SUPREME ICON

JUSTICE RUTH BADER GINSBURG HAS BECOME AN UNLIKELY POP CULTURE FIGURE

THE NATION OF CALIFORNIA?
A TEST OF THE TONGUE
SLOW-GROWING GENDER EQUALITY
ABA’S NEW DEAL FOR MEMBERS
What if you could see black letter law in vivid color?

Let color-coded search terms guide you to the most relevant cases in your research results. Exclusive and award-winning, Search Terms Maps also show you key search hits clustered throughout each case, from headnotes to footnotes. There’s no faster way to find on-point law.

See how color brings clarity at lexisnexis.com/color or call 800.628.3612.
FEATURES

34 | Supreme Icon
From shirts to action figures to movies and an album, Justice Ruth Bader Ginsburg has become an unlikely pop culture idol.
By Stephanie Francis Ward

44 | California Dreaming
The Golden State is seeking to assert its powers on the global stage in defiance of Trump administration policies it views as harmful.
By Mark F. Walsh

52 | Slow Growing
More firms join “best for women” lists, but statistics are stalled.
By Liane Jackson
6 Letters

8 President's Message
Pro Bono Celebration 2018 highlights disaster resiliency efforts.

9 Opening Statements
Disabled people who are under guardianship often lose voting rights.

11 A pro bono program expands to help students in struggling schools.

12 10 Questions
Criminal defense lawyer and singer Danielle Ponder uses her two platforms to advocate for legal reform.

14 My Path to Law
Andrew Leitman Bailey overcame an unstable childhood and found a secure place in the law.

15 HearSay
Short takes and fast facts on the law.

16 Docket
National Pulse
A legal aid program in Oklahoma is dedicated to representing moms in trouble.

18 National Pulse
Are free speech and academic freedom under assault at colleges and universities?

20 Supreme Court Report
The court considers whether an aging prisoner with dementia should be put to death.

22 Practice
Advocacy
Can lawyers learn to be civil to one another?

24 Words
Try our quiz to evaluate your pronunciation skills.

26 On Well-being
What every lawyer should know about alcohol and substance abuse.

28 Business of Law
Special Edition: Digital Dangers
Tech companies face a difficult juggling act as customers demand cybersecurity, while law enforcement wants easier access to evidence.

31 Technology Review
Lawyers looking for more secure options to communicate electronically have a number of choices.

32 Hiring
Several law firms have embraced blind recruiting as a means of promoting diversity, but does it work?

59 Your ABA/Annual Meeting Report
Members will see lower dues and more benefits.

61 House of Delegates urges end to mandatory arbitration of sexual harassment claims.

62 Deputy Attorney General Rod Rosenstein defends zero-tolerance immigration policy.

63 Team protest cases are labor law, not free speech.

64 A survey finds that women's experiences differ from men's—and affect their longevity in law.

65 Check out nine upcoming events, and make sure to put them on your calendar.

66 Would Pope Francis' rejection of the death penalty have changed Justice Antonin Scalia's opinion?

66 Three ABA presidents share views from the top.

67 Immigration lawyers must deal with "manufactured crisis."

71 Cartoon Caption Contest
See the winner from last month's contest, and submit a caption for this month's contest.

72 Precedents
Sentencing is handed down for Iva D'Aquino, the woman known as "Tokyo Rose" and who was convicted of treason.
The best-run law firms use Clio.

“We have been using Clio for six years. As our firm grows and our needs mature, Clio is right there with us.”

– Billie Tarascio, Managing Member
Modern Law, Mesa, AZ

ABA members receive a 10% discount with Clio.

Clio is the world’s leading practice management solution. Find out why over 150,000 lawyers trust Clio to better manage their law firm.

1-877-754-9153
clio.com/aba-advantage
THE PREFERRED CHOICE
For more than a decade, LawPay has been the go-to solution for the legal industry. Our simple online payment solution helps lawyers get paid faster. LawPay lets you attach a secure payment link to your email, website, or invoices so that clients can pay with just a click. Our solution was developed specifically for law firms, so earned and unearned fees are properly separated and your IOLTA is always protected from any third-party debiting. Simply put, no online payment processor has more experience helping lawyers than LawPay.

SECURE credit card processing for law firms
IOLTA COMPLIANT
Approved Member Benefit of 48 STATE BARS
Trusted by over 50,000 lawyers
Powering payments for 30+ TOP PRACTICE MANAGEMENT SOLUTIONS

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

LawPay is a registered ISO of Citizens Bank, N.A.
SUPREME DREAMS
The article “Justice, Mercy & Redemption,” August, page 48, about Bryan Stevenson, founder of the Equal Justice Initiative in Montgomery, Alabama, was quite insightful. Stevenson, throughout his best-selling book, Just Mercy, reminds me of former Supreme Court Justice Thurgood Marshall. Stevenson should be considered for the next Supreme Court vacancy. He has the potential of being one of the most outstanding jurists in the history of the court.
Edward L. Koven
Highland Park, Illinois

MOVIE APPRECIATION
I’m surprised that in “The 25 Greatest Legal Movies,” August, page 36, that Thane Rosenbaum did not include The Young Philadelphians (1969) on his list. The scene in which ambitious associate Paul Newman woos the pet Chihuahua of elderly oil heiress is classic.
Nicholas H. Cobbs
Washington, D.C.

I would add Woman in Gold (2015) to the honorable mention list. Ryan Reynolds presented a very positive portrayal of a lawyer fighting for justice for his client. Hands down this trumps Jim Carrey’s negative portrayal of a lawyer in Liar, Liar.
Daniel Jurkowitz
Tucson, Arizona

Kudos for this feature. The pieces are both sharp and comprehensive. But there are five superbly done films that belong on any such lists—overlooked likely because of their relative age. The first movie is The Talk of the Town (1942), a brilliant dramedy, unique in film because it wittily contrasts “the law” vs. justice. The Life of Emile Zola, the Oscar-winning best picture for 1937, tells the story of the notorious Dreyfus affair military tribunal and Zola’s own libel trial for publishing his famous letter to the People of France, “J’Accuse.” Paths of Glory (1957) is Stanley Kubrick’s first masterpiece and arguably Kirk Douglas’ greatest role. The Devil and Daniel Webster (1941) is the wild Faustian tale by poet Stephen Vincent Benét brought to the screen. Finally, Oscar Wilde (1960) focuses on the explosive 1895 libel trial initiated by Wilde amid whispers of his homosexuality.
Gus B. Bauman
Washington, D.C.

Letters to the Editor
You may submit a letter by email to abajournal@americanbar.org or via mail—Attn: Letters, ABA Journal, 321 N. Clark St. Chicago, IL 60654. Letters must concern articles published in the Journal. They may be edited for clarity or space. Be sure to include your name, city and state, and email address.
trust conference
PUTTING THE RULE OF LAW BEHIND HUMAN RIGHTS

14 & 15 NOVEMBER 2018 - LONDON

Her Majesty Queen Noor
Chair of the Noor Al Hussein and King Hussein Foundations

Asif Saleh
Senior Director of Strategy, Communications and Empowerment, BRAC and BRAC International

Jennifer Calvery
GGM and Global Head of Financial Crime Threat Mitigation, HSBC

Inna Shevchenko
Human Rights Activist & Leader of the International Women’s Movement FEMEN

Peter Rabley
Director, Investments, Omidyar Network

Emi Mahmoud
Poet & Activist

Jeff Hebert
Vice President for Adaptation and Resilience, Water Institute

Rana Ayyub
Indian Journalist & Author

Kate van Doore
International Child Rights Lawyer & Academic at Griffith Law School
President’s Message || By Bob Carlson

Serving the Public Good

Pro Bono Celebration 2018 highlights disaster resiliency efforts

Pro bono work, from the shortened version of the Latin phrase pro bono publico—for the public good—is the responsibility that lawyers accept when they enter the profession. As officers of the court sworn to uphold justice, we must ensure that justice is available to all.

Former U.S. Supreme Court Justice Sandra Day O’Connor addressed the importance of pro bono in the legal profession in 1999. “While a business can afford to focus solely on profits, a profession cannot,” she wrote. “It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure.”

Oct. 21-27 is the 10th anniversary of the Annual National Celebration of Pro Bono—a nationwide opportunity for lawyers to honor our responsibility to the profession and our communities by volunteering to serve those who cannot afford legal services.

This year’s Pro Bono Celebration will showcase disaster resiliency activities. United States Supreme Court Justice Elena Kagan will serve as honorary chair.

Last year was a record-breaking year for disasters across the United States. Hurricanes Harvey in Houston, Irma in Florida and Maria in Puerto Rico and the Virgin Islands left paths of devastation in their wakes. Wildfires in California and throughout the Western states and flooding in Oklahoma, Missouri and Arkansas, as well as other disasters, have affected millions of Americans. In my home state of Montana, 2017 was considered the state’s worst fire season in more than 100 years, and the flames destroyed homes and damaged farms, equipment and crops.

Nationwide, millions of people saw their homes ruined, their businesses destroyed, their lives uprooted. Requests for federal disaster aid jumped tenfold in 2017 compared to 2016, with 4.7 million people registering with the Federal Emergency Management Agency.

But many people don’t realize that after the hurricanes pass, the floods recede and the fires are extinguished, disaster survivors still struggle with countless problems that involve legal issues. Homeowners try to cope with the documentation demands of FEMA claims and claim appeals. Some landlords seek to force tenants to pay rent for ruined dwellings. Contractors scam desperate owners of damaged dwellings and businesses. Access to health and education benefits can disappear in the chaos of the disaster aftermath. All these situations—and more—require legal assistance so that a disaster survivor can get back on their feet.

And even before a disaster strikes, lawyers can provide important assistance to help people prepare with business-continuity planning, securing title documents and obtaining adequate insurance.

This is where you come in. We are asking lawyers this year to assist with disaster resiliency efforts. Offer pro bono assistance to survivors or evacuees of disasters. Help your community prepare for a disaster. There are so many ways you can help. All kinds of pro bono activities are encouraged.

We are also asking all bar associations, law firms, corporate legal departments, law schools, courts, legal aid and pro bono programs and others to organize programs during the celebration that address the critical value of pro bono to our communities.

If you need help or ideas to plan your National Celebration event, please go to celebrateprobono.org. It has all the resources you need.

And please share your events on Facebook, Twitter and Instagram using the hashtag #celebrateprobono. That way, your events will be posted on the National Celebration website and map, and your valuable contributions will also be recognized in our pro bono honor roll.

“Lawyers have a license to practice law, a monopoly on certain services,” Supreme Court Justice Ruth Bader Ginsburg said in 2014. “But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities.”

Together, we can all help repair tears in our communities and make a difference for disaster survivors and all others in need across America. ■

Follow President Carlson on Twitter @ABAPresident or email abapresident@americanbar.org.
Lou Vaile didn’t know how to break it to his son, Jack, when he got the news. A California judge had granted Vaile conservatorship to help with Jack’s medical decisions, as they both wanted, but in the process the judge also rescinded Jack’s voting rights. Jack, then a senior in high school, turned 18 in 2016 and had been looking forward to his first opportunity to participate in the electoral process. He has cerebral palsy and autism, is nonverbal and uses an assistive device to communicate.

“Jack was really excited about the election process. He had done research. He was totally stoked to vote in the primaries in the election—and then I got this piece of paper in the mail. I was sick. I didn’t even know how to tell him,” Vaile recalls.

Like many people undergoing the guardianship or conservatorship process to help loved ones with their health care, financial or other decision-making, neither Vaile nor his son knew that the latter’s voting rights were even on the table when they went before a judge.

In the 39 states and Washington, D.C., where it is allowed, there is no generally accepted standard probate judges use to determine whether people under guardianship should retain or lose voting rights. Archaic language in some state constitutions identifies the “idiots and insane”
**Opening Statements**

"THE ONLY BURDEN THAT SHOULD BE PUT ON PEOPLE WHO ARE OTHERWISE QUALIFIED TO VOTE IS WHETHER YOU CAN EFFECTIVELY COMMUNICATE A CHOICE.

―JENNIFER MATHIS

as those who should lose their voting rights. Others have election laws that disqualify those who have been adjudicated incompetent, incapacitated or of "unsound mind."

The existing laws are largely applied unevenly, says Michelle Bishop, disability advocacy specialist for voting rights at the National Disability Rights Network.

"Whether or not you lost the right to vote can depend on the county you live in, what judge you have, how supportive your guardian is. ... This is not how our laws are supposed to work. The law generally should be responsive to individual circumstances, but here we have to have a standard," she says.

But almost as worrying as the lack of consistency is implementing the wrong uniform standard, which could be used to disenfranchise people inappropriately, says Jennifer Mathis, director of policy and legal advocacy at the Judge David L. Bazelon Center for Mental Health Law.

The prevailing view on voting while under guardianship is that an individual should lose the right if she or he lacks the capacity to vote, but that standard remains troubling. "It sounds reasonable on its face, but the problem is it singles out a group of people under guardianship for a different standard," notes Mathis.

The questions asked of people under guardianship may include the names of current elected officials and how voting works. "The only burden that should be put on people who are otherwise qualified to vote is whether you can effectively communicate a choice," Mathis adds.

California changed its standard in 2016, following a legal challenge; now courts are required to make a finding by clear and convincing evidence that the individual is unable to voluntarily communicate their desire to participate in the voting process, with or without an accommodation.

"If I can in some way indicate that I have a desire to vote—that is the base standard that should be applied," Bishop says. "It should be the same standard as everyone else."

An argument often raised in favor of removal of voting rights is that a person under guardianship may be susceptible to manipulation. Voting and disabilities rights experts criticize societal norms and are quick to note that this should be addressed through the enforcement of laws already in place to protect ballots.

Even in the states that do not couple guardianship with loss of voting rights, such as Illinois, there are barriers to exercising the right to vote, says Ami Gandhi, director of voting rights and civic empowerment for the Chicago Lawyers' Committee for Civil Rights.

"Implementation of rules can vary," Gandhi says. "Awareness among administrators can vary, as well. There may be assumptions they are making beyond what the law requires. What is actually available to people on the ground versus what the law allows can be very different."

Lack of awareness is a major issue for voting rights groups and local election authorities, says Gandhi, who stresses that training poll workers is one way to improve consistency. The National Disability Rights Network agrees that education is key—for poll workers and the electorate.

"Be versed on what the law looks like where you are. Educate yourself and the clients," urges Bishop. "It's the first step in addressing the cowboy justice aspect of this, where people are randomly losing their right to vote and don’t even realize it until they try to register to vote in an election."

―Priya Khatkhate
HELPING HAND

PRO BONO PROGRAM EXPANDS TO HELP STUDENTS IN STRUGGLING SCHOOLS

When children get sick from poor living conditions inside their rundown apartments, they miss school. And when 95 percent of students of one school live in the same apartment complex—where evictions are routine and black mold is rampant—classrooms are often left empty.

This was the problem students from Thomasville Heights Elementary School in Atlanta faced, making the school one of the worst performing in the state. Families were forced to move in and out of Forest Cove Apartments, a Section 8 subsidized housing complex, due to unhealthy conditions, and the school suffered huge student turnover. Children routinely missed school due to illnesses caused by deplorable living conditions that landlords ignored or refused to repair. With a growing crisis, the school called the Atlanta Volunteer Lawyers Foundation for help.

"It's hard to believe that people in the city of Atlanta are living like this," says Emerson Girardeau III of Willkie Farr & Gallagher in Houston, who volunteered with the program. "I [would] get a call because they're using a stove to keep a three-bedroom, two-story apartment warm. And it's 20 degrees outside. Half the complex doesn't have heat. It's hard to focus on homework when you don't have heat."

The foundation created the Standing with Our Neighbors program in 2016 to help tenants fight for their rights. As part of the program, a full-time lawyer and a community advocate are placed directly in the school to help students' families solve their housing issues. Pro bono lawyers from nine of Atlanta's firms represent tenants at Forest Cove Apartments—in the first year, lawyers took on 55 individual landlord-tenant cases and stopped 20 evictions. After the program stepped in to help students at Thomasville Heights Elementary School, the annual enrollment turnover rate dropped from a five-year average of 39 percent to 25 percent, according to a report from the school.

Clients say they feel a sense of empowerment because of the help from volunteer attorneys, as well as a noticeable change. Problems in their homes are getting fixed faster, and they can focus on their children's education instead of constantly worrying about housing issues.

"It's not just that [the lawyers] help us—I consider them a friend," says Meosha Carr, a Forest Cove tenant with four children who attend Thomasville Heights.

The success of the program prompted its expansion to additional schools in Atlanta. Standing with Our Neighbors is now onboarding its eighth school—with lawyers continuing to bring justice to tenants in need of their help.

"It doesn't take a lot of effort for attorneys to create enormous change in people's lives," Girardeau says. "It could be something as simple as sending a demand letter. We got a responsibility to use a few of the thousands of billable hours to help others."

—Jamie Hwang
Opening Statements

The Sound of Justice

From courtroom to concert stage, this criminal defense lawyer uses her voice to advocate for legal reform

When Danielle Ponder was 16, two things happened that set her on her life’s course: Her dad gave her a guitar and her older brother went to prison. She grew up to become a criminal defense attorney and an internationally recognized singer-songwriter. Her performances address racial injustice, discrimination and the importance of criminal justice reform.

Together with her band, Danielle Ponder and the Tomorrow People, the Rochester, New York-based solo practitioner has toured the United States and Europe. In every show, she treats audiences to her signature soulful beat layered with lyrics inspired by the five years she spent as a public defender representing some of her city’s poorest citizens.

You are known for your artful combination of law and music. The connection is clear in your song lyrics, but how does music play into your criminal defense practice?

For me, it’s about the art of storytelling. As a lawyer, you are telling your client’s story, and you have to do it in a way where the jury can feel it. A good singer can make you feel something in your bones. That’s what you want a jury to do, too—to say, “Yes, girl, I feel you!”

For me, writing opening and closing statements is like writing a song. There’s a chorus in there that the jury is going to be repeating, and you need to have a good hook. In one of my cases, the victim lied on the stand, saying he didn’t have a criminal record and that he’s never used the N-word. I had all the paperwork showing he’d been previously convicted of harassment and had used a racial slur. In my closing, I said, “If you don’t take accountability, you don’t have credibility.” That was the chorus of the closing—no accountability, no credibility. My client was acquitted.

