legacy of extracting false confessions is costing the city millions

By Kevin Davis
LAROD STYLES, WHO HAD JUST TURNED 16, WAS HOME WITH his grandmother on a December evening in 1995 when some Chicago police detectives came by to ask him a few questions. Two men had been killed during a robbery at a nearby used car lot, and one of the suspects said Styles was involved.

Styles agreed to get in the car with detectives, who drove him to an area police station and led him to an interrogation room. They handcuffed Styles to a wall and questioned him on and off for several hours, during which he repeatedly denied knowing anything about the crime.

The questioning got more aggressive. The detectives told Styles he’d spend the rest of his life in prison if he failed to tell them what happened, according to Styles’ account. They shouted at him, threatening that he’d never see his family again. If he signed some papers, the detectives said they’d release him to his grandmother, Styles later recounted.

Exhausted and scared, Styles confessed about 1 a.m., eight hours after he was taken in for questioning. His story, which Styles later said was concocted by detectives, was that he and the others planned to rob the car dealer and steal a vehicle. The reason was he needed a transmission to replace the ailing one in his grandmother’s Buick. In Styles’ confession, he said another teen shot the men as they fled.

There was no physical evidence that tied Styles to the crime, yet a jury convicted him for the murders of car lot owners Khalid Ibrahim and Yousef Ali. He got life without parole. Three other teenagers, who also said they were coerced into confessing, were convicted as well. They became known as the Marquette Park Four, named after the South Side neighborhood where the crime happened.

After unsuccessful appeals, one of the defendants, Charles Johnson, sent a letter to the Center on Wrongful Convictions at Northwestern University’s Pritzker School of Law, which along with lawyers from Kirkland & Ellis, took on the case. In 2009, a judge ordered that fingerprints be re-examined from two cars stolen during the robbery and from discarded price stickers. The results excluded Styles and the other teens and matched four others. The police also learned a convicted drug dealer had argued with Ibrahim and Ali days before the murders and threatened to kill them.

Faced with these developments Anita Alvarez, who was then the Cook County state’s attorney, vacated Styles’ conviction but said she would retry the case. In February 2017, however, Kim Foxx, the newly elected state’s attorney, decided to dismiss all charges, saying the state could not meet its burden to prove the case. A judge subsequently granted Styles and the others certificates of innocence.

But that wasn’t the end of it. This past February, Styles and the other exonerated men filed a federal civil-rights lawsuit against the Chicago Police Department and the detectives involved. In the suit,
Terry Campbell, Styles’ lawyer, declared the CPD and its detectives “have a long history of using physically and psychologically coercive interrogation tactics … causing hundreds of false confessions and wrongful convictions in the city of Chicago.”

Before confessing that day, Styles says, he could not have imagined doing such a thing. “I never even conceived a thought like that,” he says after enduring nearly 23 years in prison. “It only takes a second when you’re not thinking to be in a situation like the one I just got out of. I just didn’t think it would take this long.”

Once again, the city is on the defensive, accused of allowing detectives to obtain false confessions through bullying and intimidation, an allegation that’s hardly new for Chicago. But it continues to haunt the city—while taxpayers foot the bills for misdeeds of the past. Peter Neufeld, co-founder of the Innocence Project in New York City, appeared on 60 Minutes in 2012, calling Chicago the capital of false confessions.

“Quite simply, what Cooperstown is to baseball Chicago is to false confessions,” he said. “It is the hall of fame.”

Six years later, little has changed. Of the 29 wrongful conviction rulings involving false confessions in the United States in 2017, 13 were in Cook County, where the court system covers Chicago, according to the National Registry of Exonerations. Of the more than 260 false confession cases recorded since the registry began counting in 1989, about 25 percent have come from Cook County.

THE AWAKENING

While false confessions have been documented throughout the country, Chicago stands out in part, Neufeld thinks, because of the high concentration of innocence projects and lawyers who specialize in wrongful conviction litigation.

They include the Center on Wrongful Convictions, the Exoneration Project at the University of Chicago Law School, the Roderick & Solange MacArthur Justice Center at Northwestern, and dozens of law students and pro bono attorneys interested in these kinds of cases. In Chicago and elsewhere, they’ve become known as professional exonerators.

One of them is Steven Drizin, former legal director at Northwestern’s Center on Wrongful Convictions and co-founder of the Center on Wrongful Convictions of Youth. Drizin, a relentless and passionate advocate, once thought that devoid of torture, people didn’t confess to crimes they didn’t commit. “Then I had an awakening,” he says.

That awakening came in 1994 when Drizin got involved in an appeal for a black boy who was 11 when he was arrested for killing an elderly white woman. The boy confessed without a lawyer or parent present. Even though police had no physical evidence, and the boy’s statement was filled with inconsistencies, he was convicted. He became known by his initials, A.M., to protect his identity.

Drizin asked A.M. why he confessed. The boy told Drizin that police promised he could go to his brother’s birthday party if he did, and that God would forgive him. The cops had also told A.M. they found his fingerprints on the murder weapon, which was not true. “They got to his head, and he saw the only way out was admitting to the crime,” Drizin says.

The 7th U.S. Circuit Court of Appeals at Chicago reversed the conviction and set Drizin on a new mission. “So I embarked on a personal odyssey to learn everything I could about police interrogations and false confessions and the connections between them,” he says. “I didn’t understand how psychological tactics could get people to confess to the most heinous of crimes.”

What would motivate police to force confessions out of young suspects? Drizin’s experience and research suggest a pattern that began with the “superpredator” phenomenon of the 1990s, during which rising crime rates instilled fear of juvenile criminals run amok. Police were under intense pressure to make arrests.

“The murder rate in Chicago was at record highs, and crack cocaine created a spike in homicides,” Drizin says. “You can’t divorce the Chicago false confessions from the context in which they arose. You have a police department that is under siege—not enough detectives working too many homicides on a daily basis and having to deal with crime victims. I think it created an environment where police officers were more interested in closing cases than in solving crimes.”

Drizin says some of the same detectives were racking up confessions by playing suspects against one another and creating their own narratives. The confession of
Styles was an example of how detectives can manipulate young people to confess to crimes in which there are multiple suspects who implicate one another and try to minimize their roles. Two of the detectives named in Styles’ lawsuit, James Cassidy and Kenneth Boudreau, were linked to other false confession cases.

Before Styles was arrested, police received an anonymous tip that led to their first suspect. Under questioning, he named three other teens, including Styles. They all confessed without parents or lawyers. Although Styles thought his version would guarantee leniency because all confessed without parents or lawyers, detectives knew better. One even taunted him, saying, “You just signed your life away,” according to Styles’ lawsuit.

COSTLY CONFESSIONS

Chicago police have long grappled with a reputation for torturing suspects into confessing, due in large part to the notorious detective Jon Burge, who along with his “midnight crew” has been found responsible for beating, electrocuting and intimidating suspects from the 1970s to the 90s. The city has paid out more than $100 million in settlements and reparations in Burge-related cases alone and more than $500 million altogether in the past decade to settle police misconduct and wrongful conviction lawsuits, according to a report from the Better Government Association.

This seemingly endless succession of suits has fueled an acrimonious relationship between rank-and-file police officers and civil rights attorneys. Last year, a spokesman for the Fraternal Order of Police, the union representing officers, lashed out at a Chicago city council meeting after the city settled what was known as the Englewood Four case for $31 million.

Four young men confessed to raping and murdering 30-year-old Nina Glover but were later exonerated by DNA evidence. The FOP maintains the four are still guilty. It accused civil rights lawyers of carving out a cottage industry in the name of wrongful convictions and collecting handsome settlements from a city more than willing to open its checkbook.

“That’s just a reflection of the head-in-the-sand attitude of this department,” says Locke Bowman, executive director of the MacArthur Justice Center, which represented one of the four men.

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“There's definitely a pattern in
no doubt in my mind, or the mind of anyone who has worked on this case, that Mr. Solache and Mr. Reyes are guilty of these crimes,” said Eric Sussman, the Cook County first assistant state’s attorney at the time.