You left the PD’s office in May and opened a solo practice so that you could have more control over your schedule and devote more time to music. How’s the transition been?

It’s been different. In the beginning, I was like, “This is amazing! I can get up and do yoga and have tea and go for a walk!” But after two weeks, I was like, “Uhh …” I miss having colleagues; I miss having the support of my office; and I miss my clients. When you go to court and a client tells you thank you, or you talk to a frantic client on the phone and they feel better at the end of the conversation, those moments make you feel good. I still feel very much like a public defender. I haven’t figured out this new life yet.

Was there a specific turning point where you knew you had to make the change?

It was gradual. Everything in my life started leaning toward music. Every weekend I was either on stage or in the studio. Crowds of people were coming to see us. It didn’t feel like a side hustle anymore—I realized I had the potential to make an income from music, and it became clear that this was my purpose. But I grew up poor, and I always thought, “I need to have a check from somewhere.” I can’t do the starving artist thing!

I don’t blame you! Now that you’re an established performer, have you ever been tempted to think, “I should have just skipped law school and gone directly into music?”

No, I needed to be inside the system in order to come out of the system and bear witness. I am 100 percent certain that what I saw at the PD’s office had to be part of my musical journey, so I can say, “This is what happening,” and say it in a way that people can feel it, to say it as an artist. And I needed to learn the skill set to make my music business lucrative.

My dad was an entrepreneur, and there were years when we were going to Disney World and years where we struggled to keep the lights on. The instability always scared me. Now I can have a solo practice and do music. I also work as an adjunct professor and professional speaker.

You’ve incorporated these personal and professional experiences into a powerful multimedia show called For the Love of Justice. Tell me about that show and how it came about.

My goal is to use the power of music to talk about the criminal justice system. In this show, I explore how three forms of love have been the anchoring theme in my music—whether it be love for yourself, romantic love or the kind of love that propels you forward toward a revolutionary justice.

The title, For the Love of Justice, was inspired by a quote from Cornel West: “Justice is what love looks like in public.” I wanted to talk about the justice system in a way that would feel very personal to the listener. Love is something we all can relate to. Maybe a struggle to love ourselves or falling in love, and then there is love for our others, and that is justice.

We perform songs such as “Criminalized,” which I wrote about the criminalization of black youth, or the song “We Live,” which is about being hopeful in the face of adversity. We use...
powerful visuals to complete the sensory experience for the audience. In between songs, I tell stories from my work as a PD. I think it is a powerful way to connect people. I’ve performed this show in Canada, the U.S. and Brussels, and I hope to take it all over the country.

Do you consider yourself an activist?
I have always considered myself an activist. Music can raise awareness, but it’s just one piece of it. The next step is action. At our shows, we started having tables for different organizations to directly connect our audiences to ways they can take action.

Do you ever get feedback from your fans that it’s working—that they’re feeling compelled to act?
All the time.

There are a lot of artists who address issues of racial injustice. What makes your approach different?
Well, I guess I have been on both sides of the system; I grew up seeing my family victimized by the criminal justice system and then I worked within the system. So I have the knowledge of how this system is personally impacting families, but I also know the inner workings of the system. I am not just singing songs;

I am also saying that I know that 16-year-old kids are getting arrested for not having a bell on their bike and spending the night in jail. Because I have represented them.

Your brother is now out of prison and has a good job, and you are active in your advocacy on behalf of other former inmates so they can have the same chances to find happiness and success after they’ve served their time. But I am curious, have you ever brought your music to a prison?
I have performed twice at Attica. To this day, it’s the best performance I’ve ever done in my life. It was so moving, so powerful. There was a man at our concert who was incarcerated in his 20s, and he was in his 70s; he had not heard live instrumentation in 50 years. There was a moment when the guards couldn’t help but clap their hands—at that moment, the guards and the prisoners were one. It was beautiful.

But you also had to look at all the men in that room and think, “There has to be a better way than just locking someone in a cage for 20, 60, 70 years.” There has to be a way to reform and rehabilitate, to tap into skill sets and talents of people instead of just throwing them away.

Your lyrics tackle meaningful and heartbreaking issues, but the music itself is so joyful. Is that the point?
There is a quote that says “It’s not my revolution if I can’t dance.” I believe you can be political and talk about difficult issues, and you can still make them dance.

—Jenny B. Davis

The reinvention of law practice didn’t start yesterday. Our Legal Rebel Trailblazers, innovators in legal practice, speak, looking back at their accomplishments and forward at what is on the horizon.

MEET ONE OF OUR LEGAL SERVICE PIONEERS
Mike Dillon has served as executive vice president, general counsel and corporate secretary for Adobe. His previous positions include general counsel and corporate secretary for Silver Spring Networks, Sun Microsystems and ONI Systems. He was formerly a board member of the Association of Corporate Counsel. Currently, he is a member of the Leadership Council on Legal Diversity (LCLD) and a board member of Adventure Cycling Association.

Find more Legal Rebels podcasts at LegalRebels.com

PODCAST SERIES

PROUD SPONSOR

Thomson Reuters
Westlaw Edge™
Finding a Home in the Law

My Path to Law is a guest column that celebrates the diversity of the legal profession through attorneys' first-person stories detailing their unique and inspiring trajectories. Read more #mypathtolaw stories on Twitter.

By Adam Leitman Bailey

Daily, I wonder from where my passion against and disdain for injustice derived. The ingredients? Something rising inside me that shoots through my entire body and makes my heart beat faster, combined with a need to help others no matter how small the task. I realize how blessed I am to be part of a profession that feeds my drive, and though I have never been able to find out what caused it, my childhood provides fertile ground.

Ripped at age 5 from my home in Queens and my biological father, I hit the road with my mother, a new man and my sister, onward to Los Angeles to look for work after massive teacher layoffs that had engulfed both my parents. By this time, I had already made my first appearance in front of a judge in divorce court and grew used to going from hotels to rental homes, running to escape the landlords in different towns. Learning in the car where we were headed, there were no goodbyes to friends and family or my home that I would never see the inside of again. We finally settled down after missing kindergarten. I do not recommend any New York City child be transplanted to California. Besides being different, carrying a thick accent and being extremely skinny, I was bullied inside and outside the home—my contact with my father was limited to living with him at camp in New York during the summers.

My temporary reprieve also involved learning how a new law works—Proposition 13, promoting integration, passed in Los Angeles. I boarded a bus each morning to drive more than an hour each way to an inner-city school. Now, at age 9, on this bus, I used my time to devour books—especially *The Hardy Boys*—and my love for reading had been ignited. This school also provided free lunch to a very underweight child, and the bullying ceased during this time, as these students focused on the essentials of life—food, shelter and survival. Although I had no idea at the time, reading became an important skill for succeeding in the law.

Another important quality was born, as I had to learn to become a leader for the sake of protecting myself and my sister, a year younger. I also spoke publicly at a rally for the first time as parents without political or monetary power gathered to protest the three-hour bus rides taken to and from school. These gatherings looked very similar to the ones I attend regularly in my capacity as a lawyer representing or educating large groups of people.

In seventh-grade English class, I was introduced to a book about John Peter Zenger—the reason I have been giving my entire life to wanting to become an attorney. Zenger was a newspaper publisher arrested for seditious libel and saved (acquitted by a jury) by a top lawyer, Andrew Hamilton, who used the power of words to convince a jury a person should be able to write whatever they want about a governmental official as long as the words were truthful.

At this exact moment, I knew what I wanted to do for the rest of my life. And a few years later, I was told it would only be a dream—"only rich people go to law school." So I set a new goal of being a journalist until I finally met a lawyer, and he explained how he paid for law school with loans.

On my birthday, 29 years later, in the exact location where Hamilton went to trial to defend Zenger, I would join 466 others to celebrate the publication of my first book on how to buy a home for first-time buyers with a dedication that read: "To everyone who grew up (like me) without business-savvy parents to teach them the lessons in this book."

As a child, the only thing worse than moving to a foreign state is moving again another 3,000 miles to a new state, New Jersey. At 13 years old, my life was thrown into chaos again.

The bullying became much worse, and once again I held my head high and learned or adapted to taking the
pain of a punch.

In life, no challenge became too difficult for me to handle. No battle existed that I could not overcome. I learned to survive with less, and I had to become street smart to survive. I knew school was the only way out, and getting good grades was the only option. I needed the books to have characters to relate to and to replicate. I learned to be able to spend long hours by myself and to be able to focus on a project for a long period of time. I remember buying a pair of shoes at a garage sale and telling a bully at school that I was bringing them back into style. I had to be not just a leader but a leader who could overcome so much at such a young age.

Hence, I prepared for law school almost from when I could walk. I studied hard. I solved my own problems. I learned empathy and understood different types of people. I conquered so much just by surviving. By NEVER having a video game or watching much television, my mind was clear and sharp. I did not know it at the time, but my analytical abilities allowed me to see strategies into the future. I never followed anyone else, which assisted in making me a natural leader of people. No human could be more disciplined. I never lose control of my temper, and I can usually work longer and harder hours than anyone else I have ever met.

I discovered in law school and beyond that I had jungle street skills and a passion for justice. Although it took me nine months to find a job after law school, once I took my first job, I never looked back. I was determined to try to become the best lawyer I could be. And whether in court or in a boardroom, each day, I try to be better than the next, always thankful for the gift of being a lawyer and this profession where I am able to do so much for so many—knowing at least in part because of the training I received during the first 14 years of my life.


TOUGH LUCK

Highlights from a new survey by the Center for WorkLife Law showed only 40 percent of women of color and 44 percent of white women felt free to express anger at work when it’s justified, compared to 56 percent of white men. The female attorneys also said they felt penalized for assertive behavior. According to an Arizona State University study, female attorneys who used anger during closing arguments also were considered less competent at their jobs, while jurors perceived men who use tough behavior during a close positively. Participants watched identical closing arguments and found the female attorney to be shrill and ineffective, while the men were commanding and powerful. Researchers’ findings support evidence that women face a double standard and are more harshly judged for showing anger or dominant behavior.

Sources: abajournal.com, usnews.com
DEFENDING MOTHERS
A LEGAL AID PROGRAM IN OKLAHOMA IS DEDICATED TO REPRESENTING MOMS IN TROUBLE  

As Benjel Brown, 38, walked around an Oklahoma Walmart with her younger brother and his girlfriend on an April day in 2017, she discovered her brother had a drug kit with syringes in his back pocket. She asked him to give it to her.

A recovering addict herself, Brown placed the drug kit in her purse, intending to get rid of it once they left the store. At the self-checkout station, Brown was scanning a sippy cup when her brother's girlfriend attempted to take a baby blanket and baby shoes without paying. Brown was unaware.

A security guard noticed, however, and the trio was stopped for suspicion of shoplifting—all three tried to leave the store. The guard led them to a room where they had to empty their bags and pockets. During the search, the guard found the drug kit in Brown's bag: It contained a dose of methamphetamine.

Even though Brown claimed she had paid for her items and her brother explained the kit was his, she was charged with shoplifting and possession of methamphetamine—a felony in Oklahoma at the time—and taken to jail. Her brother's girlfriend was not arrested but given a ticket for shoplifting.

Brown says regardless of her explanation, police stuck with the drug charge. “I thought no one was going to believe me because I have prior convictions,” she says.

She spent a sleepless night in jail, not knowing whether her husband would be able to get her out and wondering how she'd pay for an attorney. But when she went home with her husband the next day after posting bail, Brown noticed a card in front of the door. The card was from Still She Rises, a holistic public defender organization in Tulsa that represents women with legal needs who can’t afford counsel. This was no coincidence. The group constantly tracks the jail website, available to the public, to find potential clients in need.

Kristina Saleh, an attorney and program director at Still She Rises, had learned about Brown's situation and personally visited her house to drop off the card, offering to help.

Brown remained skeptical of the unfamiliar organization when she picked up the card, but she thought she had no other choice—so she decided to call the number. After the organization took on her case, she found support. “They believed in the system when I didn’t,” she
AN INNOVATIVE MISSION

Some research shows that Oklahoma incarcerates more women per capita than any other state in the nation—149 per 100,000 women in 2016. This is more than double the national average for that year, which was 57 per 100,000, and significantly higher than other states such as Missouri (107 per 100,000) and Texas (92 per 100,000). Oklahoma held its position—first place in female incarceration—for more than 25 years, according to the Oklahoma Department of Corrections.

Still She Rises seeks to address this high rate of criminalization and incarceration of women in Oklahoma, focusing on helping indigent mothers in northern Tulsa, a historically impoverished and underresourced community. Still She Rises began taking clients in January 2017 as the first pro bono law office in the country specifically dedicated to representing mothers involved in the criminal justice system.

Still She Rises is a project of the Bronx Defenders, a New York City holistic public defender organization that opened in 1997. It adopted the Bronx Defenders’ model, addressing the underlying issues that play a role in bringing clients to the justice system. “We don’t look at clients as just a case; we look at our clients as humans with needs,” says Ruth Hamilton, legal director of Still She Rises.

Robin Steinberg, executive director and founder of the Bronx Defenders and Still She Rises, implemented the holistic defense model with Still She Rises to address the challenges women face in north Tulsa because of a lack of access to food, health care and other basic needs, along with poor transportation options. Many women are the main caretakers of their children, which is why

Steinberg decided to focus on helping indigent mothers such as Brown. “Women are the fastest-growing population in jails and prisons in America,” Steinberg says. “They have been for decades now. Most public defender systems aren’t really looking uniquely at women’s experiences in the criminal legal system because they’re still a smaller percentage than men. Sometimes the public defender community unintentionally overlooks the differences in consequences for women and for children.”

Steinberg brought a management team of five attorneys and one social worker from the Bronx Defenders to Oklahoma to help start Still She Rises, but local members soon joined the team. Now with more than a dozen full-time attorneys, social workers and client advocates working together, the organization has worked with about 300 clients on more than 600 cases, with the founding group from New York still on the team. A majority of the women are charged with nonviolent offenses, such as drug possession, theft, forgery checks and failure to pay fines and fees. Many are faced with a combination of these charges.

“It begs the question: Is really the response to these kinds of things to handcuff moms and put them in jail, removing them from their families and destroying their communities?” — Robin Steinberg

“Is really the response to these kinds of things to handcuff moms and put them in jail, removing them from their families and destroying their communities?” — Robin Steinberg

especially compared to what some of the attorneys witnessed in New York. “People here see punishment as a tool for discipline, a consequence of bad choices and bad behavior,” says Kristen Black, a social worker with the Bronx Defenders.

This leads to lengthy sentences and harsh penalties and bail practices. Black says the same kinds of criminal charges that would have been three to five years in prison in the Bronx is set at 20 years in Tulsa.

“One thing that contributes is a strong idea of criminalization of mothers and what a mother or woman should be—and punishing someone who doesn’t fit that model,” says Asher Levinthal, family defense resource specialist at Still She Rises.

He says a mother could be sitting in jail because she didn’t have running water in her home while her kids were there or because her kids were home alone without a baby sitter.

“These cases, we see in criminal court here, which I never saw in criminal court in New York. These sorts of cases are really the criminalization and punishment of mothers for falling short of the way this state and the prosecutors view womanhood and motherhood,” he says.

Faced with fees and fines of probation from such charges, mothers are forced to choose between feeding their child and paying the fees with the little money they have. “So she’s put in prison for choosing to feed her child,” Levinthal says.

Working in the state that incarcerates the most women per capita in the country, the team continues to unpack other issues that might be driving women into the system, broadening the representation beyond the confines of a criminal case. Still She Rises aims to fight injustices and systemic issues that women face there, working closely with stakeholders and other members of the north Tulsa community. In addition to providing individual
The Docket

defense, Still She Rises helps connect clients to public benefits and services, including abuse treatment, counseling and child care.

A PATH FORWARD
Before the arrival of Still She Rises, women in the north Tulsa community have barely had easy access to free lawyers. Now, they can walk through the doors and get the help they need.

Even though the Tulsa office is a little more than a year old, the team has received support and gained trust from the community. With five new young attorneys joining the team in the fall, Steinberg says Still She Rises will continue to start a path forward with stakeholders in the system to help change some of the practices, culture and systems that are impacting the women of north Tulsa.

"Sometimes it feels like pushing a boulder up a hill, but we're making progress every day," Steinberg says. "We are really inspired by the clients. If my client can go through the system and be treated with such inhumanity, lack of dignity and unfairness and still come out at the end of the day with a sense of hope, optimism and resilience, then the least we can do as lawyers is to stay in the work and fight really hard every single day."

Brown witnessed the team's passion as Still She Rises defended her through every step of her case until it was resolved with a suspended sentence, no jail time and six years of probation. Today, she participates in rehabilitation aftercare with Women in Recovery, an intensive outpatient alternative in Tulsa for women facing long prison sentences for drug-related offenses. Brown had been part of the rehab group before Still She Rises' arrival to Tulsa.

Working and taking care of her family, including her 9-year-old daughter, Brown still sometimes calls the Still She Rises members who helped her and encourages others in need of help in her community to reach out to the organization.

"The day I accepted the plea it felt almost godsent," she says. "Without them, I would be incarcerated right now. Still She Rises means my freedom." ■

<table>
<thead>
<tr>
<th>Class Dismissed</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Is free speech and academic freedom under assault at colleges and universities?</strong></td>
</tr>
<tr>
<td><strong>By David L. Hudson Jr.</strong></td>
</tr>
</tbody>
</table>

Teresa Buchanan, by most accounts, was a rising academic star at Louisiana State University. She began teaching there in 1995, was promoted to associate professor with tenure in 2001, and recommended for a full professorship in 2013.

However, her fortunes changed after a public school superintendent and several of Buchanan's students had complained about inappropriate language, including comments about a student's sex life and repeated use of the word *pussy.*

Another student alleged Buchanan used "extreme profanity" in the classroom. She acknowledged she used profanity to get her students' attention, loosen them up and prepare them for the teaching environment.

The university removed her from the classroom in 2013 and investigated Buchanan for violating its sexual harassment policy, which defines such harassment as "speech and/or conduct of a sexually discriminatory nature, which was neither welcomed nor encouraged, which would be so offensive to a reasonable person as to create an abusive working or learning environment and/or impair his/her performance on the job or in the classroom."

A faculty committee determined Buchanan had violated the sexual harassment policy but recommended against her dismissal. However, the university's chancellor fired her anyway in 2015. She sued for her job back, but this past January a federal district court granted summary judgment to the university and other defendants. The court determined her profanity and comments of a sexual nature were not protected by the First Amendment.

"In addition to being just plain wrong, LSU's decision to fire Dr. Buchanan is supremely ironic," says her attorney Bob Corn-Revere, who's based in Washington, D.C. The late "Ann Hopkins won a landmark Supreme Court ruling in 1989 declaring that she was a victim of sex discrimination when Price Waterhouse refused to promote her to partner because she used profanity. Now, LSU claims that it can fire a woman for the same type of behavior by calling it sexual harassment."

In Buchanan's case, the federal district court also ruled that because her speech was made during classroom instruction, it was part of her official duties and, therefore, her First Amendment claims were foreclosed by the U.S. Supreme Court's decision in *Garcetti v. Ceballos* (2006). In that decision, the court ruled public employees have no free speech protection for official, job-duty speech.

UNDER THE MICROSCOPE
Many see her case as emblematic of the precarious state of academic freedom for college and university professors. Others view the case as an example of the perils of applying the categorical rule in *Garcetti* to limit professorial speech.

"She was terminated for 'sexual harassment' over the recommendation of a faculty committee just for preparing her adult students to be the best teachers they can be," says Will Creeley, senior vice president of legal and public advocacy for the Foundation for Individual Rights in Education. "Professor Buchanan has proved to be an excellent educator over her career, and punishing her for doing her job strikes at the heart of academic freedom."

Unfortunately, she is far from alone, Creeley says. "Faculty speech is under threat nationwide, from overly broad restrictions on faculty speech contained in university policies to calls for censorship for speech outside of the classroom."
Creeley says during the last academic year, his organization saw a surge of “outrage mobs” demanding the firing of faculty members for expressing their opinions about politics and matters of public concern online. “Faculty members are under a microscope right now, and if left unchecked, the threat to faculty freedom of expression will ultimately harm us all,” he says.

Among other incidents:
- Political commentator Lisa Durden lost her adjunct teaching position at Essex County College after defending a Black Lives Matter march on Tucker Carlson’s show on Fox News in June 2017. She told the Washington Post she was “publicly lynched.”
- Drexel University associate professor George Ciccariello-Maher resigned from his teaching position in December 2017 after the school investigated his speech on Twitter, including his infamous tweet: “All I want for Christmas is white genocide.”
- Erika Christakis resigned from her lectureship position at Yale University in December 2015 after controversy erupted when she sent an email that said students should have costumes to wear, even ones that can be offensive. Hundreds of students called for her resignation.
- Donald Hermann’s class at DePaul University College of Law was canceled in April after students complained he used the N-word in a lecture. Hermann said he used it as part of a hypothetical situation in which a white supremacist attends the funeral of a civil rights leader and shouts the word to attendees.

SPEAKING THEIR MINDS
Durden has filed a lawsuit against Essex, alleging a violation of her free speech rights under the New Jersey State Constitution. “It was a clear violation of her free speech rights,” says her attorney Leslie Farber of Montclair, New Jersey. “There was no connection between what she said and her employment.” Furthermore, Farber says the college hired Durden in part because of her outspoken political commentary and media attention.

Free speech expert Erwin Chemerinsky, dean of the University of California at Berkeley School of Law, a columnist for the ABA Journal and co-author of Free Speech on Campus (2017), calls these cases outliers. “It is not frequent for professors to get fired for their speech; that is why these cases get so much attention,” he says.

Farber says Durden’s case isn’t isolated. “It is a part of a trend,” she says. “Unfortunately, demands for faculty censorship seem to be as prevalent as ever, if not more so,” Creeley says. “Our balkanized politics and the advent of social media have proven to be an explosive combination for faculty speech rights. Faculty who dare to speak their minds about politics or other matters of public concern risk winding up on a professor watchlist, hounded on social media, or even fielding threats of violence. That’s deeply disturbing.”

Josh Wheeler, senior fellow at the Liberty & Law Center’s Free Speech Clinic at George Mason University law school, agrees. “Without question, free speech as a value has been under attack on college campuses in recent years,” Wheeler says. “Ironically, the free speech movement of the 1960s and the anti-free speech forces of recent years were both largely led by students.”

ACADEMIC FREEDOMS UNCLEAR
Part of the problem is the U.S. Supreme Court has never clearly defined the contours of academic freedom. The court waxed eloquently about the freedom in Keyishian v. Board of Regents (1967). “Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom,” the court said.

While the court referred to academic freedom as something of “transcendent value,” it did not define its contours. “The relationship of the First Amendment and academic freedom is unclear,” Chemerinsky says. “Both professors at public and private universities can claim protection of academic freedom, but legally it is much more complicated outside of public universities.”

Wheeler agrees the problem is in confusion about the definition. “Although often used, the term academic freedom has been little explained by the Supreme Court and the lower federal courts,” he says. “There is debate over whether academic freedom is a right that belongs to the professor as an individual or to the public university as an institution in matters of self-governance in academic affairs. Such uncertainty in the law makes it very difficult to set policy in the academy.”

Only the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, and the 9th Circuit at San Francisco have ruled Garcetti inapplicable in the college and university context for those exercising academic freedom. For example, the 9th Circuit ruled in Demers v. Austin (2014) that Garcetti doesn’t apply to “teaching and academic writing” because those activities are entitled to protection as academic freedom.

“If Garcetti applies to professors, then there is no First Amendment protection for their teaching and writing,” Chemerinsky says. “I hope the other circuits follow the 4th and 9th Circuits in holding that the case does not apply in the academic setting.”
The Docket

Too Old to Execute?

The court considers whether an aging prisoner with dementia and no memory of his crime should be put to death

By Mark Walsh

Last November, the U.S. Supreme Court summarily rejected the appeal of an Alabama death row prisoner, principally because the inmate’s habeas plea could not meet the tough standards for federal relief.

Justice Stephen G. Breyer filed a separate concurrence, noting that 67-year-old Vernon Madison, convicted of the murder of a police officer in 1985, “is one among a growing number of aging prisoners who remain on death row in this country for ever longer periods of time.”

“Given this trend, we may face ever more instances of state efforts to execute prisoners suffering the diseases and infirmities of old age,” Breyer continued.

Breyer and Justice Sonia Sotomayor also joined a separate concurrence in the case, by Justice Ruth Bader Ginsburg, that suggested the issue of “whether a state may administer the death penalty to a person whose disability leaves him without memory of his commission of a capital offense is a substantial question” that would merit the court’s attention if “appropriately presented.”

Three months later, due to some factual and procedural twists, just such a case came along—a separate appeal by Madison, this one unencumbered by the intricate habeas restraints imposed by the Antiterrorism and Effective Death Penalty Act of 1996.

On Jan. 25, Madison had eaten a last meal of two oranges and was a half-hour away from lethal injection when the Supreme Court intervened with a stay of execution.

“It is undisputed that Mr. Madison suffers from vascular dementia as a result of multiple serious strokes in the last two years and no longer has a memory of the commission of the crime for which he is to be executed,” said the stay application filed by his lawyers with the Equal Justice Initiative in Montgomery, Alabama.

“His mind and body are failing,” the filing continued. “He suffers from encephalomalacia [dead brain tissue], small vessel ischemia, speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain.”

On Feb. 26, over the objections of Alabama state officials, the high court granted full review of Madison’s case, based on the questions of whether the Eighth Amendment and relevant court precedents permit a state to execute someone who whose mental disability leaves him without memory of his commission of the capital offense, and whether evolving standards of decency bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes.

Arguments are scheduled for Oct. 2, the second day of the court’s new term.

“This case is going to have something to say about dignity, and who we execute and why,” says John H. Blume, a professor at Cornell Law School and the director of the Cornell Death Penalty Project.

Blume has represented defendants in many death penalty cases, though he is not involved Madison’s case.

LACK OF UNDERSTANDING

Madison was convicted for killing Julius Schulte, a Mobile, Alabama, police officer who was protecting Madison’s ex-girlfriend and her 11-year-old daughter after a domestic dispute. Madison crept up behind
The Docket

Schulte and shot him twice. The merits brief filed on behalf of Madison by Bryan A. Stevenson, the high-profile author and executive director of the Equal Justice Initiative, documents the death row inmate’s mental decline, including strokes that have left him with vascular dementia and long-term severe memory loss, disorientation and impaired cognitive functioning.

Testing by a defense expert after Madison’s most recent stroke, in 2016, revealed that the prisoner could not recall any of the 25 elements in a brief story vignette that was read to him; he could not remember the alphabet past the letter G; and he could not remember the name of the previous U.S. president.

Ultimately, the defense expert testified in a lower court proceeding that Madison does not “seem to understand the reasoning behind the current proceeding as it applies to him” and does not understand why he was slated for execution.

The 11th U.S. Circuit Court of Appeals at Atlanta granted habeas relief to Madison, holding that a trial court’s finding that the prisoner was competent to be executed was “plainly unreasonable” and could not be reconciled with Panetti v. Quarterman.

In that 2007 decision, the Supreme Court ruled that the retributive purpose of capital punishment was not well served where “the prisoner’s mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.”

Panetti had built on a 1986 Supreme Court decision, Ford v. Wainwright, which held that the Eighth Amendment bars the death penalty for those who are mentally incompetent at the time of execution.

In Dunn v. Madison, Alabama appealed the 11th Circuit’s habeas decision to the high court. In an unsigned opinion on Nov. 6, 2016, a majority of the court said the Alabama trial court “did not reasonably apply Panetti and Ford when it determined that Madison was competent to be executed because— notwithstanding his memory loss—he recognizes that he will be put to death as punishment for the murder he was found to have committed.”

The high court held in the per curiam decision in Dunn v. Madison that Madison could get no habeas relief under AEDPAs deferential standard, though it said it was expressing no view on the merits of the underlying question outside the context of AEDPA.

This is the decision in which Ginsburg and Breyer issued their concurrences suggesting, respectively, that a case in an appropriate posture that presented the question about competency would warrant review, and the aging death row population was a cause for concern.

Breyer, however, went on in his concurrence to say that rather than the court developing a “constitutional jurisprudence that focuses upon the special circumstances of the aged,” he thought it wiser to “reconsider the root cause of the problem—the constitutionality of the death penalty,” as he outlined at length in his 2015 dissent in Glossip v. Gross.

HUMAN DIGNITY

Lawyers for Madison, meanwhile, with a looming Jan. 25 execution date for their client, again challenged his competency to be executed, this time before the Mobile County Circuit Court. Along with medical arguments, they presented evidence challenging the credibility of a state court-appointed psychologist.

The trial court rejected the arguments. In his stay application and cert petition to the Supreme Court, Madison was perhaps helped, somewhat ironically, by Alabama’s tough death penalty procedures. State law does not permit any appeal in state courts, and thus the U.S. Supreme Court was the only place Madison could get review of the state trial court’s determination that he was competent to be executed.

On the merits, Stevenson and other EJI lawyers argue that “no penological justification or retributive value can be found in executing a severely impaired and incompetent prisoner, especially where advances in neurological science now make clear the nature of this incompetency. The execution of Vernon Madison consequently is prohibited by the Eighth Amendment’s essential commitment to human dignity.”

The American Psychological Association and American Psychiatric Association filed a joint amicus brief in support of Madison, arguing that it is cruel and unusual punishment to execute an individual with severe vascular dementia. The brief pointed out that mental health experts can help courts in identifying prisoners with severe dementia through the use of modern brain imaging, standardized clinical assessments and tests to detect “malingering,” or faking a condition.

“Someone with the advanced vascular dementia that Mr. Madison has really doesn’t have what the court has long required to allow for an execution, which is a rational understanding of the reasons for his execution,” says Daniel S. Volchok, a Wilmer Cutler Pickering Hale and Dorr partner who co-wrote the brief.

Neither the Alabama attorney general’s office argues that Madison understands he is being punished for a murder he committed and for which he has never accepted responsibility. “He is neither delusional nor psychotic,” Attorney General Steve Marshall stated in the brief. “Although some other dementia patient could be incompetent, the state court was well within reason to hold that Madison is not.”

Also that “the death penalty is justified by the state’s interests in retribution and deterrence, and those interests are not diminished when a convicted murderer cannot remember committing his crime.”

An amicus brief supporting Alabama filed by Texas and 13 other death penalty states argues that courts commonly use the “rational understanding” standard for deciding a defendant’s competence to stand trial, plead guilty or waive counsel, and “it follows that a prisoner’s failure to remember his capital offense does not render him incompetent to be executed.”  

OCTOBER 2018 ABA JOURNAL || 21
Civility Reboot
Can lawyers learn to be nicer to one another?
By Heidi K. Brown

In his book *The Soul of the Law*, Benjamin Sells cautions that “the soul of the law is suffering.” He points to the “disturbing rise in incivility among lawyers” as one manifestation of this affliction.

Sells notes that the term *civility* derives from Latin words related to “citizenship” and “members of a household.” Indeed, civility comes from the Latin word *civils*, meaning “relating to public life, befiting a citizen.”

It’s been four years since the republication of Sells’ book. (It was first published in 1994 and then by the American Bar Association in 2014.) In our current tempestuous political climate, incivility seems to be the modus operandi for how many citizens converse about the rainbow of legal issues facing our country. Incivility abounds in households, offices, boardrooms, courtrooms and written communications.

Social media (and President Donald Trump’s liberal use of it to demean and debase others) has raised (or lowered?) the bar of incivility. It’s not enough to respectfully disagree with someone anymore. Now we assign nicknames, we heap sarcasm, we condescend, we bully. Citizens use the harshest of language to criticize one another, writers, politicians, athletes, singers, social movements and even restaurants, books and art—often using the anonymity of the internet as a weapon.

When did it become so cool to be so unkind? Can our profession (and society in general) detoxify and reboot its soul? Sells suggests that “incivility itself might be pointing the way by directing the law to citizenship and household, both of which require attention, caring and interest more than anything else.” Maybe we need to take a step back and ask ourselves: How should citizens or members of healthy and nontoxic households converse with one another?

VICIOUS VOLLEYS
As a young and introverted legal writer in the early days of my law practice in the boisterous construction litigation arena, I always felt more comfortable in the shelter of my office typing furiously on my laptop than in the fray of the courtroom. I felt newly empowered to say things through my legal writing that I never would have uttered face to face to another member of the profession. I admit that, as a legal writing novice acclimating to an aggressive niche of law practice, I readily got caught up in mirroring the rhetoric that peppered many of my opposing counsel’s demand letters, mediation papers and motions that landed on my desk.

I confess I felt an uncharacteristic rush of power when, scrutinizing my opposing counsel’s briefs, I discovered flawed arguments, inaccurate citations or pivotal typographical errors that our trial team could criticize in opposition and reply briefs. It seemed to be the rules of engagement. Opposing counsel lobbed snark, sarcasm and ad hominem attacks at us, and we volleyed back in kind. I thought that was the way litigators were supposed to talk to each other. Several of my formative mentors and trainers spoke that way. The message was if you weren’t superaggressive, you were weak.

Growing up as the daughter of an Episcopal minister, I was pretty skilled at censoring myself as a kid. Swearing (and voicing blossoming political opinions that differed from others) was verboten in our household; even the phrase *shut up* was outlawed. But once I became a member of the bar, I learned a whole new vernacular. Such language felt potent at the time. I honestly didn’t realize the toll all that back-and-forth disparagement took on one’s psyche.

When I transitioned to teaching legal writing, I pored over so-called bench slaps—admonitions by judges of lawyers who submitted shoddy briefs or flouted procedural rules for court filings. Having been trained to follow—to the letter—courts’ substantive, procedural and formatting rules governing written submissions, it always baffled me how often lawyers just outright violated such rules or submitted written work riddled with such flaws, citation errors and rampant grammatical blunders. I love when judges take the time to note these writing transgressions and explain how...
and why had briefing affects the judicial process.

As a teacher, I thought it might be effective to show these bench slaps to law students as examples of what not to do—lest they be publicly reprimanded in written judicial opinions like the lawyers in question. That approach came to a screeching halt when I realized that some law blogs were further calling out these lawyers by name, using a jeering tone to describe the attorneys’ mistakes.

Yes, the judges’ written critiques nestled within their substantive judicial opinions can be on point, clever and sometimes even humorous, and the lawyers’ deficient writing or blatant rule-flouting is often shocking and worthy of reproach. But do we as media consumers and sideline voyeurs really have to humiliate these folks through social media and other online platforms to further make the point? It hit me though; in my early days as a brief writer, I basically had attempted the same thing through the tone of my opposition and reply briefs (though much less publicly and with much less derision), under the cloak of “zealous advocacy.”

Why does criticism, mockery and belittlement of others make us (albeit temporarily) feel so good, so haughty, so superior? Perhaps it’s time to pause and consider the effect that our current go-to tone and language has on our collective national well-being. Do we really want children—the future of our legal profession and America—to mirror this mode of self-expression and communication? Do we want to send the message that settlement of others make us (albeit temporarily) feel so good, so haughty, so superior? Perhaps it’s time to pause and consider the effect that our current go-to tone and language has on our collective national well-being.

To me, civility is different from “political correctness,” which I think gets a bad rap. Is it really so hard to consider and acknowledge that some of the terminology we use is now outdated and hurtful to others? I’m not contending that, by being civil, we must self-censor, restrict freedom of speech or hold ourselves back from asserting an opinion even in a passionate way. I’m certainly not suggesting we should be soft, weak, timid or spineless as advocates, citizens or members of a household.

I do think, however, that we are capable of showing a greater level of respect for other human beings, even if they are on the polar opposite side of a legal case, or the political spectrum, from us. Civility means not hiding behind our laptops or our devices to dehumanize an opposing attorney, party or rival so we can tear apart their thoughts, writing, ideas, opinions, appearance or personality in an acerbic way.

Yes, sometimes exercising civility feels impossible and maybe even pretty lame. When a difficult boss uses choice words to criticize a piece of our writing or a novel litigation strategy we crafted to solve a sticky problem, our gut instinct might be to verbally swing back and defend ourselves. When opposing counsel starts an oral argument or a brief with a snarky comment about how we “must have forgotten how to read” or “obviously never learned legal research in law school,” we might champ at the bit to react in kind.