That is not unusual. Neufeld of the Innocence Project has observed that prosecutors often are reluctant to believe, or admit, they sent innocent people to prison based on false confessions. “There is an arc of denial,” Neufeld says. “It’s not unique to Chicago. Prosecutors are extraordinarily resistant to admitting a person is innocent.”

**CHANGED WAYS**

Robert Milan used to think that way. In 2002, when he was chief deputy of the Cook County State’s Attorney’s Office, he had a revelation. Milan saw two murder cases in his office unravel—cases that hung on false confessions, including one from a teenager described as mentally disabled.

The following year, Milan developed a program to train prosecutors to detect warning signs for false confessions and prevent wrongful convictions. He eventually took it nationwide. “I started that training after seeing that these cases were problematic,” Milan says. “And then I studied cases across the country.”

Milan followed up by creating a DNA review unit, which reinvestigated cases where DNA testing hadn’t been done or was unavailable at the time and could support or discredit actual innocence claims. It became a model for similar units across the country. Today, 33 conviction integrity units exist in the United States. Their effectiveness and staffing vary, with some better funded and more aggressive than others.

Within days of taking office in 2017, Foxx, the Cook County state’s attorney, began revamping its conviction integrity unit, which she says was slow and inefficient under her predecessor, Alvarez.

“So much of what stagnated progress in this unit prior to this administration was the belief that why would anyone confess to a crime they wouldn’t commit?” Foxx says. “There was this need to believe that. Otherwise, we’d be acknowledging that we were convicting people who shouldn’t have been convicted.”

Foxx made it clear she would have an open mind in re-examining claims of innocence. “First and foremost, the recognition that someone would confess to a crime they didn’t commit is very real,” she says.

After posting instructions online on how to file claims and sending pamphlets to state prisons, the unit was...
created the Jeffrey Deskovic Foundation for Justice, a nonprofit based in New York City committed to preventing wrongful convictions and helping exonerees reintegrate into society. “Being an advocate is in my blood,” he says. “It’s hard to walk away from this.”

Since his release, Deskovic has earned a bachelor’s degree in behavioral science, a master’s in criminal justice, and is now enrolled at Pace University’s law school. He intends to specialize in criminal law and civil rights litigation, most likely post-conviction work.

When he’s not busy with school, Deskovic goes on speaking engagements, attends hearings for those claiming wrongful convictions, and works to help exonerees adjust to life outside prison.

Despite those lost years, Deskovic says, he doesn’t hold a grudge. “My position has been that I’m not bitter. I want to enjoy my life as much as I can, and I can’t do that if I’m angry and bitter,” he says. “I don’t have ill feelings toward police. To paint the whole profession with one brush, I don’t apply that view. But in my case, I don’t think it was a good-faith error. They knew the tactics they engaged in, and they knew the DNA did not match me. They wanted to get promotions.”

Deskovic is encouraged that more states are requiring the taping of interrogations, and that more judges are open to hearing claims of innocence. “Things are moving in a better direction in proving wrongful convictions, but there is slow implementation of laws for best practices to prevent it,” he says.

His mission in life is now to help others. “I find it cathartic. I find it healing,” he says. “It’s why I’m in this world. It’s such an important issue for me because it happened to me, and I don’t want it to happen to anyone else. I need to make my suffering worth something.”

flooded with requests. But not all cases were black and white. Foxx says her office struggled with the cases of Coleman and Fulton. “The unit itself concluded it was not a case of actual innocence,” Foxx says. “But would we be able to meet the burden of proof at trial of guilt? The answer we had was no.”

Still, because of the questionable interrogations and lack of evidence, Foxx concluded the charges had to be dropped. “It troubled us,” she says. “It pained us to try to characterize the right way to say what we were doing. These cases are really complicated.”

Coleman and Fulton have since filed civil lawsuits against the city, and a judge recently granted them certificates of innocence, which Foxx declined to comment on because of the pending litigation. Coleman’s attorney, Russell Ainsworth, says his client is indeed innocent and was fed details of the crime for his so-called confession. “It was ludicrous that this man, a working man with no criminal record, that his first arrest is for a murder and rape,” Ainsworth says. “He didn’t go into hiding. He didn’t run.”

Ainsworth suspects the pending suit is why the state’s attorney is reluctant to admit prosecutors were wrong. Still, he credits Foxx’s conviction integrity unit for its decision. “It shows a willingness to do the right thing,” he says.

Milan found himself in a similar position earlier this year while he worked as a special prosecutor to evaluate two innocence claims. He spent seven months investigating allegations that two men convicted of murdering the wife of a retired Chicago police officer in 1989 were beaten into giving false confessions. Without the confessions, Milan told...
the judge, the evidence against the men did “not meet the burden of proof beyond a reasonable doubt,” but he did not declare them innocent. As part of an agreement to drop the charges, the men were barred from seeking certificates of innocence.

While not speaking about that specific case because it’s the subject of civil litigation, Milan says prosecutors must do the right thing based on available evidence. “In your mind, as a seasoned prosecutor, you know that it doesn’t meet the burden. If it doesn’t meet the burden, then we have to drop it. That’s our duty,” he says. “But at the end of the day, you can’t say they’re innocent.”

To avoid these kinds of cases, Foxx says her office has been training prosecutors in the felony review section on how to identify signs of false confessions and to analyze whether interrogators are following proper procedure. Prosecutors also meet regularly with Chicago police to review cases and explain why some cannot move forward, including those in which confessions can’t be corroborated by other evidence.

**EXPLOITING VULNERABILITIES**

Kathleen Zellner, a personal injury lawyer in Downers Grove, Illinois, who became one of the nation’s best-known wrongful conviction specialists, has learned quite a bit about interrogation techniques and false confessions after helping exonerate 19 clients during the past several decades.

“About 40 percent of those cases involved false confessions,” she says. “Every person I know who has confessed has had some vulnerability.”

Exploiting those vulnerabilities helps police extract the confessions they want, Zellner says. That’s what happened to her client Kevin Fox—a grieving father torn by guilt that his daughter, Riley, age 3, had been abducted from their home, raped and murdered.

Fox had been taking care of Riley and her older brother while his wife was with friends preparing for a breast cancer walk. Riley’s body was discovered in the creek of a forest preserve not far from their suburban Chicago home in 2004. Riley had been tied up with duct tape and sexually assaulted.

For five months, the case remained unsolved. Detectives asked Fox to come to the police station to answer questions and asked whether he’d take a polygraph test. He did, and detectives told Fox he failed, which was not true.

Fox claimed that during an all-night interrogation, detectives threatened him with being raped in jail, said his wife and father abandoned him, and promised he could go home if he confessed he accidentally killed Riley. Fox was tired, scared and vulnerable. He agreed to say he inadvertently killed his daughter. “By then, he was like a whipped dog, just saying ‘yeah, yeah’ to anything,” Zellner says.

Fox spent eight months in jail before he was released and ultimately cleared through DNA evidence. It took another six years before the real killer was arrested and convicted. “When people tell me, ‘I would never confess to that,’ I tell them, ‘You’ve never been in that
kind of situation,” Zellner says. “You get to where you’re just not thinking straight. It’s impossible to know what that pressure is like unless you go through it.”

Zellner understands that police want to close cases, especially those that involve the killing of a child. “They have a conflict walking in the door. Police have a vested interest,” she says. “But when you have a legitimate confession, it needs no prompting. You just listen. I’ve been around enough innocent people. I can tell in an instant.”

CHECK THE TECHNIQUE

Lawyers such as Zellner have become students of interrogation techniques and the use (and misuse) of methods drawn from one of the most famous: the Reid technique. The technique is a staple in law enforcement training and the most widely used approach to questioning subjects in the world, according to John E. Reid and Associates. It was developed more than 70 years ago by polygraph expert Reid.

The process involves conducting what the company describes as a neutral, fact-finding interview while assessing the person’s behavior and then determining whether information gleaned from the interview can be verified. Problems occur, however, when interrogators veer off course and use a sort of hybrid method.