When a family member mocks our political views or uses derogatory terminology to refer to party factions, it’s going to feel incredibly tempting to fight fire with a rain of condescending and superior fire, especially now when we feel we have to scream to be heard through ideological walls. When the folks on the other side of the aisle seem so outrageous or clueless, of course we feel the urge to patronize. But those momentary highs of connecting that ferocious jab aren’t enough to balance the subsequent dips to our collective psyche.

Let’s try a new tack. We can be forceful and intelligent and move the dialogue forward—in a case, in the boardroom, at the Thanksgiving table—without debasing ourselves. It takes an incredibly strong individual to sustain verbal or written blows from others and focus on what’s right. We can educate without annihilating. We can be formidable—and considerate at the same time.

We can even be creative, clever and humorous to make our point without being cruel. Let’s take a deep breath, rise above and use the words of the law, the rules and codes of our profession and the power of legal persuasion, instead of disdain and condescension. Let’s get behind and launch new initiatives to reboot civility.

Let’s embrace efforts “to elevate the standards of integrity, honor and courtesy in the legal profession,” like the Foundation of the American Board of Trial Advocates’ Civility Matters project. Or we can “promote a culture of civility and inclusion,” like the Illinois Supreme Court Commission on Professionalism’s 2Civility initiative.

There is immense power and dignity in speaking and asserting ourselves in measured voices. As my favorite philosopher, Bono, asks: “Are you tough enough to be kind?”

Heidi K. Brown, an associate professor of law and director of legal writing at Brooklyn Law School, was a lawyer in the construction industry for two decades. She is the author of The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy (ABA, 2017).
ONE CONSTANT IN LANGUAGE, as in life, is change. Over time, words can change in spelling, meaning and pronunciation. This month, we’ll explore changes in pronunciation and next month in meaning.

The main goal with pronunciation is to stay within the mainstream of one’s linguistic community—which, for lawyers, normally means educated professionals. Even there, you’ll find regional differences in terms such as *voir dire*, which is /vwah DEER/ in most parts of the country but /vohr DIRE/ in much of the South and Southwest. A Texas judge might well look askance at a lawyer using the out-of-state pronunciation.

Some pronunciations are in flux as the result of repatriation: a word imported centuries ago, and thoroughly anglicized, is sometimes treated as if it were foreign by those unaware that it was long ago made English. Hence *homage*, pronounced /HAH-mij/ for centuries, is now often heard being pronounced /oh-MAHZH/ by those who think they’re using a French word. Similarly, people forget the English word *ambience* /AM-bee-uhnts/ and instead use the French *ambiance* /ahm-bee-AHNTS/.

Doubtless worst of all are the mistaken attempts at foreign pronunciations: *concierge* /kahn-see-ERZH/ (think garage) and *coup de grace* /koo duh GRAH/ are often pronounced as if there were no consonant sound at the end. In other words, people attempt the foreign pronunciation but get it utterly wrong. A term like *foie gras* /fwaH GRAH/ can mislead Anglophones into mispronouncing *coup de grace*.

Some people couldn’t care less about such matters (and they’re likely to say they *could* care less). But educated professionals are likely to care because of adverse inferences that others might draw about their lack of care.

Although pronunciation is among the steadier aspects of language, we occasionally see major shifts. In British English, for example, there’s a strong tendency to lose /th/ and to make it either /f/ or /v/: go *wif* you (go with you) or my *muvver* (my mother), you’ll often hear.

The spread of a nonstandard speech pattern has been remarkable. A few years ago, British educational authorities announced that teachers should stop insisting their students master the /th/ sounds: In British English, /f/ and /v/ in place of /th/ should not be “fwarted.”

In all types of English, there has always been a group of words with sundry pronunciations—not all of which are considered equally good for standard spoken English. True, you might well decide to depart from a standard pronunciation to fit in with your own linguistic community just to avoid coming across as bookish, pedantic or supercilious. But it’s always best to depart from a norm not inadvertently but knowledgeably. The question is whether you can identify the traditional norm.

In the quiz that follows, choose the traditionally standard pronunciation, by which I mean the pronunciation overwhelmingly favored by American manuals printed in the late 19th century through the 20th. (Yes, there were dozens of books on pronunciation published in the days when a lot of people cared about such things.) Granted, these words have been undergoing some degree of shift, and you’ll occasionally hear them pronounced differently. Your mission is to try to identify the traditional forms—even if perhaps only the stodgiest speaker would use every one of them.

For the most accurate results, try saying the word first and then choose the pronunciation that matches your own. In the pronunciations, /uh/ simply represents a schwa: Don’t overpronounce it.
### PRONUNCIATION QUIZ

<table>
<thead>
<tr>
<th>Question</th>
<th>Pronunciation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. acumen</td>
<td>(a) /uh-KYOO-muhn/ or (b) /AK-yuh-muhn/</td>
</tr>
<tr>
<td>2. applicable</td>
<td>(a) /uh-PLIK-uh-buhl/ or (b) /AP-uh-kuh-buhl/</td>
</tr>
<tr>
<td>3. certiorari</td>
<td>(a) /suhr-shee-uh-RAIR-eye/ or (b) /suhr-shee-uh-RAHR-ee/</td>
</tr>
<tr>
<td>4. comparable</td>
<td>(a) /KAHM-puh-ruh-buhl/ or (b) /kuhn-PAIR-uh-buhl/</td>
</tr>
<tr>
<td>5. comptroller</td>
<td>(a) /KAHM-troh-ruh/ or (b) /kuhn-TROH-ruh/</td>
</tr>
<tr>
<td>6. controversial</td>
<td>(a) /kahn-truh-VUHR-shuhl/ or (b) /kahn-truh-VUHR-see-uhl/</td>
</tr>
<tr>
<td>7. debacle</td>
<td>(a) /DEB-i-kuhl/ or (b) /di-BAH-kuhl/</td>
</tr>
<tr>
<td>8. defendant</td>
<td>(a) /di-FEN-duhnt/ or (b) /di-FEN-dant/ or (c) /di-fen-DANT/</td>
</tr>
<tr>
<td>9. disparate</td>
<td>(a) /DIS-puh-ruh/ or (b) /dis-PAIR-uh/</td>
</tr>
<tr>
<td>10. electoral</td>
<td>(a) /i-LEK-tuh-ruh/ or (b) /i-lek-TOHR-uhl/ or (c) /ee-lek-TOHR-uhl/</td>
</tr>
<tr>
<td>11. err</td>
<td>(a) /uhr/ or (b) /air/</td>
</tr>
<tr>
<td>12. formidable</td>
<td>(a) /FOR-mi-duh-buhl/ or (b) /for-MID-i-buhl/</td>
</tr>
<tr>
<td>13. gravamen</td>
<td>(a) /GRAV-uh-muhn/ or (b) /GRAH-vuh-muhn/ or (c) /GReh-VAY-uh-muhn/</td>
</tr>
<tr>
<td>14. heinous</td>
<td>(a) /HEE-nuhs/ or (b) /HEE-neuh-uhl-ee/ or (c) /HEE-neuh-uhl/</td>
</tr>
<tr>
<td>15. integral</td>
<td>(a) /in-TEG-ruh/ or (b) /IN-tuh-gruhl/</td>
</tr>
</tbody>
</table>

### PRONUNCIATION ANSWERS

<table>
<thead>
<tr>
<th>Question</th>
<th>Pronunciation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. (a). The pronunciation stressing the first syllable is a relative newcomer.</td>
<td>overpronunciation.</td>
</tr>
<tr>
<td>2. (b). Here, the second-syllable stress is relatively new.</td>
<td>7. (b). This mispronunciation here is similar to saying /fuh-KAYD/ for façade.</td>
</tr>
<tr>
<td>3. (a). Believe it or not, this is the traditional Anglo-American pronunciation, used mostly by very traditional old-timers. The usual and fully acceptable pronunciation is (c). If you're unsure, just say cert.</td>
<td>8. (a). It's a schwa in the final syllable. For some reason, law professors often accent the last syllable with a short -a-, perhaps to help their students spell the word correctly on exams.</td>
</tr>
<tr>
<td>4. (a). This one, like No. 21, is a linguistic marker for educated speech.</td>
<td>9. (a). There's no parrot in this word.</td>
</tr>
<tr>
<td>5. (b). This one surprises many people. The “spelling pronunciation” is traditionally considered incorrect. The history is a strange one: medieval Latinists tried respelling the word controller based on false etymology (thinking the root count-[Latin compr-] came into play, when in fact it was just the prefix con-). They didn’t intend to have the word’s pronunciation change, but the spelling pronunciation became widespread in the second half of the 20th century.</td>
<td>10. (a). Think of election, with the accent on the second syllable. The word is often misspelled and mispronounced as if it were electoral.</td>
</tr>
<tr>
<td>6. (a). The second choice is just an acceptable pronunciation.</td>
<td>11. (a). The old pronunciation may be a lost cause, given the analogy to the noun error (which is pronounced only one way).</td>
</tr>
</tbody>
</table>

### OCTOBER 2018 ABA JOURNAL

16. (b). There's a strange tendency to making this three-syllable word into four. Think of principal and interest. Nobody would say /IN-tuh-rest/. |

17. (a). Some lawyers seem to want to call to mind the related word revoke. |

18. (b). As with pastoral /PAS-tuh-ruh/.

19. (a). The -t- is traditionally silent, as in fasten and listen. Sounding the -t- makes for another so-called spelling pronunciation.

20. (d). Yet most doctors, I'm assured, say /op/-, not /off-/. In fact, opto is a slang shortening often used in hospitals. |

21. (b). See No. 4.

22. (a). Two syllables, not three.

23. (b). See No. 17.

24. (a). The word has little to do with the modern sense of the word vague, even though they both derive from the Latin vagus “wandering.”

25. (b). The first syllable is accented, and the -h- is silent.

Bryan A. Garner, editor-in-chief of Black’s Law Dictionary and author of many books on advocacy and legal drafting, is the distinguished research professor of law at Southern Methodist University. His most recent book is Nino and Me: My Unusual Friendship with Justice Antonin Scalia.
Tales of Addiction

What every attorney should know about alcohol and substance abuse

By Jeena Cho

According to a 2016 study in the *Journal of Addiction Medicine*, 20.6 percent of lawyers screened positive for hazardous, harmful and potentially alcohol-dependent drinking. Men had a higher proportion of positive screens, as did younger participants and those working in the legal field for a shorter duration. Attorneys age 30 or younger were more likely to have a higher likelihood of harmful drinking than their older peers.

Attorneys in the first 10 years of their practice experienced the highest rates of problematic use (28.9 percent), followed by attorneys practicing for 11 to 20 years (20.6 percent), continuing to decrease slightly from 21 years or more.

Lawyers often are warned about the dangers of excessive alcohol use. But according to Bree Buchanan, director of the Texas Lawyers’ Assistance Program, “We have been trained through the culture of our profession that alcohol use is the way to celebrate wins as well as mourn losses. Alcohol is the legal profession’s sanctioned way to deal with feelings.”

STORIES OF RECOVERY

One California attorney currently in outpatient treatment shared that when she was at Stanford University as an undergrad, “Being hungover was a fact of life. Everyone was doing it.”

She didn’t realize she had an issue because excessive alcohol use was socially normal. When she started law school at Georgetown University, she began using Ritalin, then Adderall. It was a shortcut: The drugs made it easier for her to keep up with her schoolwork.

After law school, she continued to use Adderall as an associate. She thought the drug was the key to her success. “Partners loved me because I was able to work late into the hours and crank out good work. I associated Adderall to producing good work product,” she says.

Eventually, the drug use caught up with her. She started missing deadlines, and people around her noticed. However, she felt the partners at her firm were also hesitant about showing empathy or concern. “As long as the billable hour is king, it’s not in their interest to ask too many questions.”

When she finally checked in to a residential treatment program for three weeks, she felt relieved. “It was the first real time off I had since I started practicing law,” she says. Surrendering her smartphone and being away from work helped her gain perspective on her life, and she began to address not only her substance abuse issues but also bipolar depression and anxiety.

Through her recovery, one of the most important lessons she learned was she was incredibly critical and demanding of herself. “It was so hard for me to be nice to myself,” she says. The journey to healing also meant taking time for self-care and learning to be kind toward herself.

A lawyer from Texas didn’t address his issues with alcohol abuse for 15 years. Even though the alcohol use interfered with sleep, personal and professional relationships and his health, he rationalized it was OK because he didn’t drink during the day. “I was always able to wait until the end of the day to drink,” he says.

When he finally sought help, he realized alcohol was a way he coped with procrastination at work. It was a way to help him deal with the mental distress the procrastination created.

“The more I procrastinated, the more I drank. Alcohol brought relief, and it made everything OK. Alcohol was a constant in my life,” he says.

He would become defensive when people told him, “You smell like alcohol.” But he knew it was true. “I was able to smell alcohol from my pores. I had to keep a 3-foot buffer zone from people. It was embarrassing. The comments weighed on me,” he says.

Even though he responded with defensiveness, he thinks those comments from his colleagues and others planted the seed that he should seek help. He realized in recovery he never gave himself a break. “I wasn’t practicing self-care; I took care of it by taking drugs,” he says. He thinks if he had taken regular mental breaks and practiced mindfulness, it would’ve helped.

C TIMES THREE

Sarah Weinstein, a former lawyer who’s now a psychotherapist based in Berkeley, California, says, “Though denial is an issue for some, it is actually a myth that the majority of those with substance use disorders are in denial.”

When she works with clients who may have an addiction problem, she asks the clients to consider the three Cs: control, compulsion and consequences.

- **Control** refers to the out-of-control use and typically more use than is intended. For example, do you regularly set out to have “just one drink” at your firm’s happy hour but often find yourself imbibing many more?
- **Compulsion** refers to spending a lot of time, energy and mental space obtaining, using and recovering from use. Consider whether your weekly calendar is full of events in which alcohol will be in plentiful supply and/or whether you frequently socialize with people who engage in heavy drinking or substance use. This is especially important for those who tend to compare their drinking to others as a means to normalizing their use.
WHEN YOU NEED AN EXPERT WITNESS ENGAGE AN APPRAISAL INSTITUTE DESIGNATED MEMBER

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

Find An Appraiser at: appraisinstitute.org/confidence

• Consequences refer to the negative social, professional, legal, economic and interpersonal effects of continued use. A common example is continuing to use despite experiencing blackouts or other serious losses of physical or emotional control that have put in jeopardy personal relationships, safety or professional standing.

Weinstein emphasizes you do not have to wait until you think you are addicted before seeking help. It’s important to remember addiction is a disease. “I often tell my clients that sometimes we need two minds to help figure out one person’s challenging thoughts or situation,” she says.

HOW TO HELP

Often, attorneys are reluctant to approach a colleague who may be struggling because it’s uncomfortable and we don’t want to wrongfully accuse someone of alcohol or substance abuse. The hesitancy is understandable. Buchanan of the Texas Lawyers’ Assistance Program says lawyers are keen on protecting their reputations, so they’ll go to go lengths to hide their use. So by the time the overt signs of problems are noticeable, the person is typically in the advanced stage of alcohol and substance use disorder.

Buchanan provides these suggestions: First, if you are concerned about another lawyer, check in with your gut. If you have a gut feeling, there’s likely a problem. It is important to remember it is not the job of the concerned person to diagnose the problem. Having a gut feeling someone is struggling is enough. This is especially true if you are familiar with the person.

Second, contact your state lawyers’ assistance program. (The ABA Commission on Lawyer Assistance Programs has an online state-by-state directory. Go to ambar.org/colap, then click “LAP Directory.”) The program is anonymous, and you do not have to give your name or the name of the person you are calling about. A LAP counselor can coach you on how to address the situation and, if appropriate, how to have the difficult conversation. Another resource the ABA has is the Well-Being Toolkit For Lawyers & Legal Employers.

When approaching a troubled individual, it’s important to have an open mind and heart. You can establish a dialogue by saying, “You’re my friend; I respect you; I admire you.” Then state the facts. For example, “I’ve known you for 10 years; and over the last six months, I noticed that you often look sad, you’re showing up late and not returning calls. I am worried. What is going on? Talk to me.”

After you state the facts, stop talking and listen. Buchanan says this is often the hardest part—to simply sit quietly and listen, to see whether the troubled individual will open up to you. Often, it may be necessary to check back with the person more than once before they are ready to get help.

Tara M. van Brederode, assistant director for attorney discipline at the Iowa Supreme Court’s Office of Professional Regulation, says common warning signs a lawyer may be in need of help include missing hearings or deadlines and neglecting communication responsibilities. Other warning signs include an alcohol- or substance-related criminal charge such as a DUI. “Suspension of a law license doesn’t address the underlying problems,” she says. “If anything, it compounds it. It’s a blunt-edge system for dealing with these problems.”

Van Brederode emphasizes the sooner the attorney seeks help, the more options may be available to regulators. For example, in many states, if a lawyer in disciplinary trouble gets help before clients are actually harmed, the lawyer can work out a deferral agreement in which they get help, then report back to the disciplinary board on progress. As long as the lawyer complies, the matter is closed after a year. In these situations, there is no sanction and no public record.

It’s important for lawyers to remember it’s possible to live a healthy, productive and thriving life by managing substance and alcohol issues. Every day thousands are recovering from substance abuse disorders and are respected members of the legal profession.

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.
CAT-AND-MOUSE GAME

Tech companies face a difficult juggling act as customers demand cybersecurity while law enforcement wants easier access to evidence

By Jason Tashea

On March 6, the iPhone’s encryption became no match for the Indiana State Police.

Armed with GrayKey, a tool that circumvents iPhone passwords and encryption, the agency was able to plug into dozens of iPhones in its possession and collect previously unattainable information for ongoing investigations.

Communications technology is “definitely making it more difficult for us to gather evidence, both technically and through service of legal process,” says Chuck Cohen, an Indiana State Police captain.

Within 60 days of obtaining GrayKey, the agency, with legal authority, was able to unlock 96 iPhones. The tool has led to both incriminating and exculpatory evidence, Cohen says.

The Indiana State Police, which spent $15,000 on the technology, is not alone. The Maryland State Police and police departments in Portland, Oregon, and Rochester, Minnesota, have also bought GrayKey, according to public records. The Drug Enforcement Agency is looking to spend $30,000 on an advanced model.