“They begin mixing apples and oranges,” says Joseph Buckley, president of John E. Reid and Associates. “They don’t follow the guidelines. They follow their own.”

Critics have suggested the technique is all about nailing a confession from someone they’ve already pegged as guilty—that it teaches interrogators to be manipulative and threatening, and that it can produce false confessions through intimidation and deception.

Buckley says it’s nonsense. “The purpose of an interrogation is to tell the truth,” he says.

He says he’s often recruited to assist lawyers seeking to discredit confessions by analyzing the methods in which they were obtained. He has worked with Neufeld and Barry Scheck at the Innocence Project as well as Zellner.

“They know that we represent what the standard of proper procedure should be,” Buckley says. “We never teach or recommend that the interrogator should try to increase the suspect’s feeling of despair or hopelessness. In fact, we teach that it is improper to tell the suspect that he is facing inevitable consequences.”

According to the company, false confessions aren’t caused by following its methods. They’re usually caused by interrogators engaging in behavior the courts have ruled to be objectionable, such as threatening inevitable consequences; making a promise of leniency in return for the confession; denying subjects their rights; conducting an excessively long interrogation; and denying suspects an opportunity to satisfy their physical needs.

The detectives who interrogated Styles in Chicago, according to his lawyer, failed to follow the proper procedures taught in the Reid technique, including taking special precautions when questioning juveniles.

“You have a 16-year-old kid handcuffed to a wall in an interrogation room with no adult or parent there for him,” says Styles’ attorney Campbell. “The kid was manipulated. It’s not that hard to manipulate a kid, mentally.”

AN END IN SIGHT?

The wrongful conviction movement has come a long way during the past two decades, and with it the revelation that many were based largely on false confessions. That’s due in large part to the advent of DNA evidence and a shift in public thinking. Neufeld thinks that until the ’90s, the public was mostly indifferent to claims of innocence.

But a succession of exonerations, many of which gained widespread media coverage, drew critical attention to prosecutions, especially in death penalty cases. As a result, 18 states and the District of Columbia have instituted safeguards to try to prevent false confessions by requiring the taping of all interrogations from start to finish. Approximately 1,000 jurisdictions have voluntarily done so, according to the Innocence Project.

“It’s a vast improvement,” Neufeld says. “When police know they’re being videotaped, they’re going to behave.”

Even so, taped interrogations don’t necessarily stop police from using their skills to elicit false confessions, especially from young people, says Drizin of the Center on Wrongful Convictions of Youth. That’s exactly what he says happened to one of his latest clients.

Drizin, with co-counsel Laura Nirider, also at Northwestern, is representing Brendan Dassey, the nephew of Steve Avery, whose case became a national obsession thanks to the Netflix documentary series Making a Murderer. In the series, viewers can see Dassey, then 16, undergo an interrogation that leads to a confession implicating himself and his uncle in the murder of Teresa Halbach, 25, in Wisconsin in 2005. That interrogation, Drizin says, is riddled with faults and is flat-out false.

With all other appeals exhausted, Drizin and Nirider are trying to bring Dassey’s case to the U.S. Supreme Court. “It’s all there on the tape,” Drizin says. “These police offers are feeding him facts left and right. ... When you use tactics like that on a child, they are coercive.”

Those kinds of coercive tactics have prompted Styles to tell his story in an amicus brief on behalf of Dassey. “Everybody needs to hear my story,” Styles says. “It’s not to put the police department down—because they have a job. But it’s to expose to the world what really goes on behind closed doors.”

Dassey’s petition got support from 62 current and former state and federal prosecutors. In their amicus brief, the prosecutors argue that leaving Wisconsin’s appeals court ruling intact “would leave scores of children subject to coercive interrogations, heighten the likelihood of false confessions, and undermine the truth-seeking function that properly performed interrogations serve.”

Styles, now 38, is still adjusting to his newfound freedom—working to earn the high school diploma he never got, taking auto body repair classes, and reconnecting with family. “To this day, it’s still surreal,” he says. “I drink my water slow now. It’s a blessing every day now.”

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Hands - EXPERIENCE
As deputy managing partner at Hunton Andrews Kurth and former co-chair of its national bankruptcy and restructuring practice, Robin Russell has built a thriving practice combining attention to detail with an ability to strategize and think creatively. But Russell’s finely honed skill set is behind more than just her professional success—it also comes in handy at the fabric store.

When Russell isn’t advising corporations on counterparty insolvency risks or structuring international acquisitions, the Houston-based lawyer often can be found in her home studio creating handcrafts.

Russell is an avid quilter and also creates detailed needlepoint pieces and holiday decorations. She enjoys working with charms, vintage jewelry, fibers and fabrics that she sources from flea markets, antique shops and market stalls. One of her more recent creations was of a wall hanging depicting a street scene in San Miguel de Allende, Mexico, complete with a sequined Virgin de Guadalupe and design accents made from repurposed wooden earrings.

While Russell’s creations are all one of a kind, she is not the only lawyer with a passion for crafting. Men and women across the country complement their practice of law with the practices of knitting, sewing, woodworking and

These high-achieving lawyers turn to crafting to relax, recharge and have fun

BY JENNY B. DAVIS

Robin Russell de-stresses by crafting tapestries and holiday trees.
similar hands-on artistic endeavors. They say it helps them to relieve stress, refresh and refocus. The idea of a high-powered litigator or transactions wizard spending hours manipulating yarn with sticks or swiping sandpaper back and forth against a chunk of wood might seem like a skills mismatch. But Russell believes the type of thinking that makes lawyers successful in their profession also sets them up to succeed at making handcrafts.

"The thing that allows me to sit in my studio and spend hours working on an art quilt because I want it to be perfect and beautiful is the same thing that has helped me through my practice," she explains. "When you are doing a complex legal project of the kind I typically do, the most important thing to see is the big picture: What are your goals? How do you want it to look at the end to be successful for your client? When you're doing art, you also have to think about your goals, and you do have to have some idea what you want it to look like at the end."

In both law and art, “it just takes time, patience and a sense of perfectionism,” she says. “The type of approach that makes you think, 'I have done a fabulous job, and I love this piece of art' is the same approach your clients want—they want you to go all in and be creative.”

There exists perhaps an even more compelling reason for lawyers to craft: It's fun. Lawyers can be prone to thinking that work is always the best use of one’s time, says mindfulness expert Jeena Cho, co-author of The Anxious Lawyer. Cho, a partner at San Francisco's JC Law Group, cautions against such a single-minded lifestyle. “We need to be whole human beings, which means developing all the aspects of ourselves,” she says. “Everyone has a creative side, and it’s important to nurture it.”

Cho learned this lesson herself during a period of professional burnout in 2010. A therapist suggested she take up a creative pursuit to move toward finding more balance in her life, and that led Cho to rediscover her love of sewing. One of her favorite things to make is handbags, but she's also made garments such as skirts and lounge-wear. Whether it's sewing or knitting or some other craft, she says, tapping into one's creative side is an important part of enjoying life and feeling happy and fulfilled.

SEWING AWAY STRESS
It’s no secret that law and stress are intertwined, and crafting is a great way to begin untangling that knot. Stress was the reason business litigator
Lauren Clark Rad got into knitting. Rad, an associate with Ferguson Case Orr Paterson in Ventura, California, turned to knitting during her first semester at Harvard Law School, right around the time of her first final exams. “I was stressed out and worried about studying effectively, and somehow I got on the subject of knitting with a friend,” she recalls. The friend had learned to knit from her grandmother, and she offered to teach Rad how to do it. Rad jumped at the chance and found a respite from the pressure of school in the manipulation of yarn.

More than 10 years later, Rad has become an accomplished knitter, even selling a few patterns through Ravelry, a popular knitting website. She says learning to knit during those often-overwhelming first months of law school “helped me build in study breaks and gave me something to look forward to while giving my brain time to process and reset.” As a result, she was able to study longer and more effectively.

Patrick “Leh” Meriwether uses woodworking to de-stress from his practice. He is the co-founder of Meriwether & Tharp, a midsize family law firm with offices across the Atlanta area. When he’s not practicing, administrating, marketing, mentoring or advising clients, he enjoys retreating to his basement workshop, where he transforms fallen trees into “useful works of art.”