In response to this type of security-busting technology, Apple released a feature in beta to iOS 11.4.1 called the USB restricted mode, which requires a phone to be unlocked within the previous hour to allow for data transfer through the charging port, effectively neutering products such as GrayKey.

“We’re constantly strengthening the security protections in every Apple product to help customers defend against hackers, identity thieves and intrusions into their personal data,” Apple said in an emailed statement. “We have the greatest respect for law enforcement, and we don’t design our security improvements to frustrate their efforts to do their jobs.”

After unlocking a backlog of phones, Cohen says it’ll be hard to go back to the way things were.

“If a company makes a business decision that locks us out again, that causes
me a lot of concern—more so than before,” he says. “Now, I know what I’ve been missing.”

Modern technology has created a honey-pot of data for cyberthieves and law enforcement. This has led to a proliferation of default encryption features in consumer technology, which challenge criminal investigations. As technology companies engage in a cat-and-mouse game, police and prosecutors are trying to adapt by adopting novel technology and raising new constitutional arguments in court, which brings up privacy concerns from advocates.

“We live in a golden age of surveillance,” says Nate Cardozo, a senior staff attorney at the Electronic Frontier Foundation. “There’s more data generated and collected today than ever before in the history of humanity.” That data, he says, is largely accessible to law enforcement.

THE CAT’S OUT OF THE BAG

In reaction, people are turning to encryption to protect their digital communications and information.

In recent years, companies such as Apple and Google have added encryption as a default feature to their offerings. At the same time, products including Signal, Skype and WhatsApp have made encrypted communication commonplace and easy to use.

Even though broad consumer access to encryption is relatively new, the questions it raises are perennial, says Anita Allen, a professor at the University of Pennsylvania Law School.

“The government always wants to exploit a new technology to their advantage,” she says. “And the question is if there should be any limits on that.”

For law enforcement, encryption has created a “going dark problem,” which is when communications or data are legally seizable but unreadable.

“This challenge grows larger and more complex every day,” said FBI Director Christopher Wray in a 2018 speech. “Needless to say, we face an enormous and increasing number of cases that rely on electronic evidence. We also face a situation where we’re increasingly unable to access that evidence, despite lawful authority to do so.”

Recently, the FBI admitted to overcounting the number of locked devices in its possession and is conducting an internal audit to determine the correct number. The exact number of devices inaccessible to law enforcement nationwide with a valid warrant is unknown.

According to a New York Times report earlier this year, the Department of Justice has renewed calls for a legal mandate requiring that technology companies create a way for law enforcement to access encrypted communications or data. Often called a “backdoor,” proponents claim it can ensure that encryption’s integrity while allowing law enforcement access with legal authority.

“Requiring a backdoor is a bad idea for security,” says Ari Schwartz, managing director of cybersecurity services at Venable and previously a member of the White House National Security Council. “It might help law enforcement on a certain case in the short term, but it’s bad for security in general.”

The concern is that once a backdoor is created it is only a matter of time before nefarious actors exploit the intentional vulnerability. To Schwartz, the solution is not a backdoor, but creating securer systems and giving law enforcement more tools, which may include hacking with greater oversight or having law enforcement work more with technology companies.

PASSPORT, PLEASE

As that debate simmers, judges around the U.S., confronted by encrypted data in criminal cases, are compelling defendants to decrypt their devices.

In one recent example, a warrant was issued to search Ryan Michael Spencer’s residence in Aptos, California, including computers and storage devices, for evidence of child pornography. Spencer refused to provide passwords to give law enforcement access to encrypted data on three of his 12 devices, invoking his Fifth Amendment privilege against self-incrimination.

In April, Judge Charles Breyer of the U.S. District Court for the Northern District of California disagreed and ordered Spencer to decrypt his devices. In the opinion, he held that the government had met its burden by showing that Spencer had the knowledge to decrypt the devices.

“A rule that the government can never compel decryption of a password-protected device would lead to absurd results,” wrote Breyer.

Spencer didn’t comply, and the judge found him in contempt of the order and imposed a $1,000-a-day fine until he complied. Spencer notified the court that he will appeal the contempt order to the U.S. Court of Appeals for the 9th Circuit at San Francisco. Plea negotiations to the underlying crimes are ongoing.

Other circuits have set the bar even higher for the government. In 2017, the 3rd Circuit at Philadelphia required the government show “reasonable particularity” that the defendant can decrypt a device. In 2012, the 11th Circuit at Atlanta ruled that to compel decryption, the government must show that the defendant knew the password and that...
particular, incriminating information was on the encrypted device.

Writing for the 11th Circuit panel, Judge Gerald Bard Tjoflat held that compelling “decryption and production would be tantamount to testimony by [the defendant] of his knowledge of the existence and location of potentially incriminating files,” which would infringe his Fifth Amendment right.

MOOT POINT?
While the constitutional contours of this issue will continue to form, the reality is that compelling decryption may not be necessary. But the alternatives still pose a challenge.

Jennifer Daskal, associate professor at American University Washington College of Law, says that before law enforcement compels decryption there should be an obligation to try other means to access the evidence.

Take, for example, the case of Paul Manafort, President Donald Trump’s 2016 campaign chair. According to court filings from June, Manafort allegedly communicated with individuals over Telegram and WhatsApp—two end-to-end encrypted messaging apps—in an attempt to coordinate testimony. Neither app creates or keeps copies of messages sent.

While some of the communications were given to investigators willingly by other participants, documents filed in the U.S. District Court for the District of Columbia show that Manafort’s communications were collected from his Apple iCloud account, which kept backups of his messages. Investigators never needed to access the defendant’s phone.

In August, Manafort was convicted on eight counts of financial fraud in a trial stemming from the Russia investigation.

While opportunities like this exist for law enforcement to uncover otherwise encrypted data, it is easier said than done.

“The inability to effectively identify which service providers have access to relevant data was ranked as the No. 1 obstacle in being able to effectively use digital evidence in particular cases,” wrote Daskal in a 2018 report that surveyed law enforcement officials, technology company representatives and advocates for the Center for Strategic and International Studies, a think tank in Washington, D.C. “Difficulties in obtaining sought-after data from these providers was ranked as a close second.”

Rich Littlehale, technology and digital evidence committee chair for the Association of State Criminal Investigative Agencies, sees this reality in his work.

Littlehale says that if you look at law enforcement email discussion lists that deal with digital evidence “you will see a constant stream of frustrated emails about response times, specific phrasing requirements for legal demands and efforts to get someone on the phone to answer questions.”

REQUESTING DIGITAL EVIDENCE
It is hard to know exactly how much of this frustration is justified. Transparency reports from Apple, Facebook and Google that summarize the second half of 2017 indicate a majority of law enforcement requests are being fulfilled—at least in part.

Apple received U.S. government legal process requests for 4,450 devices, including search warrants, wiretap orders, pen registers and subpoenas, among others. According to the report, data was provided for 80 percent of requests.

Facebook reported that it produced some data for 85 percent of requests. Similarly, Google reported 82 percent of requests lead to some data being produced.

“An 80 percent response rate sounds good on the surface, until you compare it to traditional warrants that we execute ourselves,” which near a 100 percent response rate, Littlehale says. He adds that companies’ decisions to reject these orders are rarely litigated.

Daskal and her co-author, William Carter, argue in the report that a new “national digital evidence policy” is needed to fill in the gaps between law enforcement and technology companies. They recommend working across local, state and federal law enforcement agencies to track challenges law enforcement face accessing digital evidence, increase education and funding and improve cooperation with service providers.

Littlehale, however, thinks law enforcement may need to go further.

If technology company compliance with court orders continues to lag, he believes that “it may be that we will have to start litigating these [rejections] more and more.”
Alternatives to Email
Lawyers looking for more secure options to communicate electronically have a number of options

By Sean La Roque-Doherty

On May 14, security researchers claimed to have discovered a flaw, called Efail, in the deployment of encryption technology in email applications such as Apple Mail, Gmail and Outlook. The Pretty Good Privacy encryption standard and a similar protocol, S/MIME (Secure/Multipurpose Internet Mail Extensions), commonly used by lawyers to protect email from unauthorized readers, were under attack—but not for the first time.

Security professionals have long known about the issues with PGP, says John Simek, vice president of Sensei Enterprises, a digital forensics and information security company. “The real problem is with the way that PGP and S/MIME interact with email programs and the difficulty to properly configure and utilize PGP,” Simek says.

Vendors patched email client applications affected by Efail, but what will lawyers do the next time a flaw appears in their email apps that may compromise client communications?

There are alternatives to using encrypted email to secure client communications. I’ve found the most promising are secure online portals such as those provided by web-based practice management services from the likes of MyCase, Rocket Matter and Clio and end-to-end encrypted messaging apps.

Beware that chat is a real-time communication tool. If you use it like email, clients may be disappointed in your response time. Note that online portals can contain case-related information that obviates questions and provides service that clients expect from professionals: online self-service tools that provide answers.

Most web-based practice management services can create online portals when users link matters to contacts or clients. Upon creation, clients are notified via email with a link to access the portal from any internet-related device to set up a username and password.

Clients connect to portals over an encrypted Secure Sockets Layer or Transport Layer Security connection. The connection gives reasonable protection from eavesdroppers looking for valuable information and hackers looking to gain access to remote servers.

Portals allow users to communicate with their lawyers via messages, upload documents and read case-related information, such as documents, calendar events and invoices. Online portal services can notify clients via email when data is added or changed.

“Secure portals are not as easy to use as email,” says Mike Fratto, a senior analyst at 451 Research, an IT research and advisory company. But they “might be the best option overall,” he says.

“Portals don’t use PGP or S/MIME, and the communications are more or less contained in the service.”

SECURE COMMUNICATIONS
End-to-end encrypted chat tools are secure communication systems in which only end users can understand the communications in text, voice or video format. The encryption is done locally on user devices, so messages cannot be read by intermediary hackers or even internet providers.

“End-to-end encrypted chat is easy to use, but both parties need to use the same product,” Simek says. “And it is much more difficult to preserve, save or archive the communication session.”

Frank Gillman, chief information security officer at Lewis Brisbois Bisgaard & Smith headquartered in Los Angeles, agrees. “Most secure messaging applications have insufficient complexity of features for broader business purposes early in their life cycles,” Gillman says. He adds that the lack of features “lowers usage adoption rates among professionals like lawyers.”

“Security concerns, while clearly viewed as critically important, will always place second next to the ability to quickly and effectively service and communicate with clients,” he says.

THE REPLACEMENTS
Hearing that, I turned my attention to end-to-end encrypted chat applications in which lawyers and clients have no option to disable the encryption.

<table>
<thead>
<tr>
<th>PRODUCT</th>
<th>Feature</th>
<th>Signal</th>
<th>Wickr Me</th>
<th>Wire</th>
</tr>
</thead>
<tbody>
<tr>
<td>DEFAULT END-TO-END ENCRYPTION</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>MOBILITY SUPPORT FOR ANDROID/IOS</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>DESKTOP SUPPORT FOR MACS/WINDOWS</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>ENCRYPTED FILE TRANSFER</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>OFFLINE MESSAGING</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>OPEN-SOURCE SOFTWARE</td>
<td>✓</td>
<td>No1</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>BACKUP MESSAGE HISTORY</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>EPHEMERAL (time-to-live, disappearing) MESSAGES</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>MESSAGE AND CONVERSATION RECALL (delete on all devices)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>SECURE VOICE/VIDEO/CONFERENCE CALLING</td>
<td>Voice/Video</td>
<td>Voice2</td>
<td>Voice/Video/Conf</td>
<td></td>
</tr>
<tr>
<td>SCREENSHOT DETECTION, NOTIFICATIONS</td>
<td>No</td>
<td>✓</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>SYNC MESSAGES ON PHONE AND PC</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>KEY VERIFICATION (verify conversation participants)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>GITHUB.COM</td>
<td>/signalapp</td>
<td>/Wickrinc</td>
<td>/wireapp/wire</td>
<td></td>
</tr>
<tr>
<td>COST</td>
<td>Free</td>
<td>Free</td>
<td>$5 per user/month</td>
<td></td>
</tr>
</tbody>
</table>

NOTES: 1 Open code but not distributed via open-source license. 2 Wickr Pro, for $25 per user per month, includes voice, video and conference calls. The Pro version supports secure rooms for teams and projects and the capability to set expiration times for all messages.
Blind Faith

Several law firms have embraced blind recruiting as a means of promoting diversity, but does it work?

By Danielle Braff

Could the résumé become an anachronism? At some law firms, particularly in Canada and the United Kingdom, hiring partners have embraced “blind recruiting,” removing identification details from candidates’ résumés and applications as a means of eliminating potential bias and promoting diversity.

Following the lead of accounting firms such as Deloitte and Ernst & Young, as well as governmental and financial institutions in Australia, some firms are even using programs specializing in removing information from résumés based on hiring goals.

For example, if a firm is trying to eliminate a bias toward hiring male attorneys, it can filter out résumés from male applicants. If a firm is concerned about hiring too many lawyers from privileged backgrounds, it can rid the résumé of descriptive hobbies.

In July, Lenzner Slaght Royce Smith Griffin, a Toronto law firm, announced it would start using blind recruiting for its summer associates. The firm, which has about 60 lawyers and typically hires between five to eight summer associates, said it would use software to remove an applicant’s name, according to the Canadian Lawyer. The firm expressed hope that, between this and subconscious bias training, interviewers would speak with and hire a more diverse crop of law students—and that other firms in Canada would follow its lead.

Some UK law firms have been using blind recruiting for several years. It “was incorporated to help combat any unconscious biases that interviewers may bring into the process,” says Catherine Morgan-Guest, a graduate recruitment manager at Macfarlanes based in London.

Macfarlanes, which has more than 300 lawyers, introduced blind recruiting in 2014. When recruiting for the new trainee intake, the graduate recruitment team sees all the résumés, but the assessors on the assessment days don’t even get to glance at them. “Three-quarters of the assessment day is conducted CV-blind, including the written, group and in-tray tasks,” Morgan-Guest says. “This means that a large part of a candidate’s assessment is based on their actual performance on the day, which we believe promotes greater fairness.”

A firm spokesperson says there’s been an increase in diverse candidates going through to assessment days, with this past September’s trainee intake expected to be the most diverse to date.

Clifford Chance has started doing blind interviews in its London office, meaning the interviewers don’t see information about the candidate before the interview.

“This is to reduce any potential for bias during this stage,” says Laura Yeates, head of graduate talent at Clifford Chance.

“We need to always make sure we hire the very best candidates, regardless of the institution of study, degree discipline or background.”

Since it adopted this approach in 2014, Yeates says, it’s seen the number of institutions from which it receives applications—and made hires from—an increase.

A firm spokesperson says one year after adopting blind recruiting, the firm hired trainees from 41 different education institutions—a rise of nearly 30 percent compared to the previous year.

NOT SO FAST

In an October 2016 study, résumés from fictitious students at nonelite law schools were sent to more than 300 law firms in 14 cities, assigning signals of social class background and gender to otherwise identical résumés. The higherclass men received significantly more callbacks than anyone else.

Names are also important. In a 2003
study, University of Chicago and MIT researchers wrote fake resumés with the same qualifications but gave half black-sounding names and half white-sounding names. The ones with white names had 50 percent more interview requests than those with black names.

Likewise, a study published in 2015 found, among other things, when getting interview requests and callbacks from employers, candidates with black-sounding names from top universities did about as well as those with white names from less selective schools.

With a mission to eliminate hiring bias, software company GapJumpers has created a program that lets companies make an online test based on skills required for a law firm’s job. Instead of viewing the resumé, a firm sees applicants’ scores and can select applicants based on the scores. Some companies that have used the program include Adobe, Dolby Laboratories and Mozilla.

Still, not everyone is convinced. In June 2017, the Australia Public Service announced it would pause its blind recruiting program after finding it did not result in a more diverse workforce.

“We anticipated this would have a positive impact on diversity—making it more likely that female candidates and those from ethnic minorities are selected for the shortlist,” said Michael Hiscox, a professor at Harvard University who oversaw the study, to various media outlets. “We found the opposite—that de-identifying candidates reduced the likelihood of women being selected for the shortlist.”

Meanwhile, in the United States, blind recruiting runs counter to the mentality at many firms. “When considering a candidate to hire, we must ensure that the candidate possess[es] the skills and experience necessary to properly handle the case for our clients,” says Moses DeWitt, managing attorney at the DeWitt Law Firm, an eight-attorney firm with offices in Tampa and Orlando, Florida.

Because law schools in the United States are ranked by tier, he says, his firm may be less likely to consider a candidate from a lower-tier law school—and clients might not want to retain a firm with numerous attorneys from lower-tier schools.

“Ultimately, it is the on-the-job performance that matters,” DeWitt says. “But as an employer, we need some criteria to evaluate a candidate to determine whether the candidate would be appropriate to handle matters on behalf of our clients.”

“We need to always make sure we hire the very best candidates, regardless of the institution of study, degree discipline or background.”
—Laura Yeates

The quickest path to acquiring new clients.

More Clients. Less Complicated.
866.344.8852 | ScorpionLegal.com
SUPREME

BY STEPHANIE FRANCIS WARD

There will be enough women on the Supreme Court when there are nine.

RUTH BADER GINSBURG
From shirts to action figures to movies and an album, Justice Ruth Bader Ginsburg has become an unlikely pop culture icon.

On the website Etsy, which sells crafts and vintage items, typing “Ruth Bader Ginsburg” into the search bar yields more than 1,000 results.

You can buy a birthday card with the associate justice’s image and the phrase “small and mighty” written in pink. There’s also a tank top bearing her stern visage and “I dissent” written underneath. There are posters of her as Rosie the Riveter, peg dolls of her in full judicial regalia and even prayer candles portraying her as “the Patron Saint of the Supreme Court.”

If Etsy isn’t your thing, you can find a Ginsburg action figure on Kickstarter, complete with gavel, pointing finger and her “iconic jabot,” a frilly, fancy-looking collar perfect for making “fashion and judicial statements.” The initial funding goal was $15,000. As
of September, it had raised well over $600,000. "She is a rock star. She is an inspiration. She is constantly fighting. She is brilliant and fearless," the introductory video to the Kickstarter page states. "She is an icon."