Meriwether made his family’s dining table and outdoor furniture, his office desk and a sleigh pulled by nine reindeer for his family’s epic Christmas lawn display. He made bedroom furniture for his two kids, including a crib for his firstborn—it was actually the piece that got him started. He also maintains the Avid Woodworker website. Although he has paused his posts and podcasts, both remain popular within the woodcraft community.

“When you’re dealing with the drama found in family law, it’s getting into the shop and pulling the beauty out of a piece of wood that, in addition to my faith, keeps me sane,” Meriwether says.

For Cho, sewing provides a break from stress that can stem from uncertainty. “Lawyers are very much trained to worry about things they have no control over,” she says. Whether it’s the result of a ruling, a verdict or a mistake, Cho says lawyers can take it personally and internalize the setback. “They start going into self-criticism and self-judgment,” she explains. “We can be our worst critic—it’s a terrible way to go through life.”

Crafting is much more forgiving. “If I sew something incorrectly, it’s a great life lesson: Mistakes can be fixed, and we can make a mistake. It’s how we learn,” Cho says. “I can enjoy the process of making a bag, even if I am not terribly happy with the outcome.”

**KNITTING TO THINK—OR NOT**

Crafting also provides a chance for busy brains to recharge in a way that seems to clear neural pathways for new ideas.

Russell says she’s definitely had ideas come to her while she’s creating. “Complex bankruptcies can be like three-dimensional chess, and you have to map out a
strategy,” she says. “Sometimes when you step back from what you’re doing and let your mind relax and start wandering, you are able to see things that you couldn’t see before.”

Rad reports similar experiences. “Sometimes I’ll knit and ponder, and I’ll have to pause the knitting and shoot myself an email or jot down some notes,” she says.

Conversely, ERISA lawyer Beth Diamond believes she’s a better lawyer precisely because she never thinks about her job while she’s crafting. “I am just thinking about colors and shapes—it’s almost like a meditative experience,” she says. “Then when I go back to work, I have fresh eyes.”

Diamond is a multitasker by nature. “I am doing and thinking all the time—and not just about one thing, but three things. Even when I am relaxing, I am watching TV, making a list and thinking about what I am going to do the next day,” she says.

It’s a perfect mindset for her work as an employee benefits investigator in the U.S. Department of Labor’s Boston office. Diamond spends her days studying large corporate health, welfare and retirement plans to ensure they comply with myriad federal laws so that plan participants can get the benefits they’re entitled to receive.

In all, she constantly juggles around 20 cases, each one extremely detail-oriented and each one with the potential to involve thousands of participants. “My cases are like kittens in a box—you have to attend to all of them,” she says. “There are some cases I want to work all the time, but I have to put them down and cleanse my brain.”

Doing that can be difficult, she admits. “I think it’s really hard to set down your work when you’re in the law—it’s hard to put it down and do something else and not have it in the back of your head.” That’s where crafting comes in. “I can get out of my head and do one thing for a little bit,” she says.

Crafting also allows her to indulge her artistic side. At work, she says, “the most creative part of my job is coming up with spreadsheets and tables.” Once in a while, she admits that she’ll shift fonts from Times New Roman to Calibri just to mix things up.

At home, however, it’s a different story. There, creativity abounds. She’s quilted an elaborate scene depicting the view from her parents’ lake house, and she has made a baby blanket with quilted bear faces that she customized using fabric and colors that represent the hobbies and interests of each member of the baby’s family. Recently, Diamond learned how to make tuffets—little stools made of colorful cloth strips. She’s looking forward to making more tuffets and maybe even learning more new crafts. “I hope to someday be mellow enough to knit,” she says with a laugh.

Rebecca Berfanger also enjoys the ability to turn off her analytical mind and indulge her creative mind. As half of Giles & Berfanger, a general practice firm in Indianapolis, she slants her practice toward serving the diverse legal needs of people in creative fields, such as arts, entertainment and journalism.

She and her law partner founded the firm in the fall of 2017, and getting it off the ground has been an undertaking, she says. In addition to investing in growing her practice, she juggles an entirely different set of deadlines stemming from her work as a freelance writer.
Berfanger learned how to cross-stitch in middle school, but she renewed her interest when she discovered a book devoted to a new genre of the craft called subversive cross-stitch. These alternative designs draw on traditional patterns, including flowers and fuzzy animals, but instead of cloying phrases like “Home Sweet Home,” they feature rap lyrics, swear words and pop culture references. “It’s not how you’d normally think of cross-stitch,” Berfanger says. “It was inspiring and I thought, ‘This is something I want to do!’ ”

The designs Berfanger tackles aren’t technically complex, but they’re just hard enough to capture her attention—and sly enough to make her smile.

One recent project celebrated both pop culture and law, combining delicate flowers with the phrase “And he disrespected the Wu-Tang Clan.” The phrase, taken from the court transcripts of the jury selection process for the securities fraud case against Martin Shkreli, was a potential juror’s explanation of why he disliked the defendant. Wu-Tang Clan, a groundbreaking hip-hop group that originated in the 1990s, famously released an album with only one copy, which the recently convicted Shkreli owned.

Berfanger has also begun adapting patterns to incorporate her own slogans.

“It’s definitely a mental break where I can focus on one thing instead of 30 things,” she says. “I recently read that doing things with your hands is a good way to shut off your brain, and that makes sense. When I am doing cross-stitch, I can’t be at my computer.”

She recalls, “I really identified with the article because, while I do good work for people, everything I do is on the computer.”

Stadler, a partner at Del Vecchio & Stadler in Buffalo, New York, practices intellectual property law with a focus on the biomedical and chemical industries. One of her areas of interest is nanotechnology: She devoted her masters of engineering thesis to the topic and studied it while working as a patent examiner.

Stadler says her mom used to knit and once tried to teach her how. It wasn’t a fit, but that memory inspired Stadler to consider crochet, which requires a single hook instrument rather than a set of needles. “I found a lady who taught crochet, and I learned to do it, and I thought, ‘Wow, I am not terrible!’ ” That was five years ago. Since then, she has made hats, scarves, blankets and shawls.

Currently she’s working on a shawl made from yarn she bought in Bath, England, spun from the wool of three different types of sheep. The ability to hold a finished piece in her hand gives her a unique sense of satisfaction, she says. “You just can’t look at a filing receipt on a computer screen and feel the same sense of pride.”

Meriwether agrees. He says he appreciates being able to make a product after he’s spent all day providing a service.

“As a lawyer, I send out a bill, but in some respects there’s no product to show for it—there’s great service, but no product,” he explains. “But with woodworking, there’s the satisfaction of having a finished product that I can hold and feel; something I made with my hands.”
Recently, Meriwether has been focusing his creative attention on making writing instruments. They’re much faster and easier to make than furniture, and he says there’s an added bonus: They make great gifts. Among the recipients of his handmade pens are sheriff’s deputies directing traffic at his church, lawyers in his firm, clients and even a journalist he met while giving expert commentary.

“I can’t really say, ‘Hey, I appreciate you. Want a free divorce?’” Meriwether says with a laugh. “Pens are a much easier way to say thank you.”

Rad notes that knitting has given her something that feels just as tangible as any piece of art: a sense of community. She belonged to a knitting circle in law school, and she still meets up with other lawyers on a regular basis to knit together. Sometimes the group talks about law and the experience of being a lawyer; sometimes they don’t. But there’s usually food, the vibe is warm and cozy, and new members are always welcome.

“Law can be a pretty lonely profession for people. You spend a lot of time at your desk reading and writing and not interacting as much with people in other fields,” she says, which is what makes her so appreciative of knitting groups. “It’s nice to have that built-in time that’s just social. There’s no competition, no requirement that you produce anything—it’s just time to sit and knit and be together.”

After one of her Twitter threads about the history and benefits of knitting went viral in January, Rad created a virtual space for these kinds of interactions. Cho and Rad became the admins of a Facebook group called Legally Stitching, “a place for stitching lawyers, law students and friends of all skill levels to discuss knitting, crocheting and other fiber arts.”