The items aren’t all kitschy. There are plenty of posters, coffee mugs and shirts featuring inspirational and even strident quotes from her speeches and opinions. One oft-used line came from an interview she gave shortly after Sonia Sotomayor was nominated to the Supreme Court in 2009: "Women belong in all places where decisions are being made." Another popular one for product designers is: "Fight for the things you care about."

That latter quote was from a 2015 luncheon at the Radcliffe Institute for Advanced Study at Harvard University in Justice Ginsburg’s honor. Oftentimes, these products will leave off the last part of Ginsburg’s sentence, which was “but do it in a way that will lead others to join you.” That outlook may explain why Ginsburg has become a cottage industry, generating countless products—none of which she has likely endorsed but has often been a good sport about.

And that’s just the tip of the iceberg. There is a music album inspired by her life story. There are websites and memes that celebrate her jurisprudence, her fiery dissents and her dedication to civil rights, gender equality and social justice. There’s even a recent documentary and an upcoming Hollywood film chronicling her long and storied career as a litigator fighting on behalf of gender equality.

That tireless devotion to doing what she believes is right is one reason why Ginsburg has emerged as an unlikely pop culture icon. Ginsburg, who became only the second woman to serve on the U.S. Supreme Court when she was appointed by President Bill Clinton in 1993, has built a career overcoming the odds. Prior to becoming a federal judge, she argued six gender discrimination cases before the high court, winning five. Much like her celebrated predecessor on the Supreme Court, Justice Thurgood Marshall, Ginsburg’s litigation success and subsequent judicial career has led to her being perceived as a civil rights icon. That she has crossed over into the mainstream says a lot about where this country is today, as well as what kind of heroes people are looking for.

Indeed, you can be an upper middle-class, a suburban stay-at-home mom, an urban graduate student who identifies as genderqueer/nonbinary or a rural America retiree who voted for Donald Trump and still admire Ginsburg, according to marketing experts, who say that her appeal with various groups is unique. And the attention the Me Too movement has brought to sexual harassment and rape has made many more people interested in speaking about gender discrimination publicly—issues Ginsburg has been addressing and fighting for decades.

“She’s our Venn diagram of feminism. She’s relatable because she’s fighting for what she cares about, but she’s not doing it in a way that’s off-putting, and anyone can relate to.” – COURTNEY VICKERY
not doing it in a way that’s off-putting, and anyone can relate to it,” says Courtney Vickery, an Etsy retailer based in San Francisco whose wares include enamel push-back pins, with a line drawing she made of Ginsburg’s face and the words “I dissent.”

HOLDING OUT FOR A HERO
Ginsburg’s transition to pop culture figure began before Trump took office.

In 2013, a Tumblr meme of Ginsburg wearing a skewed crown and one of her trademark jabots while bearing the moniker of “the Notorious R.B.G.” went viral. The image was inspired by a photo of the late rapper Christopher Wallace, also known as “the Notorious B.I.G.”

Shana Knizhnik, a former New York University law student, created the meme in response to the Supreme Court’s decision in Shelby County v. Holder, striking down a portion of the Voting Rights Act of 1965 that required certain jurisdictions to get preclearance from the U.S. Department of Justice before being allowed to change their voting laws. Feeling outraged, Knizhnik was inspired by a pithy line in Ginsburg’s dissent: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

Sales for items featuring Ginsburg have picked up since Trump took office, say Vickery and other online sellers. And marketing experts say that the January 2017 Women’s March on Washington also played a role in the growing popularity of Ginsburg merchandise. A worldwide event that attracted at least 3.2 million people in the United States, many participants wore clothing and accessories expressing their anger about Trump, who had been captured on video talking about grabbing women by their genitals, which he later described as “locker-room talk.” Additionally, participants cited specific complaints about the Trump administration including exceptions put in the Affordable Care Act to cut no-cost contraceptive coverage, freezing an Obama administration equal pay initiative and ending asylum protections for immigrants who experienced domestic violence in their countries.

Ginsburg, with her small, frail-looking stature and genteel demeanor, presents an ideal role model for people who want to express their disagreement with the current administration without appearing completely disagreeable. The justice rarely, if ever, appears angry or flustered, even when she’s reading one of her infamous dissents from the bench while wearing her dissent jabot, a black velvet variation with jeweled studs that she wears whenever she disagrees with the majority.

Vickery, a commercial illustrator who has designed for the retail chains Hot Topic, Urban Outfitters and Claire’s Accessories, says she designed the “I Dissent” Ginsburg pin the night before the 2017 presidential inauguration as a way to deal with concern about Trump becoming the country’s president.

After all, it was an issue that Ginsburg herself seemed concerned about. During a 2016 CNN interview, she described then-presidential candidate Trump as “a faker,” who “really has an ego.” Trump complained through a series of tweets, and the justice issued an apology statement the next day.

Monique Karlov, a Washington state Etsy retailer, sells jabots inspired by the one Ginsburg puts on for her dissents. A former pharmacy researcher, Karlov wore one of her jabot pieces to the Seattle women’s march.

“I think people are so frustrated...
with the current administration and everything that is going on. To have something you can wear that’s bold and attractive, I think that’s a way of making a statement without actually having to say anything, or possibly engage without having an argument,” says Karlov, who estimates that she’s sold more than 300 jabots since 2017.

DEFENDER OF GENDER EQUALITY

“People are hungry for a hero, and Justice Ginsburg fits the bill for many people,” says Betsy West, who with Julie Cohen directed and produced the May 2018 documen-

tary RBG, distributed by Magnolia Pictures. It opened May 4, and according to the Wall Street Journal, earned $7.9 million the first month of release. A movie based on Ginsburg’s life, titled On the Basis of Sex, is set for release on Christmas Day, starring Academy Award nominee Felicity Jones as the justice.

In the documentary, Ginsburg talks about her mother, Celia Bader, who died of stomach cancer just before her daughter graduated from high school. Besides teaching her daughter to be independent, Celia Bader said that she should be a lady, and being a lady meant that letting people see you angry doesn’t accomplish much, the justice explains in the film.

Ginsburg had plenty of reasons to be angry. She had enrolled at Harvard Law School in 1956 and had been selected for law review before she decided to transfer to Columbia Law School after her husband, Martin Ginsburg, got a job practicing law with Weil Gotshal & Manges in New York City. At Columbia, Ginsburg continued her stellar academic career, joining law review and graduating tied for first in her class in 1959. Despite those achievements, Supreme Court Justice Felix Frankfurter refused to hire her as a clerk, citing her gender. And following a clerkship with Judge Edmund L. Palmieri of the U.S. District Court for the Southern District of New York, she received no private practice job offers, presumably because she was female.

“I’m sure Ruth Bader Ginsburg has been angry about things. When she faced coming out of Columbia and not getting a Supreme Court clerkship or a job at a top law firm, how could you not be annoyed?” West points out. “She figured out a way to get past her anger and strategize her way around it.”

The documentary film crew asked Ginsburg about arguing gender discrimination cases in front of the Supreme Court, and what she thought when some of the justices—then all men—made flippant remarks about women’s equality. In an often-shared story, she replied that her job was not unlike that of a kindergarten teacher, calmly encouraging the court to think about how they would feel if a loved one experienced something like her clients did.

Also, she sometimes used men as plaintiffs, to show the Supreme Court that the case in front of them was not just a women’s issue. Her approach has been somewhat different than that of other famous feminists—bell hooks, Gloria Steinem and Betty Friedan—whose images may not sell to as many different audiences as Ginsburg’s.

“She probably appeals to a lot of soccer moms as somebody that stands up for something and is tough-minded, but still capable of liking people that are different than her, and hating men is not part of her mantra,” says
Michael Solomon, a marketing professor at Saint Joseph’s University. His research focuses on branding and the symbolic aspects of products.

Another pop culture comparison could be made to Hillary Clinton, who like Ginsburg, has inspired many pieces of merchandise. But some of the items don’t portray the former first lady, U.S. senator and secretary of state in a positive light. “Hillary Clinton suffered from a horrible affliction with some people just hating her. It was for many reasons other than the fact of who she is or was,” says Mary Meehan, co-founder of the consumer research consulting group Panoramix Global. Meehan adds that because Ginsburg has not run for office, she hasn’t been in the public eye as often as Clinton.

Day O’Connor. The majority of these things include Ginsburg and focus on all four of the Supreme Court’s female justices together.

While the current Ginsburg zeitgeist can be traced back to Knizhnik’s 2013 Notorious RGB meme and her 2015 co-authored New York Times best-seller, Notorious RBG: The Life and Times of Ruth Bader Ginsburg, the roots of this pop culture explosion arguably began approximately a decade before. Court watchers noticed the justice’s writing becoming bolder and more critical about other justices’ rulings when she thought they were wrong, starting with her dissent in Bush v. Gore. The retirement of Justice John Paul Stevens in 2010, leaving Ginsburg as the most senior liberal justice, could have brought the change, Karen Ellen Leve wrote in a 2014 Seton Hall Law Review article. The piece also suggested that her writing change may have come because Ginsburg, 85, was concerned there was a rise in judicial activism on the Supreme Court, and she wanted to draw the public’s attention to that.

Ginsburg’s age may also figure in with her increasing popularity, as older people are becoming more celebrated, say some academics. Irving Rein, a communications professor at Northwestern University, compares Ginsburg to Sister Jean Dolores Schmidt, the 98-year-old chaplain for Loyola University Chicago’s men’s basketball team. She gained notoriety when the team made it to the 2018 NCAA tournament, and like Ginsburg, Sister Jean’s image has been featured on T-shirts and pins.

Other’s point to Ginsburg’s celebrated marriage to Martin Ginsburg.
"As compassionate as she is about feminism, she always seems to have good things to say about her husband and her relationship to him," says Lynn Kahle, a professor emeritus of marketing at the University of Oregon.

Martin Ginsburg died of cancer in 2010. A successful tax attorney, he later joined his wife as a professor at Columbia Law School, which he left in 1980 when she was appointed to the U.S. Court of Appeals for the District of Columbia.

He was also known for his cooking skills, and in his honor Supreme Court spouses created a cookbook titled, *Chef Supreme: Martin Ginsburg*. It includes a photo of the Ginsburgs together, with the justice smiling broadly, while Martin looks at her, grinning. She wears her judicial robe and a white jabot with ruffles, and he’s in shorts and an apron, with a kitchen towel neatly tucked in at the waist string.

**A WOMAN OF SUBSTANCE**

"Her ability to do things that are a bit unexpected—and do them gracefully—has been a big plus for her reputation. I also think Justice Ginsburg has a little bit more of a sense of humor she can play off of," Kahle says.

That sense of humor was captured in the documentary, when the film crew played Ginsburg a *Saturday Night Live* clip with cast member Kate McKinnon portraying her on "Weekend Update." The character dances around, sometimes in a sexually suggestive way, and makes snide comments called "Ginsburns."

Filmmaker Cohen says that they’d ask Ginsburg’s children, Jane and James Ginsburg, what their mom thought of the character, and were told that she didn’t watch television, other than *PBS NewsHour*. The film crew wasn’t sure how the justice would react to the portrayal, Cohen says.

“She loved it. Then she said: ‘What is the name of this actress? She is very good.’” Cohen adds. Ginsburg even told National Public Radio in January that she would like to use “Ginsburn” on her colleagues sometimes.

When asked by the *ABA Journal* in June what she thought of the various things one can buy that bear her image, a Supreme Court public information officer responded that Ginsburg was very busy with the term wrapping up, and “regrets she must decline.” The justice does appear to support some recent offerings related to her, including a new book by her personal trainer Bryant Johnson. She wrote the foreword to *The RBG Workout: How She Stays Strong ... and You Can Too!* explaining that Johnson helped her get in better shape following a 1999 battle with colon cancer and a 2009 pancreatic can-

**POP CULTURE JUSTICE**

Another item created by people who know the justice is *Notorious RBG in Song*, an album released in June by her son, James, who founded and runs the nonprofit classical music label Cedille Records. Most of the music on the new release was composed and performed by his wife, soprano Patrice Michaels.

The album was inspired by songs that he and his sister, Jane, a Columbia Law School professor, had commissioned for their mother’s 80th birthday. It also has new pieces, including “Celia: An Imagined Letter from 1949.” Michaels wrote it as a letter Celia Bader would have written her daughter at camp.

Other songs touched on school phone calls about James’ third-grade hijinks and a farewell love letter Martin wrote to his wife, which was found in his hospital room.

“You are Searching in Vain for a Bright-Line Solution,” an aria written by the composer and lyricist Derrick
Wang, for his 2015 opera *Scalia/Ginsburg*, is also on the album, and sung by Michaels. In the liner notes, she describes her mother-in-law as “Ready. Considerate. Laser-focused on ‘doing the best I can every day.’”

In the liner notes, James mentions the 2013 Tumblr meme started by Knizhnik. “It’s amazing to see how much the meme has spread in the last five years as Mom has been propelled from ‘regular’ Supreme Court justice to ‘pop icon,’” he wrote. Ginsburg, for her part, seems to have embraced the “Notorious” moniker. When asked about the comparison to the Notorious B.I.G., Ginsburg jokingly reminded *Late Show* host Stephen Colbert in March that she and the famed rapper were both “born and bred in Brooklyn, New York.”

You can find the album and the *Notorious RBG* book, as well as the workout book and a 2016 biography, *My Own Words*, which Ginsburg wrote with Georgetown Law professors Mary Hartnett and Wendy Williams, at major book stores and online retailers. But it’s unlikely you’ll find clothing items or accessories with the justice’s likeness at retail chains. That’s because most require affidavits or written contracts from wholesale vendors stating that the product doesn’t violate any copyright or right of publicity laws, says Lynne Boisineau, a trademark attorney who practices in Westminster, California.

“They don’t buy anything unless the seller has licensing rights. All the major retail chains and savvy smaller companies work that way, because you don’t want the headache,” says Boisineau, who has written rights of publicity articles for the American Bar Association’s *Landslide* and *GPSolo* publications.

Rights of publicity laws vary by state, she adds, and some have exemptions for public figures, providing there’s no implied endorsement. Also, she says that First Amendment protection for parody doesn’t cover something that’s defamatory or seen as a privacy invasion.

According to West, Ginsburg has been surprised by how much her image is used in pop culture. “In many ways, I think she’s embraced that as an opportunity to reach a wider audience about the message of democracy and the rule of law,” *RBG* documentary director West says. “I think she appreciates that opportunity.”
ABA MEMBER DISCOUNTS TO SMILE ABOUT
A PAYMENT SOLUTION JUST FOR ATTORNEYS
Lawpay is proud to be a top payment solution for the legal industry, giving firms a simple, secure way to accept online payments. Designed specifically for attorneys, LawPay correctly separates earned and unearned fees, and protects your IOLTA account from any third-party debiting. Join the more than 50,000 lawyers who trust their payments to LawPay and we’ll waive your monthly fee for three months.
LEARN MORE AT LAWPAY.COM/ABA

DELL DISCOUNTS JUST FOR YOU
Whether you’re looking for new technology at home or the office, Dell has laptops, desktops, notebooks, servers and more that fit your needs. ABA members save up to 40% on the everyday price of Dell branded electronics, accessories and systems.
LEARN MORE AT AMBAR.ORG/DELLSAVINGS

UP YOUR FIRM’S MARKETING GAME
If you’re looking to expand your firm’s marketing capabilities, consider investing in software and services from Marketing 360. Designed as an all-in-one marketing platform for law firms, Marketing 360 offers built-in call tracking and CRM integrations to manage your leads and cases. Plus, ABA members get a $250 discount!
LEARN MORE AT AMBAR.ORG/MARKET360

TIPS FOR AUTOMATING YOUR PRACTICE FROM MYCASE
Almost any aspect of your law practice can be automated. MyCase offers a free guide, exploring the ways in which you can streamline your practice through technology. Get yours today!
LEARN MORE AT AMBAR.ORG/FREEGUIDE
THE GOLDEN STATE IS SEEKING TO ASSERT ITS POWERS ON THE GLOBAL STAGE IN DEFiance OF TRUMP ADMINISTRATION POLICIES IT SEES AS HARMFUL
Last month, California hosted a major climate summit in San Francisco, bringing together leaders from around the world.

The Global Climate Action Summit drew representatives from states, cities, businesses and civil society to highlight measures taken against global warming and spur further action against the threat.

The event was a direct outgrowth of commitments made by California and other states and cities to back the Paris Agreement after President Donald Trump said in June 2017 the United States would withdraw from the landmark climate pact.

When California Gov. Jerry Brown announced plans for the San Francisco summit the following month, he told his audience the president “doesn’t speak for the rest of America” in deciding to pull out of the Paris Agreement.

Brown’s defiant posture underscores how U.S. states and municipalities are increasingly venturing into the realm of international affairs as they mobilize against Trump administration policies in areas such as the environment, immigration and human rights.

Beyond the political stakes, their growing assertiveness tests the conventional view that the federal government exercises exclusive control over U.S. foreign policy.
At the forefront of this states’ rights push is California. Sometimes viewed as a nation-state, it ranks as the world’s fifth-largest economy and boasts a population of about 40 million. The state also has a long history of social activism and independent-mindedness embodied by Brown.

In his role as the de facto national leader on climate change, the governor appears to be relishing the clash with Trump, even as he nears the end of his 40-plus years in public life. But how far can he thrust California into world affairs before running up against the limits of state power?

The Constitution expressly places responsibility for the conduct of foreign affairs with the federal government. And courts historically haven’t given states much room to maneuver on the world stage. But legal scholars suggest a combination of factors are emerging that favor the expansion of states’ power beyond their borders.

“In the midst of a long-running transformation in how foreign affairs are conducted and evolution in legal thinking about federalism’s boundaries, the time to challenge federal foreign affairs powers may finally have arrived,” argued David Freeman Engstrom, a Stanford Law School professor, and Jeremy M. Weinstein, a Stanford University political science professor, in “What If California Had a Foreign Policy? The New Frontier of States’ Rights”—a spring article in the Washington Quarterly.

They maintained that the very pace and scope of state-level activism in the Trump era is bolstering the legal and logistical foundation for states to claim an expanded role in global politics. They’re not the only ones taking notice.

“The posture state and local governments are taking is absolutely more aggressive than at any time in the recent past,” says Peter J. Spiro, a professor of international law at Temple University’s Beasley School of Law. “It's starting to approach open defiance.”

LOCAL INTERNATIONALISM

If Trump has galvanized far-reaching state and local action, it’s also the result of trends that have been building for some time. The idea that the United States must speak with “one voice” in foreign affairs, for example, has become less ironclad in the modern age.

While the U.S. Supreme Court has consistently favored a uniform approach, the United States’ evolution from fledgling nation to superpower has meant less risk of any one state causing harm in foreign relations that could lead to retaliation against the entire country.

More recently, factors including globalization, federal government inertia and the size and economic heft of individual states rivaling that of foreign countries have diluted the one-voice doctrine and fostered the growth of “local internationalism,” according to Michael J. Glennon and Robert D. Sloane, authors of the 2016 book Foreign Affairs Federalism: The Myth of National Exclusivity.

They pointed out that state and local governments in recent decades have entered into thousands of compacts with other nations, adopted a variety of international standards, and set up trade offices overseas, among other initiatives.

The Constitution bars foreign-state compacts without congressional consent. But the pace of these agreements—concerning topics including trade, environmental policy and women’s rights to more practical
matters such as firefighting—has only continued to increase.

“The compact clause is pretty much a dead letter,” says Spiro, with neither Congress nor the courts trying to stem the surge of state-level agreements.

That said, the Constitution expressly forbids states from making treaties with other nations. To avoid confusion, Spiro says foreign-state compacts are usually nonbinding and termed “memoranda of understandings,” “communiques” and the like.

Even without pursuing formal agreements, states have demonstrated their collective clout on the world stage. A prime example is the sanctions movement against South Africa’s apartheid system in the 1980s. Challenging President Ronald Reagan’s policy of “constructive engagement,” 26 states, 22 counties and more than 90 cities wound up taking economic action against companies doing business in South Africa.

More recently, according to Foreign Affairs Federalism, about half the states imposed some form of sanctions on Iran before President Barack Obama’s administration negotiated the deal under which the country agreed to limits on its nuclear program in return for sanctions relief.

But states’ wielding of trade bans or sanctions hasn’t always sat well with the Supreme Court. In 2003, the high court invalidated a California law requiring insurance companies to disclose details of policies held by Jewish people during the Holocaust.

The court held in American Insurance Association v. Garamendi that the law conflicted with an executive agreement President Bill Clinton signed with Germany and so was pre-empted by federal authority because it interfered with the president’s ability to conduct foreign policy.

Immigration lately has emerged as the most hotly contested battleground in what’s sometimes referred to as foreign affairs federalism. Perhaps that’s not surprising given the stricter controls on immigration pursued by the Trump administration, including the travel ban and its zero-tolerance policy on border control.

The travel ban imposed on several majority-Muslim countries triggered a state-led legal backlash that culminated in the Supreme Court’s June decision to uphold the ban in Trump v. Hawaii. The court’s 5-4 decision was guided by its traditional deference to the president on foreign affairs and national security.

But the immigration controversy pitting states most directly against the federal government stems from the administration’s directive to cut federal funding from sanctuary jurisdictions unwilling to assist federal immigration officials.

Municipalities including San Francisco, Chicago and Philadelphia have so far successfully challenged the order as an unconstitutional overreach of federal power. Yet the Constitution appears to give the federal government a strong claim on exclusive authority regarding immigration. Article I authorizes Congress "to establish a uniform rule of naturalization." And Engstrom and Weinstein wrote that the Supreme Court “has consistently held that this clause confers exclusive federal authority over admission, deportation and naturalization of noncitizens.”

But that hasn’t stopped states from playing an active role in shaping immigration regulation and policy. As a practical matter, the federal government lacks sufficient resources to handle immigration completely on its own, according to authors Glennon and Sloane, also professors of international law at Tufts University’s Fletcher School of Law and Diplomacy and Boston University School of Law, respectively.

Congressional gridlock and the deep political divide in Washington, D.C., on immigration have opened the door for the states to set policy themselves. “At a time when national progress on immigration reform seems locked in a state of perpetual inertia, state and local officials have stepped into the breach, enacting a host of immigration initiatives,” they stated in Foreign Affairs Federalism.

Take the California Values Act, also known as California’s “sanctuary state law.” Signed by Brown a year ago, the law limits local police involvement in deportations. Among other provisions, it bars local authorities from automatically transferring people to federal immigration authorities.

Since last year, California also has passed a raft of legislation that extends resources and benefits to immigrants. This includes the California Dream Act, which allows top students on the path to citizenship to apply for college financial aid, and a law to provide health care and other protections to undocumented children in the state.

Holly Cooper, co-director of the immigration law clinic at the University of California at Davis School of Law, says California has long been a leader in advancing immigration rights. “The state legislature has done more than the federal government for immigrants in
at least the last 20 years I've been a lawyer," she says.

But states historically also have taken the opposite approach, aiming to restrict rather than expand immigrant protections.

The best-known recent example is a 2010 Arizona law that, among other things, allowed police to check the immigration status of anyone they arrested or detained and made it a crime to be in the state without valid immigration papers.

The Supreme Court struck down key provisions of the law in 2012, relying on the pre-emption doctrine, derived from the Constitution's supremacy clause, which says federal law will prevail when federal and state laws conflict.

"Integrationist" laws, such as California's, have proven to be more successful against legal challenges than restrictive ones like Arizona's, according to Engstrom and Weinstein. That's because the high court generally has allowed states to regulate immigrants and immigrant services while leaving control of immigration to the feds.

Still, the widening conflict about sanctuary cities is severely testing that delicate balance and any straightforward application of the supremacy clause to resolve competing state-federal interests.

At the center of that dispute is Trump's January 2017 executive order denying federal funds to jurisdictions that limit cooperation with immigration enforcement. Lawsuits against the order have argued it violates anti-commandeering principles under the 10th Amendment by requiring state and local officials to enforce federal immigration law.

"The whole issue is that the federal government can't commandeering local resources to do its own work," says Eric Holder Jr., former U.S. attorney general.

Appeals at San Francisco, which, in a 2-1 decision in early August, agreed with a lower court that the order exceeded the president's authority.

While defending the executive order, the Trump administration also has gone on the offensive against California's pro-immigration legislation.

In March, it sued the state regarding the California Values Act and two other laws—one that bars private employers from voluntarily complying with immigration enforcement in the workplace and another that requires the state attorney general to investigate immigration enforcement efforts by federal agents.

The Department of Justice argues the laws are pre-empted by federal law and interfere with the government's ability to enforce U.S. immigration laws.

LEGAL HEAVYWEIGHTS GEAR UP

California's fierce immigration fight underscores another reason why it's poised to lead the way in foreign affairs federalism: It has the resources and legal muscle to back up novel policies and legal arguments.

For one thing, the state DOJ and municipal legal departments have built impressive litigation shops staffed with talented young lawyers.

"Even to this day, outside places like California, few localities have the capacity to conduct the kind of gritty, full-fledged litigation that Santa Clara County and San Francisco have done in the sanctuary cases," Engstrom tells the ABA Journal.

Williams says litigation is handled through its social justice impact litigation team, a dedicated unit of six to 12 lawyers (out of 85) that has brought lawsuits taking on topics such as the opioid industry and the Trump administration's elimination of net neutrality rules.

If that wasn't enough, the county counsel also brought on heavyweight San Francisco litigation boutique Keker, Van Nest & Peters as outside counsel on a pro bono basis.

"They brought a lot of heft to be able to move quickly and aggressively to file for the preliminary injunction
[against the executive order] right away,” Williams says.

At the state level, the California legislature enlisted its own ringer last year to help shape legal strategy to challenge Trump administration policies in the form of former U.S. Attorney General Eric Holder Jr.

The state Assembly ended its contract with Holder after four months, but he and his Washington, D.C.-based firm, Covington & Burling, have continued to represent the state Senate on a per-project basis. That includes handling amicus briefs on its behalf in the Chicago sanctuary city case and against the DOJ suit to invalidate the California Values Act.

California Attorney General Xavier Becerra also has emerged as a leader in the resistance effort. The state DOJ so far has filed 36 lawsuits against the Trump administration challenging environmental, consumer, health care and immigration policies.

The state, for example, has led legal action against the administration’s planned border wall, the travel ban and, more recently, its family separation policy at the U.S. border. It also has sued over inclusion of a question concerning citizenship on the 2020 U.S. census form and to protect health subsidies under the Affordable Care Act.

California suffered a setback in the Supreme Court’s travel ban ruling, and a federal judge rejected the attempt by the state and environmental groups to stop the government from building a border wall earlier this year. Becerra also has notched victories, but many cases are still ongoing.

To fuel its battles with the Trump administration, the state DOJ added about 20 attorneys earlier this year and was allotted an extra $6.5 million by the legislature for the 2017-2018 fiscal year. With 1,100 attorneys and 5,000 staff overall, it’s no small operation.

CLIMATE BATTLE

California’s war with Trump about climate policy hasn’t yet grabbed headlines like the immigration clashes. But it represents another key arena in which the state is aiming for a bigger role in international affairs.

Driving that effort has been Brown. Even before California joined with 15 other states and Puerto Rico to form the United States Climate Alliance to uphold commitments to the Paris Agreement, Brown had become an outspoken advocate for combating climate change.

In 2015—before the Paris Agreement—he helped create the Under2 Coalition, a nonbinding worldwide agreement that commits signatories to reduce carbon emissions to net-zero by 2050.

Last year, Brown was named a special adviser for states and regions ahead of the United Nations Climate Change Conference. That appointment came on the heels of a high-profile trip to China to meet with President Xi Jinping and other officials to forge closer ties on clean energy.

A New York Times story at the time noted it was unusual for a Chinese president to meet with an American governor in a formal setting in Beijing. It also came only a few days after Trump announced his intent to withdraw from the Paris Agreement.

A less prominent example of California’s global climate push is its cap-and-trade program for reducing carbon emissions, launched in 2013 and extended to include Quebec in 2014 and Ontario this past January. Under the linked program, carbon allowances and offset credits can be exchanged among participants in all three jurisdictions’ cap-and-trade initiatives.

Engstrom and Weinstein pointed out that Congress never objected to the Quebec linkage and so far hasn’t opposed the latest one to Ontario. That might matter for several reasons.

“Continued congressional silence would go a long way toward entrenching a norm in favor of cross-border state action, paving the way for other state efforts to step onto the global stage on climate issues and beyond,” they wrote.

The California Air Resources Board, which oversees California’s cap-and-trade program, is currently working with Oregon, Colombia and Mexico to get legislative
authorization for their own programs as well as collaborating generally with the European Union, Latin American countries and China, according to a CARB spokesperson.

“I see this as California continuing to assert that it can do more than the federal government is doing, even in terms of relations with other nations,” says Holly Doremus, a professor of environmental regulation at the University of California at Berkeley School of Law. “It has the market clout to do some of these things in a way that other states wouldn’t be able to.”

Despite the Trump administration’s broader trade dispute with Canada, so far it hasn’t acted against California’s cap-and-trade program with Quebec and Ontario.

But in August, the administration released a proposal that would dramatically roll back rules for U.S. automakers on fuel efficiency and greenhouse gas emissions. Starting in 2020, it would freeze mandates for making vehicles cleaner and more fuel-efficient, targeting one of the key policies for limiting climate change under the Obama administration.

Further, the new proposal challenges California’s right to set its own stricter tailpipe emissions standards. The state has long had a legal federal waiver under the Clean Air Act of 1970 to establish more stringent pollution rules, and at least 13 other states and the District of Columbia have adopted California’s tougher standards.

Becerra has vowed to fight the proposed rules issued jointly by the Environmental Protection Agency and U.S. Department of Transportation, with California and a coalition of other states preparing legal action against the Trump administration’s changes.

“That’s the key point of [environmental] regulatory tension right now between California and the United States,” Doremus says.

SEPARATION OF SPHERES

How that issue will resolve isn’t clear yet. But as California and other states tangle with the Trump administration, it hasn’t gone unnoticed that progressives are now carrying the banner of federalism and states’ rights.

Federalism has been viewed as the rallying cry of conservatives for a long time, reaching new heights under the Rehnquist court in the 1980s and 1990s and continuing to hold sway in the Roberts court.

Legal scholars suggest blue states such as California can take advantage of decisions in recent decades strengthening states’ autonomy—but to different political ends.

The sanctuary cases, for example, typically cite a pair of decisions from the 1990s—New York v. United States and Printz v. United States—to back up their anti-commandeering arguments under the 10th Amendment. In Printz, for example, the Supreme Court said the “separation of the two spheres [federal and state] is one of the Constitution’s structural protections of liberty.”

And in Murphy v. National Collegiate Athletic Association, handed down in May, the high court struck down a 1992 federal law that banned commercial sports betting in most states, finding it commandeered the power of the states by barring them from authorizing sports gambling.

Shortly after the ruling, U.S. District Judge Michael Baylson, the federal judge hearing the sanctuary case in Philadelphia, requested additional briefing on Murphy v. NCAA as it related to Trump’s executive order cutting federal funding to sanctuary jurisdictions. Plaintiffs counsel in the Chicago sanctuary case made a similar request.

As cases testing foreign affairs federalism reach the Supreme Court, federalism might prove to be just a political football, Engstrom and Weinstein acknowledged in their article, “What If California Had a Foreign Policy?”

But, “at the very least, a more forward-leaning state role on climate, trade and other problems with a global cast will create uncomfortable dissonance for conservative justices who have long laced their opinions with encomiums to federalism’s virtues,” they wrote.

Glennon of Tufts University tells the Journal that the Supreme Court could take up the issue of presidential policies that conflict with state-level foreign affairs initiatives. He points out that while the court sided with the executive branch in Garamendi, that 5–4 decision has since been widely criticized.

“With the scope of presidential power at issue in this administration, this is one issue that may be ripe for revisiting,” Glennon says.

Mark F. Walsh is a New York City-based freelance writer. He is a former reporter for ALM Media publications.
Medical Record Assembly is NOT a Law Firm's Core Competency

Attorneys practicing mass tort, personal injury, or any area of law relating to a plaintiff’s health, must assemble medical records. Even in a plain-vanilla PI case, the plaintiff’s firm must request and obtain medical records shortly after being retained, and, in the case of medical malpractice, records are often requested earlier.

This requires sending a HIPAA-compliant authorization to the medical providers’ offices, and follow-up communications are often necessary. Upon receiving the requested records, the law firm must sort and index those records and attempt to verify that a complete copy has been received. Once an entire copy of the medical records has been received, the firm must organize, review and summarize the records, as well as prepare a narrative.

The REAL cost of medical record assembly

Medical record assembly is costly, whether completed by an attorney, paralegal, law clerk, or administrative staff. In addition to actual salary, the costs to the employer include office space, computers, computer programs, insurance (health, malpractice, liability, etc.), benefits, and taxes, among other costs and expenses.

From an HR perspective, there is a cost associated with onboarding and training an employee in any or all of the skillsets needed to properly assemble medical records. The skillsets required to get medical records in order include (a) basic medical knowledge, (b) the ability to review and accurately summarize medical records and compose a narrative, (c) the ability to request, obtain, and assemble numerous records from multiple medical providers in a time efficient manner, (d) the ability to detect if, based on the records obtained, there are additional medical providers and records that were not identified, and (e) the ability to format the records in different templates, with hyperlinks to the records and a word summary.

These skillsets are costly and difficult to find in a single paralegal or lower cost employee, and your firm may need many people working together to adequately handle these specific tasks associated with medical record assembly. Another consideration is the potential imbalance between your medical record staff’s capacity and periodic high volume needs, causing both inefficiency and higher costs.

Why AcroDocz?

AcroDocz has a large, experienced team with medical and technical backgrounds who are able to efficiently obtain, assemble, index, review and summarize medical records. This summary includes a succinct chronological narrative, with hyperlinks to each provider’s records, so that the reader (such as the plaintiff’s attorney, opposing counsel, insurance adjuster, mediator, etc.) can easily understand the scope and extent of the injury or treatment and quickly access the relevant records.

The value proposition offered by AcroDocz is the reduction in the law firm’s costs associated with medical record assembly and completion of related tasks in a timely and efficient manner. Medical record assembly is AcroDocz’s core competency, and their services are available on either an hourly basis or as discounted packages.

AcroDocz is HIPAA and HITECH compliant, and maintains both cyber insurance and a Fidelity bond. AcroDocz’s staff follows strict, rules-based security protocols that are available for your review on AcroDocz’s website. They also provide a helpful Employee Cost Calculator so that you can calculate the REAL cost of your current, in-house medical records system versus the savings you will realize by using AcroDocz.

For a free trial you may contact AcroDocz through its website www.acrodocz.com/aba, through e-mail at info@acrodocz.com, or by calling (845) 218-1221.

Samuel Karpel is General Counsel of AcroDocz and is licensed to practice law in New York, New Jersey and Massachusetts. Mr. Karpel has extensive experience in the handling of medical records for use pre-litigation, during litigation, and trial.
MORE FIRMS JOIN 'BEST FOR WOMEN' LISTS, BUT STATISTICS ARE STALLED

BY LIANE JACKSON
It may be a sign of the times, but this year more firms than ever before vied for a spot on the 11th annual Working Mother Best Law Firms for Women 2018 list.

The list, disseminated to general counsels and law schools across the country, recognizes firms that are implementing best practices in retaining and promoting lawyers. For the past two years, the ABA Journal has worked in partnership with Working Mother Media to publicize the list to ABA members. This year’s list expanded to 60 firms from 50 for the first time since its inception, after an increase in participation.

“This year we went to 60 because we had so many firms coming in who were working so hard to be competitive that we thought it was really unfair to not recognize some of those firms,” says Suzanne Richards, director of research for Working Mother Media. “When you get to the top of the heap, you have firms separated by very few points. It made sense to us to expand to 60 to take into consideration some of the excellence we were seeing this year.”

The Best Law Firms for Women list includes seven firms making their debut. Dozens of others have been on the list for years. Participation is free, and Best Law Firms are selected from a pool of applicant firms with 50 or more lawyers in the United States. Firms answer hundreds of questions on a confidential questionnaire that covers topics ranging from flex-time policies to business development training to women in partnership. Firms aren’t ranked, and the top contenders are taken from the pool of those who have applied.