MAKING CHANGE

New York City solo Carolina Rubio MacWright is such a believer in the power of crafting that she has incorporated it into her law practice.

Last year, MacWright developed a pro bono community program in the Sunset Park neighborhood of Brooklyn to educate women living in the country without legal permission. She began informing them about their legal rights regarding immigration law and landlord-tenant law. And she added an innovative twist: She simultaneously taught them how to make pottery.

The program is composed of four classes, each three hours long. MacWright, who emigrated from Bogotá, Colombia, when she was 20, conducts the classes in Spanish. The program currently is being funded by Chashama, an arts organization that supports artists by offering them space to create and present their work.

“The clay is almost a means to an end, helping to empower these women,” MacWright says. Working the clay helps program participants concentrate; it helps build connections between people; and at the last session, she says, it’s inspiring to see how proud her students are of what they’ve created from scratch.

MacWright’s dual-purpose approach has been so successful, she has been able to expand the program to other neighborhoods and has added a class series for men only. When the program began, her class size was five years.

When the program began, her class size was
Carolina Rubio MacWright leads her pro bono community program to educate immigrant women.

between eight and 15 women. Now, she teaches as many as 27 participants at a time.

The idea to introduce clay to the educational mix was not arbitrary, MacWright says. As a trained artist who works in a variety of media to highlight social justice issues, she has experience working with clay, and she says she chose it specifically because of its forgiving nature.

“When you’re making art, it’s easy to get frustrated if you’re drawing or painting,” she explains. “With clay, you can make a crooked cup, and it looks beautiful—imperfection is beauty in clay.”

She also uses her art instruction to emphasize important points. “There are many allusions you can draw to the material, like ‘The more you know your clay, the stronger a base you can make,’” she explains.

MacWright would ultimately like to replicate the program nationwide. She says she’ll be rolling it out in Los Angeles soon, and she’d like to bring it to other states with significant Hispanic populations like Texas and Oklahoma.

“We don’t have enough places to bring people, art and law together,” she says, “and this method is really effective.”

Jenny B. Davis, a former practicing lawyer, is a freelance writer based in Fort Worth, Texas.

Check out more crafts made by these attorneys and other ABA Journal readers in a photo gallery at ABAJournal.com.
SHUT UP!

THE ART AND CRAFTINESS OF CEASE-AND-DESIST LETTERS

BY TERRY CARTER
When Anthony Scaramucci became White House communications director last July, he flamed out like a meteor in a blaze of profanity and indiscretion, reduced to a cinder and fired after just 10 days on the job. But there would be a scandalous afterglow.

In November, a graduate student at Tufts University, Scaramucci’s alma mater, wrote two op-eds in the Tufts Daily opining on his shortcomings of character and lack of fitness for his position on the board of the institution’s Fletcher School of Law and Diplomacy.

Fletcher student Camilo A. Caballero described Scaramucci as “irresponsible, inconsistent, an unethical opportunist and who exuded the highest degree of disreputability,” and having “sold his soul” for a job in the White House. He added that Scaramucci’s Twitter account had been used by someone “interested in giving comfort to Holocaust deniers.”

Scaramucci promptly peppered Caballero with emails asking that he contact him and whether he was afraid to do so. The Harvard Law School graduate and successful Wall Street investment banker was threatening to sue a student for flexing his ideals and principles.

Within days, Caballero and the school paper received a demand letter from Samuel J. Lieberman, a securities lawyer at Sadis & Goldberg in New York City representing Scaramucci, saying his client is “ready to take legal action to correct these false and defamatory statements” unless there is a retraction and public apology.

In trying to silence criticism, Scaramucci tumbled back into the arena of public contempt he’d so recently, and relievedly, left behind.

“He wound up looking like a bully and a fool,” says Ken White of Brown White & Osborn in Los Angeles. He specializes in free speech cases and is an author of the popular Popehat blog, where he dissected the flap at length in even more pointed fashion.

“It’s an ugly trend—people with money abusing the legal system to protect their image and reputation,” White adds in an interview.

INTO THE VORTEX

As the internet has fueled and fed an increasingly extreme style of public discourse in general, the use of demand letters, particularly the
cease-and-desist variety concerning free speech and intellectual property, has joined in the volume and speed of that vortex. Such a letter is now often the go-to venue for finality, given the free flow of communication and the lessened likelihood of a particular contest ever being played out in a courtroom, what with high costs and docket overload.

To be clear, most demand-and-response confrontations aren’t so dramatic or colorful—or even human.

Automated takedown notices compose much of the action, alleging illegal use of copyrighted materials under the Digital Millennium Copyright Act. Many complaints are miscategorized as copyright violations because it’s easier to get a takedown. “Bots scanning for music and motion pictures are increasingly sending takedown demands in bulk to search engines,” says Wendy Seltzer, strategy lead and policy counsel at the World Wide Web Consortium, where she works on privacy, security and free expression online. Seltzer adds that the responses can be automated, too.

“It’s bot vs. bot for a few rounds sometimes before humans get involved,” she says. “A lot of people don’t realize they can counter-notify and get material put back up, or they’re afraid to try that option.” At least bots are only as unpleasant as their coding. There are more variables when humans are directly involved from the outset, with greater possibility of adding irrational complexity.

For example, Scaramucci is indeed a victim in the Tufts fiasco, though not the kind he portrays. He got run over by the “Streisand effect,” a term coined in 2005 by the founder of the Techdirt blog, which reports on technology’s legal challenges.

Two years earlier, celebrity Barbra Streisand had sued a photographer for posting an image of her coastal California mansion—it was one of about 12,000 such shots documenting erosion. The consequences of her heavy-handed bid for privacy were swift and unintended.

Before the suit was filed, the photo had been downloaded only six times—twice by Streisand’s lawyers. Over the following month, it got 420,000 clicks. In viral fashion, she became the internet’s wealthy bully du jour.

“That student newspaper piece would have attracted very few eyes—only a few thousand—but it went viral because [Scaramucci] called attention to it,” White says. The Tufts Daily responded with sunshine, publishing Lieberman’s letter, along with links to the op-eds. The next morning, Scaramucci resigned from the board.

He had pushed back at being called unethical and the comment about a Twitter post. The latter was done by someone authorized to use Scaramucci’s account, who put up a poll for users to estimate the number of people killed in the Holocaust.

It turned out that Scaramucci’s friend, who’s Jewish, did not consider that might attract lowball numbers.
from Holocaust deniers. “In this case, either someone is not very familiar with defamation law or is bluffing, but most practitioners would say this stuff is clearly opinion and not a close call,” White says.

Lieberman says that Scaramucci is a longtime client in his work “as an elite and well-respected investment adviser,” and that the demand letter set forth substantial authority for the positions taken.

“I’m not going to engage in a back-and-forth challenging the motives of different members of the bar,” he says. Lieberman adds that the matter is now closed, in part because Caballero softened his position in a later opinion piece for the Boston Globe, “using much more benign language” such as “flip-flopping” and saying the “Twitter account was used in a way that ended up creating a platform for Holocaust deniers.”

GETTING SNARKY

The push and pull of demand letters with threats—and sometimes sarcastic humor, as well as responses—isn’t new, of course. Nor is an in-your-face ironic touch, as seen in some classic volleys from 1974 between a fan and the general counsel for the stadium of the National Football League’s Cleveland Browns.

Dale O. Cox—then a lawyer in one of Akron, Ohio’s better-known firms, Roetzel & Andress—wrote that some fans were regularly throwing paper airplanes during games, and that he would hold the stadium responsible for any injuries they might cause to the eyes of himself or those in his party.

Cox got a quick, two-sentence response from general counsel James N. Bailey: “Attached is a letter that we received on Nov. 19, 1974. I feel that you should be aware that some asshole is signing your name to stupid letters.”

Now living in Orofino, Idaho, Cox laughs at the memory and admits he engaged in a bit of pretext about the paper planes.

“That wasn’t the real problem,” he says. “I had great seats on the second level, and when the guys stood at the rail in front of me to throw paper airplanes they blocked the view of the playing field. But after I pointed out the dangers, it did stop.”

One of the best examples in recent years is a lawyer’s response to the counsel for West Orange, New Jersey. Richard Trenk’s letter demanded that a critic of the town council take down his website at westorange.info because it is “unauthorized and is likely to cause confusion (sic).”

Attorney Stephen Kaplitt’s lengthy response is a cascade of comedic flame, including: “Obviously it was sent in jest, and the world can certainly use more legal satire. Bravo, Mr. Trenk!” Thus, “it was certainly not some impulsive, ham-fisted attempt to bully a local resident solely because of his well-known political views.

“After all, as lawyers you and I both know that would be flagrantly unconstitutional and would also, in the words of my 4-year-old, make you a big meanie.”

SETTING BOUNDARIES

But demand-type interactions typically aren’t such light affairs. The question then becomes: What are the boundaries?

One of the best-known for pushing them is Martin Singer, a Los Angeles lawyer for stars such as Scarlett Johansson, Charlie Sheen, John Travolta and Bruce Willis.

Singer’s tactics and letters are notorious and widely feared. One of his clients perhaps put it best in a tribute speech in 2012, when Singer was awarded the Beverly Hills Bar...
she was “seeking publicity to bolster her fading career.” His subsequent news release said she lied.

The California Supreme Court denied a petition for review in March, letting the defamation cases proceed against both Cosby and Singer. The same court had let Singer off the hook in 2013 on a question of extortion in a demand letter.

Singer represented a part owner of some Hollywood restaurants and nightclubs, suing two of his client’s business partners for misappropriation of over $1 million. He attached a draft complaint to the letter, with information about the defendants “using company resources to arrange sexual liaisons with older men … and many others.” It included details about “fetish role-play fantasies” with father-son and uncle-nephew themes.

The appeals court, in absolving him, found the facts in Malin v. Singer to be fundamentally different from the measure for extortion laid out in the state supreme court’s 2006 decision in Flatley v. Mauro.

In Malin, the embarrassing information about sexual activities was pertinent to the case because that’s where the allegedly misappropriated funds went. But in Flatley, the state’s high court found there was extortion when a lawyer’s demand—for “seven figures’ or, at a minimum, $1 million”—included the threat that failure to settle could lead to an investigation of personal assets that would be exposed to the IRS and other federal and local agencies, as well as those in some other countries.

The court said the threat to disclose criminal activity unrelated to any alleged injury “is itself evidence of extortion.”

Illinois lawyer D. Dean Mauro’s license was suspended for a year.

HONEY AND HUMOR

An effective demand letter gets things done—in the watchwords of modern business efficiency: faster, better, cheaper.
Writing effective demand letters is both art and craft. And while nastiness seems on the increase—perhaps simply reflecting society in general—so has a kinder, gentler approach, for good reason. Some corporate law offices have come up with creative ways to get the job done and, most importantly, avoid the Streisand effect. A wrong move might go viral, even to the point of boycotts of products or services.

Last December, Anheuser-Busch crafted an entertaining approach to protect its catchphrase “Dilly Dilly,” in a monthlong series of Bud Light TV ads leading up to a finale during the Super Bowl. The ads showed a king, queen and courtiers in medieval garb hoisting bottles of the beer given to the royals by their subjects and calling out “Dilly Dilly” to show appreciation. One supplicant then offered “a spiced-honey mead wine.” At the king’s whim, the jailer took him away for “a private tour of the Pit of Misery.”

Anheuser-Busch sent a similarly clothed town crier to a Minneapolis pub that had recently launched its own “Dilly Dilly Mosaic” India pale ale.

The crier read from a scroll: “Dear friend of the Crown, Modist Brewing Co. Congratulations on the launch of your new brew, Dilly Dilly Mosaic Double IPA! Let it be known that we believe that any beer that is shared between friends is a fine beer indeed. And we are duly flattered by your loyal tribute. However, ‘Dilly Dilly’ is the motto of our realm, so we humbly ask that you keep this to a limited-edition, one-time-only run. This is by order of the king. Disobedience shall be met with additional scrolls, then a formal warning and, finally, a private tour of the Pit of Misery. Please send a raven, letter or electronic mail to let us know that you agree to this request. Also, we will be in your fair citadel of Minneapolis for the Super Bowl and would love to offer two thrones to said game for two of your finest employees to watch the festivities and enjoy a few Bud Lights.”

And thus the tale ended.

But the aggressive, all-or-nothing-style gambit still rules. A number of lawyers representing Donald Trump have issued tough demand letters in efforts to silence the adult film actress Stormy Daniels, whose legal name is Stephanie Clifford; Tony Schwartz, who penned the 1987 book *Trump: The Art of the Deal* but made the media rounds more recently as a Trump critic; and author Michael Wolff, whose gossipy, revelatory and detailed book is called *Fire and Fury*. Those missives triggered the Streisand effect: Daniels came to be seen by many as the adult in the bedroom, and Trump, in an extended train of legal filings, in effect admitted the assignations with her. Wolff moved many more books and made bigger money than he otherwise would have. Schwartz got an Energizer Bunny boost with continued invitations to offer his insights to the public.

Although actual surgeons carefully avoid damaging major nerves, in 2016 Schwartz’s lawyer—Elizabeth McNamara, a media and intellectual property law specialist and partner in the New York City office of Davis Wright Tremaine—deliberately rubbed the edge of her serrated scalpel along one in response to a demand letter from Jason D.
Greenblatt, then chief legal officer for the Trump Organization, after first schooling him on defamation law. “The fact that Mr. Trump would spend time during the week of the Republican National Convention focused on settling a score with and trying to censor his co-author on a 30-year-old book is, frankly, baffling, but only further underscores the very basis for Mr. Schwartz’s criticisms,” she wrote.

This all played out in the worldwide openness of the internet.

**NO MORE SECRETS**

Richard Zitrin, who teaches legal ethics at the University of California’s Hastings College of the Law in San Francisco, says it’s harder to bury things now. “Years ago, the Stormy Daniels story would’ve been much less likely to come out. Now it’s on every Page One, including the New York Times,” he says.

“The internet has a lot of negative impact as far as privacy is concerned, but this is one area where we want transparency. It’s helping to create more accountability among the rich and famous,” he adds.

But the role of lawyers in efforts to avoid accountability is troubling to Rebecca Roiphe, who teaches professionalism at the New York Law School and who took up study of the history of the legal profession after getting a doctorate in American history at the University of Chicago and a law degree at Harvard.

Roiphe laments the demise of professionalism, as status comes through reputation rather than wealth, with an ability to go beyond self-interest and pursue the public good. Now, she says, wealth is the main goal, rather than a byproduct of professional endeavors. Thus the rise in recent decades of a simple market concept as the core of the practice of law—the delivery of legal services.

“We’re currently living in a world where people are so much more disrespectful of facts and truth than they used to be,” Roiphe says. “It seems more important now that facts come out, and lawyers are contributing to the truth being buried. There are agreements where people are paid not to come forward. It’s all about keeping facts quiet, and that’s problematic to me from an ethical perspective.”

Barring significant objections on ethical or professional conduct grounds, aggressive demand letters, threats and money will hold their purchase. But the Streisand effect and resulting efforts to minimize such repercussions with less strident persuasive techniques can only grow in reach and impact.

As Singer, the master of demands, put it once in an interview for “The Tricky Science of the Nasty Letter,” a story in the Hollywood Reporter: “When you’re sending something to the media, you’ve got to be concerned that whatever you say will be coming out.”
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ACCOMPANYING MINORS

California attorney devotes his career to helping children navigate immigration courts

By Anna Marie Kukic

“I love what I do. It’s challenging and rewarding, and it has provided a lot of humbling experiences. It gets more challenging every day. But it’s a fight that I’m up for.”

— Martin Gauto
Martin Gauto, a senior attorney for Clinic (the Catholic Legal Immigration Network Inc.) in Los Angeles, has represented hundreds of immigrant children who were apprehended at the U.S. border after fleeing abusive situations in countries such as Mexico, Honduras, El Salvador and Guatemala.

They may have been in the country illegally, unaccompanied by a parent or guardian, used for smuggling drugs or forced into human trafficking. As a child of immigrants, Gauto is passionate about helping these young people seek better lives.

“I love what I do,” says Gauto. “It’s challenging and rewarding, and it has provided a lot of humbling experiences. It gets more challenging every day. But it’s a fight that I’m up for.”

Gauto was born in Cincinnati to parents who emigrated from Argentina in the 1970s. His father was a doctor who came to the United States to get medical training and decided to stay. The family later moved to Palm Desert, California.

Gauto earned a bachelor’s degree in political science in 1998 from the University of California at San Diego. Before law school, he worked for a recruitment firm that staffed a warehouse where he encountered a number of employees from across the border in Tijuana, Mexico, with work permits for jobs in the United States. Some would get up at 3 a.m. to get to their shift on time, and Gauto admired their work ethic and determination.

“I knew I wanted to be in public interest law, but this experience set me on the path to focus on immigration,” Gauto says.

In 2006, Gauto earned his law degree at the University of Southern California’s Gould School of Law. After graduation, he briefly worked for the office of public service to help find service opportunities for law students, then started his immigration law career in earnest at Clinic.

A couple of years later, Clinic decided to transfer part of its organization to Catholic Charities of Los Angeles, including the division where Gauto worked, and he became the interim program director and lead immigration attorney for the Esperanza Immigrant Rights Project. But by 2013, he had returned to Clinic and provided training and technical assistance to attorneys nationwide who represent unaccompanied children.

CHAMPIONING CHILDREN

About 26,000 unaccompanied children were apprehended at the U.S. border between October 2017 and April 2018, according to U.S. Customs and Border Protection. Gauto has argued a number of such cases before immigration judges to help keep his clients in a safer environment.

Without the help of Gauto and others at Clinic, those children would need to pay for their own legal representation. Federal statutes do not give them the right to government-funded representation, though the ABA House of Delegates passed a resolution in 2015 urging that this be changed. And the likelihood of the children being successful without a lawyer is practically nil, Gauto says.

In one case, a 14-year-old girl from El Salvador was sold against her will by her mother to a man in the United States. The girl was arrested at the border and later placed in a detention center, where Gauto was enlisted to represent her. She received a special immigrant juvenile visa, which is given to abused, abandoned or neglected children. A state court judge was convinced of the girl’s plight and agreed that she could apply for the visa. Later, the girl was transferred to a foster care home.

In another case, he worked with two teenage girls who left Vietnam to testify against a U.S. serviceman accused of sexually abusing them. Gauto partnered with Immigration and Customs Enforcement and the girls were later placed in foster care. Gauto helped them get U visas because they were victims of crime and were helpful in the prosecution of that crime.

AIDING ADVOCATES

Gauto has not only zealously represented children facing deportation but also was the driving force behind the growth and development of the Esperanza Immigrant Rights Project that has served thousands of young people, says Lindsay Toczylowski, executive director of the Immigrant Defenders Law Center in Los Angeles. She and Gauto have known each other since law school, and they worked together at Clinic.

Now Gauto provides training, technical assistance and consultation to new lawyers so they can help even more immigrant children.

“In my current position with Clinic, Martin is able to do one of the things he does best—mentoring attorneys—and I admire his determination and commitment to social justice.”

In 2016, Gauto joined the Children’s Rights Litigation Committee of the ABA Section of Litigation. He says he believes that under the current presidential administration, immigrant children are in jeopardy. He worked with the committee to draft ABA policy calling for the presentation and development of laws, regulations and procedures that protect due process and create other safeguards for immigrant and asylum-seeking children.

“I will continue to push the envelope, fight tooth and nail to help as many children as possible,” he says. “I’ll also help train other lawyers to give them my experience to help these children and to use that knowledge and skills to represent and help as many children as possible.”

Members Who Inspire is an ABA Journal series profiling exceptional ABA members. If you know members who do unique and important work, you can nominate them for this series by emailing inspire@abanet.org.
What do you know now that you wish you’d known at the start of your career?
It’s a question that ABA Journal podcast host Stephanie Francis Ward loves to ask, one that can prompt incredible stories. It’s the question that inspired her to create a special series of her Asked and Answered podcast, titled Asked and Answered: Lived and Learned. Ward spoke with six experienced lawyers from around the country to find out what lessons they’ve learned while practicing law, and what those lessons have meant for them both personally and professionally.

Mia Yamamoto, who was born in a Japanese-American internment camp in Arizona during World War II, says her life lesson was the importance of living as her true self—a lesson she put into practice after 20 years as a trial lawyer by transitioning genders. Andrés Gallegos, whose spinal cord was injured after a car accident, learned that he was the only one with the power to decide what expectations he should have for his life and career, and he went on to become a disability rights advocate with a full-time law practice. Former Justice Cruz Reynoso spent his early years working alongside Dolores Huerta and Cesar Chavez to protect the rights of migrant laborers and the rural poor, and became the first Latino to sit on the California Supreme Court. His lesson came from his father, a farmworker, who insisted that every job is worth doing to the fullest of your abilities. All of the guests on Asked and Answered: Lived and Learned have wisdom to share with attorneys at any age or stage of their career.

Below you’ll find excerpts from each interview. To listen to full episodes of Asked and Answered: Lived and Learned, go to abajournal.com/livedandlearned or look for Asked and Answered via your favorite podcast listening service.
ROBERTA “BOBBI” LIEBENBERG
Senior partner with Fine, Kaplan and Black in Philadelphia
Life lesson: Laughter belongs in your work life.
“I am really passionate about the use of humor in the workplace—not only because it’s fun, but it’s also an important business asset and can defuse situations.”
“The studies are quite clear in terms of why humor is so important, in terms of, as I said, promoting your brand, increasing employee retention, and the research also shows that people who are humorous are consistently evaluated as more confident and more competent.”
“We’re always looking at sort of ‘How can we make the young lawyer better?’ when a lot of the question should be: ‘How can law firms institute the type of structural changes that will make young lawyers better?’”

LUCIAN PERA
Partner with Adams and Reese in Memphis
Life lesson: If you think you may have a professional conduct problem, ask for help.
“None of us—and this is not just lawyers—are really objective about our own matters.”
“I think it’s more important than ever for us to figure out how to get over the concern about dealing with mistakes.”
“I want them to call me when the slightest little tingle goes up the back of their neck that maybe there’s a problem.”

CRUZ REYNOSO
Former California Supreme Court justice and law professor emeritus at the University of California at Davis
Life lesson: Fulfill your obligations, and ask those in power to fulfill theirs as well.
“Whatsoever you do, you need to do it well. If it requires that you be in the field at 5 in the morning, you should be there at 5 in the morning. You should be respectful of the work that you’re doing because, after all, it really is important.”
“Realize that sometimes, those in authority haven’t done the right thing simply because the issue has not been brought to them. And when brought to them properly, very often the public officials will actually respond affirmatively.”
“It seems to me that a community is better off having everybody in that community do well, that even those who are wealthy will be happier if everybody in the community is doing well.”

MIA YAMAMOTO
Criminal defense attorney in Los Angeles
Life lesson: Present as your true self.
“Be yourself and fight for yourself. Authenticity is far more important than almost anything else that you’re going to encounter in the world. Without it, what is your life?”
“I said [to myself], ‘I don’t care if somebody shoots me the day after I transition. I’m going to transition. I will die as a woman.’”
“In fighting for yourself, you’re fighting for everybody else that’s going to be coming after you. And it’s a worthwhile fight.”
Ad or Subtract

Do proposed changes to the ABA Model Rules on ads and referrals go too far—or not far enough?

By Jason Tashea

As internet technology continues to present new challenges for legal ethics, older rules regarding advertising and referrals are being re-examined.

When the ABA Annual Meeting takes place in Chicago next month, the House of Delegates will likely consider changes to Rule 7 of the ABA Model Rules of Professional Conduct, which covers how lawyers can discuss their services, advertise and solicit new clients. While some believe the changes proposed by the Standing Committee on Ethics and Professional Responsibility are modernizing, others think they do not go far enough.

Springing from 2015 and 2016 reports by the Association of Professional Responsibility Lawyers that called for modernization of the rules, the proposed changes are a “significant philosophical shift” that will bring the Model Rules “into the 21st century,” says Dennis Rendleman, lead senior ethics counsel in the ABA Center for Professional Responsibility.

Rendleman hopes the proposed updates will lead states to standardize lawyer advertising rules, which he says are inconsistent across jurisdictions. This standardization is increasingly important as the internet renders state boundaries less relevant, he argues.

The proposed changes affect:
• Rule 1.0, Terminology.
• Rule 7.1, Communication Concerning a Lawyer’s Services.
• Rule 7.2, Advertising (the proposed changes would rename the rule “Communication Concerning a Lawyer’s Services: Specific Rules”).
• Rule 7.3, Solicitation of Clients.
• Rule 7.4, Communication of Field of Practice & Specialization, which is proposed for deletion while parts are retained in the rules and comments of Rule 7.2.
• And Rule 7.5, Firm Names & Letterhead, which the proposal deletes and repackages as Comments 6-9 to Rule 7.1.

After a forum at the ABA Midyear Meeting in Vancouver, British Columbia, and an open comments period that ended in March, the committee revised its proposed draft reflecting the input.

“There weren’t overwhelming comments on any of this,” says Rendleman. Even so, some comments focused on specific changes, including the deletion of language in Rule 7.3(c) and Comment 8 to that rule, which regards the need to label appropriate envelopes as “advertising material.”

RETHINKING REFERRALS

Members were not the only ones to provide feedback. The ABA Standing Committee on the Delivery of Legal Services sent a letter to the ethics committee in March challenging whether the proposed rules were concise, consistent and clear. Advertisement and solicitation “play a significant role in the ability of those with modest means to access legal services,” the committee wrote.

While the legal services committee’s letter discusses numerous issues with the proposed changes, six of the letter’s nine pages advocate for the deletion of Rule 7.2(b), a recommendation also made by the ABA Commission on Ethics 20/20 in 2012.

Rule 7.2(b) says: “A lawyer shall not compensate, give or promise anything of value to a person who is not an employee or lawyer in the same law firm for recommending the lawyer’s services except when paying the costs of an advertisement or receiving a nominal gift, for example.

Rule 7.2(b) “provides no protections that are not provided for in other rules,” says Charles Garcia, chair of the Standing Committee on the Delivery of Legal Services and author of the letter.

Beyond the rule’s alleged redundancy, the legal services committee argues that 7.2(b) is unclear regarding what constitutes a recommendation, which hinders for-profit referral models.

A CASE STUDY

One case that the legal services committee points to was a dispute over Total Attorneys, a for-profit lead generation company. When Total Attorneys was founded in 2002, “the concept of lead generation in
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the legal space was completely absent, even though it’s ubiquitous in every other industry,” explains Kevin Chern, who joined Total Attorneys in 2005 as president and is now the managing partner of UpRight Law.

Chern says Total Attorneys had little competition when it started because Rule 7.2 on advertising kept entrepreneurs away. The rule, according to Chern, limited business models to a flat-fee structure, while every other industry paid for the quality of the marketing.

Attempting to create a lead-generating model that comported with Rule 7.2 wound up bringing unwanted attention.

In 2009, Connecticut lawyer Zenas Zelotes filed nearly 500 ethics complaints against attorneys using the ad service in 47 states. The complaints alleged that the lawyers were using Total Bankruptcy, a part of Total Attorneys, in violation of local versions of Rule 7.2(b).

Chern says the company spent $1.5 million on legal expenses to battle these complaints on behalf of its customers and the company. Ultimately, the complaints were found baseless or dismissed in every jurisdiction.

Mary Robinson, an attorney in Chicago, represented Chern in Illinois during these challenges. She says that 7.2(b) is “a hard provision to support” because it incentivizes “highly ethical lawyers … to be unavailable to consumers.”

She says, “We’ve got to rethink that.”

Proposed Comment 2 to Rule 7.2 does say that directory listings and group advertisements “do not constitute impermissible recommendations.” But according to the letter, this defines the word recommendation “outside of the word’s usual and commonly understood definition” and “may in fact be confusing the issue all the more.”

The ethics committee will address these comments, Rendleman says. However, he says the concerns regarding for-profit referrals go “beyond the scope of just amending the advertising rules.”

“It’s really a practice of law issue,” he says.

Rendleman believes that the changes proposed are balanced and reasonable, and he is hopeful that the House of Delegates will approve them.

“We were going for Goldilocks,” he says. “We didn’t want the bed too hard or too soft; we wanted it just right.”
CONGRATULATIONS to Kathy Ludwig of Greenfield, Massachusetts, for garnering the most online votes for her cartoon caption. Ludwig’s caption, below, was among more than 115 entries submitted in the Journal’s monthly cartoon caption-writing contest.

"Your honor, would you direct the witness to pull himself together?"
—Kathy Ludwig of Greenfield, Massachusetts

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, July 15, with “July Caption Contest” as the subject.

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Draft Lottery Sparks NYC Riots

The Enrollment Act of 1863 came at a bad time for New York Democrats. With Abraham Lincoln in the White House, abolitionists were gaining political strength, drawing crowds to their rallies. Under emancipation, the introduction of free black men to the cauldron of mostly German and Irish immigrants seemed foreboding to the Tammany Hall regime.

Support for Lincoln’s conduct of the Civil War was hardly unanimous in the North; by early July, many white workers in New York City saw conscription as an existential threat to a life and livelihood relatively untouched by the strife.

The act, which Lincoln signed in March, required male citizens between ages 20 and 45 to register for conscription, with each congressional district assigned a recruitment quota. The enlistment terms were left to individual states, and some offered generous bounties to attract recruits.

In New York, a lottery was to determine conscription, but it had several unpopular exemptions: black men, whose citizenship was still a matter of national debate, and wealthy whites, who for $300 could purchase an exemption or hire a substitute draftee.

On Saturday, July 11, the lottery began smoothly at 677 Third Ave. in the 9th Congressional District. But by the time it resumed on Monday morning, July 13, white workers from several railroads and foundries had marched in unison to the site, recruiting others along the way. Anticipating trouble, officials delayed the lottery until police arrived. But the two dozen officers who responded were overmatched by the jeering mob. Shortly after the first names were pulled, jeers morphed into rocks and bricks. And as the mob moved in, officials abandoned the office to rioters. Soon furniture was destroyed, books and records strewn across the street, and the building—occupied by terrified families on the upper floors—set aflame.

Seemingly crazed by the fire, the mob moved through the city, swelling in number and indiscriminate wrath. When the police superintendent showed up, the horde beat him and destroyed his carriage. They set fire to the Bull’s Head Hotel, where the Union League was known to meet. The Marston & Co. armory was besieged and reduced to rubble. Two more enrollment offices were looted and burned. The home of the postmaster was torched along with a nearby police precinct.

Because the Battle of Gettysburg earlier in the month had sapped troop strength from the region, help from federal forces was slow to arrive. For four days, the rioters tumbled through the city unrestrained before sufficient troops could be mustered to restore the calm.

Roving gangs of Irish Catholics targeted Protestant churches and charities. For black residents, it was worse. Eleven black men were murdered for no apparent reason; countless others were beaten and maimed. Black families’ homes were destroyed. Even the Orphan Asylum for Colored Children on Fifth Avenue was torched, though its 230-plus residents managed to escape.

Confronted by 6,000 troops and a Tammany Hall promise to pay the exemption fees of its loyalists, calm finally set in on Friday. Officials set the death toll at 119, with police and firefighters among the victims. Property damage ran into the millions, and 20 percent of the city’s black population, fearful of further violence, fled. Of the thousands who rioted, only 67 were convicted of any crime.
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