The survey covers dozens of other categories, including paid leave, compensation, pro bono work and workplace culture. All participants, whether they make the list or not, are provided data to help identify the areas where there is room for improvement, along with a complimentary scorecard giving detailed information on how the firm compares in critical areas to other applicants. If firms are interested in doing a deep dive on their survey results, they can purchase an in-depth analysis from Working Mother Media.

“We are seeing much more competition to be recognized for success in diversity, which reflects the competitive advantage in recruiting lawyers and clients that the most diverse firms enjoy,” says Subha Barry, president of Working Mother Media.

Barry attributes the rise in applicants to an increased commitment and focus on gender parity in the profession, but acknowledges that appreciable change in compensation and equity partnership levels is still elusive.

SLOW PROGRESS

“In 2007 when we started the Best Law Firms for Women analysis, the winning firms had 16 percent female equity partners. In 2018, the winning firms have an average of 21 percent female equity partners. We are pleased to see an upward trend, but the progress is still slow,” Barry says.

According to an April 2017 ALM Intelligence report, Where Do We Go from Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent, over the past five years women represented only 25 percent of the nonequity partnership tier and 17 percent of equity partnerships.

While firms are making marginal gains year over year on pay equity issues, they are increasingly taking more creative approaches to work-life balance, offering amenities that make it easier for women to handle responsibilities of family and office. And some have implemented programs that go beyond standard mentorship, with 57 percent of the firms offering sponsorship programs for high-potential female lawyers.

Some common benefits include flexible work arrangements, backup care and generous parental leave policies. All firms on the list offer reduced-hours programs, but Working Mother found only 9 percent of attorneys take advantage of the opportunity. On the other hand, the number of attorneys using remote work options has exploded, with 74 percent working outside the office, compared to 53 percent last year.

“The nut that’s been cracked is the ability to be effective working remotely,” Richards notes. “I think a lot has to do with technology. It really has been a big change. We like to see that because who does it impact—women, and we know that.”

Another standout: Women are taking more advantage of maternity leave this year compared to last—up to 17 weeks on average.

THE ME TOO EFFECT

The effect of the zeitgeist on firm participation can’t be discounted. As the Me Too and Time’s Up movements remain a media focal point, firm leaders at a minimum are cognizant of industry image and the threat of bad publicity. Many are seizing the opportunity to showcase positive numbers, or are scrambling to put policies in place to appear more female-friendly and demonstrate a commitment to women’s concerns.

“I think Working Mother initiatives—and for law in particular—applying for the list and getting the data has become more important than just bragging rights, which it used to be until pretty recently,” Richards says.

For decades there has been a steady drumbeat to increase representation and pay, particularly in
the partnership ranks. The issue has been studied and dissected ad nauseum, “top” firms have been listed and ranked, but attrition and inequity remain pervasive.

While every year has seen incremental increases, the number of women who remain at large law firms at the mid- to senior associate and partnership levels is drastically lower than the number who enter BigLaw practice. While women comprise 45 percent of the entering class of law firm associates, they account for approximately 19 percent of equity partners and slightly more than a quarter of lawyers over age 50. The number of female lawyers begins to fall precipitously after five years in practice, dwindling to minuscule proportions after 30 years.

(“Go to ABAJournal.com to see the results of a joint Working Mother Media/ABA Journal survey on gender bias in the workplace.”)

“This is a culture issue,” said Roberta Liebenberg, senior partner at Fine, Kaplan and Black and co-chair of the advisory council for the ABA Presidential Initiative on Achieving Long-Term Careers for Women in Law. “We need to change the culture of law firms. It’s more than, ‘You’ve made the list in Working Mother magazine,’ ” Liebenberg said during a panel discussion on the topic.

LIMITATIONS OF LISTS

Skeptics of the utility of the Working Mother list say rankings based on snapshots of firm life aren’t enough, and in fact, detract from real issues.

Stephanie Scharf, chair of the ABA Commission on Women in the Profession and founding partner at Scharf Banks Marmor, spent most of her career at large firms and has spent the last 15 years studying how women advance in the law.

Scharf says amenities such as shipping breast milk and remote working options are nice, but are window dressing and don’t directly impact the power structure at firms that keep women out of equity ranks.

“The [Best Law Firm] list is out of date and a little misleading because it focuses on policies and not results,” says Scharf, who also co-chairs the ABA initiative on achieving long-term careers for women in law. “One of the problems with this list is it’s stuck in time, focusing on superficial indicia for good firms for women, rather than the metrics that demonstrate a firm is serious about advancing women in secure jobs.”

In fact, one of the firms that made the list, Ogletree, Deakins, Nash, Smoak & Stewart, is facing a $300 million gender discrimination suit and has reportedly lost 10 female partners since the beginning of the year. The lawsuit, filed in San Francisco in January, claims women at the firm face discrimination in pay, promotions and conditions of their employment, and that female equity partners are paid on average $110,000 less than their male counterparts. Of the firm’s equity partners, known as shareholders, 18.9 percent are women. By this publication’s deadline, Ogletree had not filed a response in court, but in a May statement to the Journal, denied allegations of unfairness in its compensation system.

Working Mother Media notes the fact that a lawsuit has been filed does not automatically disqualify a law firm from the list.

“[The] Best Law Firms for Women initiative is a data-driven, statistical analysis of the policies, practices and results of U.S. law firms on diversity and inclusion where we require applicants to disclose lawsuits, arbitrations and federal administrative charges involving sexual harassment and discrimination,” Barry explains.

“The existence of a suit, allegation, arbitration or claim involving sexual harassment or discrimination is not a de facto mark against an applicant,” Barry continues. “The application specifically notes that firms that lose a legal action related to sexual harassment or discrimination during the consideration period for the Best Law Firms for Women initiative may be removed from the list for that year.”

But critics of the list say the self-disclosure requirement is part of the problem, and that there’s no way to verify information submitted by firms. Patricia Gillette, a leading expert on gender diversity and equality, is a critic of lists that rank best firms for women. She says firms are incentivized to portray themselves in their best, possibly false light, on an application, and there’s too much wiggle room.

The dissonance at Ogletree mirrors survey data from market research firm Acritas, which found among equity partners considered “stars” by in-house counsels, the mean average pay for men in that group was 27 percent higher than for women.

Gillette points to long-standing research that demonstrates pay equity and management representation are the key factors that determine success rates for women.

“These lists have done nothing to move the dial for women,” says Gillette, a 2018 ABA Margaret Brent Women Lawyers of Achievement recipient. “There’s an incentive to participate beyond wanting to do the right thing,” such as to boost marketing to clients and recruits.

Gillette spent her career in BigLaw, rising to partner and rainmaker in Orrick Herrington and Sutcliffe’s employment law practice before retiring after 40 years of practice. She is co-founder of the Opt-In Project, a nationwide initiative focused on changing the structure of
Patricia Gillette: “These lists have done nothing to move the dial for women.”

Law firms to increase the retention and advancement of women in the workplace.

Considering the poor track record for women at large law firms, Gillette says that in many ways ranking lists offer the “best of the worst.” She says there’s no way to know whether participating firms have massaged the data, the methodology used or the weight given to each factor.

“The better inquiry is measuring firms against things that we know actually make a difference and that we know matter—like the Mansfield Rule,” Gillette says.

The Mansfield Rule was created in 2016 during a Women in Law Hackathon hosted by Diversity Labs. Firms implementing the Mansfield Rule must affirmatively show at least 30 percent of the candidate pool for promotions and leadership roles includes women, LGBTQ and minority lawyers.

Rising to the Top

Best law firms that are truly committed to elevating the status of women are looking at the long game, and they recognize that you have to start somewhere. Most of these firms are researching and implementing policies to attract and retain women, along with increasing gender diversity on compensation and management committees. The latter should be an easy fix: Study after study shows that every additional woman added to a firm’s executive committee makes a real impact.

“Let’s face it: No one has improved radically in the percentage of women who are equity partners, but it’s entirely possible to extend your money in ways that will influence that,” Richards observes. “To not only look at the results, but the journey to get there.”

Some of the firms on that journey aren’t the biggest in the game. Many of the large boutique firms are not only keeping up with mega-firm competition in terms of salary and client base but are dwarfing their BigLaw peers in terms of gender parity. The Journal spoke with female partners at some of the firms on the list—big and small—with innovative practices that are paving the way for women in the profession. One commonality: the importance of women’s affinity groups to support, develop and promote women. Another: All of the firms have room for improvement.

Fish & Richardson

New to the Best Law Firms list, Fish & Richardson isn’t a traditional BigLaw firm, but it’s a global intellectual property powerhouse with about 400 attorneys and technology specialists across the U.S. and Europe. Its size may offer a nimble alternative to the multinational firm, allowing for easier integration of change and new ideas, with the firm stating it offers a “creative and inclusive culture, which values the diversity of people, experiences and perspectives.”

Fish was an early adopter of the Mansfield Rule. Two of nine on the firm’s management committee are women, and two of five on the compensation committee are women.

Teresa Lavoie, an equity partner at Fish’s Minneapolis office with a PhD in biophysical chemistry, has been at the firm for 17 years, since she graduated from law school. Lavoie’s practice centers on biotechnology and biopharma startups.

“I could always look and see there were women who had made it—women with children, women who were partners, women who had been there 20 years and were very successful,” Lavoie says. “In addition, the mentorship and sponsorship wasn’t just from women. Men worked closely with me on their clients and really wanted to help me advance through my career.”

Lavoie has three children and cites Empower, the firm’s women’s affinity group, backup child care and generous reduced-hours programs as some of the amenities that target women. She points to a partner in Boston who reduced her hours between 50 and 85 percent in recent years and still became an equity partner.

Jackson Lewis

Alison Lynch made partner in Jackson Lewis’ general employment litigation practice in 2014 after 10 years at the firm’s Orange County, California, office. She achieved equity partner status in 2017. Alternative work arrangements, reasonable billing requirements and remote work opportunities are a few of the benefits that have allowed Lynch to successfully manage a career and two children, ages 3 and 17 months.

“I love being a mom,” Lynch says. “But there’s a lot of guilt that goes along with that. Definitely moments when I wondered, ‘How can I stay here? Should I do something else?’ But the support of the firm showed me I can do it. I’m proud of...
my firm for providing that type of environment.”

Lynch took five months’ paid leave with her youngest, and she works remotely twice a week so she can do drop off and pick up from day care.

Jackson Lewis is another newcomer to the Best Law Firms list. Lynch believes that’s where the firm belongs, because for her, being able to look at firm leadership and see women in top positions motivated her career. She says she was given “every opportunity” at the firm, including speaking at conferences and going to pitches. Lynch says Jackson Lewis’ Women’s Interest Network helps motivate and sponsor women and assist them with mentorship, business development and pro bono work.

“It’s a very supportive and inclusive environment that allows you the freedom to pursue what works best for you and your family,” Lynch says.

WILEY REIN

Wiley Rein may be an outlier in that 53 percent of female partners hold equity at the firm. According to partner Rachel Alexander, that number has helped retention rates with female junior partners on the cusp of reaching equity, lifting numbers across the board.

The Washington, D.C.-based firm has 250 attorneys, and specializes in complex regulatory, litigation and transactional matters. Like Fish & Richardson, Wiley Rein is a smaller firm, but with an outsized reputation in the marketplace.

Alexander is a partner in the health care practice and co-founder of the firm’s Women’s Forum. She says firm culture made a noticeable shift in 2012, when management adopted a model that recognized teams over individual origination credit for determining equity.

“We did step away from a hard numbers perspective and looked at a totality of factors: who’s working on the matters; who has relationships with the client; who has recognized expertise in the community; who’s doing the management in-house,” Alexander says. “We moved away purely from rainmaker-hunter to recognizing that maintaining a client of some size and growing them and making them happy requires additional skill sets and a team.”

Alexander eschews the term work-life balance, but she credits the supportive culture that she says helped her be the best lawyer she can be, and she’s proud of the work the Women’s Forum is doing to provide leadership opportunities for women who need to raise their profile at the firm and help others build professional development skills.

“This is a team sport. Most of our GCs are men and know that implicit and sometimes explicit bias is real: Men prefer to give business to men; white men prefer to give business to white people. This can only change once white men interrupt those historic, systemic and inherited biases,” Alexander says.

She notes that having a firm where leadership top down supports the progress of women is key to success,
along with male allies inside and outside the firm.

“We are engaged in an evolutionary process, and there are places we could be doing more and better, but we’re asking the questions to find out where those are.”

**KIRKLAND & ELLIS**

Kirkland has been on the Best Law Firms list every year since 2012. So what steps is the firm taking to retain the recognition?

In 2017, Kirkland women held triple the number of committee leadership positions since the firm began tracking in 2009, which has correspondingly increased shifts toward family-friendly policies, programming and a culture of “teamwork, flexibility and collegiality.”

Linda Myers has been with Kirkland for 24 years, and a management committee member since 2010—one of two women out of 15.

Myers is a founder of the firm’s Women’s Leadership Initiative and is married to a Kirkland partner, and they made non-share and share partners the same years.

“Myers says that during her leaves, colleagues were always “psyched when I came back and super-supportive when I was gone.”

“A lot of it is, ’How bad do you want it?’” Myers says of her drive and determination. But “I would never, ever suggest that it was easy, or my way was the right way. It’s such a subjective thing. You have to do what’s right for yourself and your family, and it worked for me.”

LINDA MYERS: “Being involved with management has allowed me to bring issues to the forefront that I care about.”

Myers lauds state-of-the-art programs at Kirkland that help working mothers that weren’t in place when she came up, such as onboarding of women after pregnancy leave, remote work and backup child care. But she notes that during her leaves, colleagues were always “psyched when I came back and super-supportive when I was gone.”

“Davis Wright Tremaine is proud to be recognized as one of the Best Law Firms For Women.”
The ABA Journal is hosting and facilitating conversations among legal professionals about their profession. We are accepting thoughtful, nonpromotional articles and commentary by unpaid contributors to run in the Your Voice section of our website, ABAJournal.com.
The majority of ABA members will be seeing lower dues for fiscal year 2020 under a new membership model approved at the ABA Annual Meeting in August.

Under the new structure, there will be five price points for the basic level of dues-paying membership for fiscal year 2020, which begins in September 2019:

- $75 for new bar admittees, paralegals and lawyers through their first four years of practice.
- $150 for solo practitioners, retirees, government attorneys, lawyers in firms with five or fewer attorneys, judges, international lawyers and lawyers who have been in practice starting with their fifth year and through their ninth. Members currently known as “associates”—nonlawyers, legal professionals without U.S. licenses and students—would also fall into this category and be reclassified as “affiliated professionals.”
- $250 for lawyers in years 10 through 14 of practice.
- $350 for lawyers in years 15 through 19 of practice.
- $450 for lawyers in practice for at least 20 years.

If a member fits under multiple categories, they’ll qualify for the least expensive dues amount. For example, a solo who has practiced more than 20 years would pay $150, and a government attorney in their third year of practice would be charged $75.

Membership will continue to be free for students. Currently, new bar admittees are given a year of free membership, but that would end. Others could see increases of about $5 per year. But the majority of ABA members would end up paying less, with reductions from about $20 to more than $300.

There will continue to be additional charges for joining most individual sections and forums; but in another major change, it will be free for all members to join the Law Practice Division and the Solo, Small Firm and General Practice Division, colloquially known as GPSolo. Membership in these two divisions would be opt-in.

In Resolution 177 and an accompanying bylaw amendment, 11-12, the House provided the approval for the new dues structure as part of the new membership model approved by the Board of Governors.

**INCREASED VALUE**

The new proposal seeks not only to lower the cost of ABA membership for most members but also to increase the value of that membership. To that end, much of the ABA-produced material now publicly available will be put behind a members-only paywall. At the same time, other content that members may have had to pay additional fees for will be made available without cost, such as many LPD and GPSolo materials and an increased offering of free CLE.

The Center
Your ABA || ANNUAL MEETING REPORT

for Professional Responsibility would also make its ABA ethics opinions freely available to members, as well as its back catalog of online CLE.

An expanded CLE marketplace is another goal of the membership model, with entities being encouraged to produce more online CLE content. Some content would be free to members, while some would be for sale.

A redesigned ABA website, which is in the process of being rolled out, will serve a key function in the new model. In addition to partitioning content behind a metered paywall that would reserve that material for members, a major goal for the redesigned site will be to provide a personalized experience to each user.

When the ABA’s marketing consultant, Chicago-based Avenue, conducted its research into member needs, the ABA’s outdated website and the difficulty of finding information specific to an attorney’s practice were highlighted as an area for improvement. “There is broad agreement that high-quality content drives the ABA’s value,” Avenue’s report to the Board of Governors reads. “Yet there is also a consensus that our current content experience is difficult to navigate, especially for new members who are unfamiliar with the ABA section model, and it is overly reliant on traditional content forms and outdated technology.”

Under the proposal, real focus would be placed on tailoring the website for each user. Members would be able to see a dashboard with curated content relevant to their individual interests, practice areas and stage of career rather than having to search under a specific ABA entity’s page. Some specialized content would still require entity membership, but more would be made available to the base membership and content would be easier to find.

BUILDING BUDGETS

The changes to dues and to the membership model were made in response to a long-term decline in dues-paying members. Although the Standing Committee on Membership reports that the ABA saw a 2.6 percent increase in the number of members in 2018 compared to 2017, as of June only about 185,000 of the nearly 400,000 members paid dues. That is a 4.4 percent decrease from fiscal year 2017, and dues revenue was down by $1.3 million as of July 20.

“Part of the decline in lawyer counts is the ongoing impact of the nearly 30 percent decline in law school enrollment, which began in FY2011, and is now moving through the young lawyer pipeline,” wrote Tracy Giles, chair of the membership committee, in his July 25 report to the board.

As part of the restructuring earlier this year, the ABA reorganized under nine centers aligned with its four goals.
A BUSY 2 DAYS

House of Delegates urges end to mandatory arbitration of sexual harassment claims

By Lee Rawles and Lorelei Laird

After a year in which sexual harassment in the workplace has taken center stage, the ABA House of Delegates voted to urge legal employers not to require mandatory arbitration of such claims.

Resolution 300, a response to the MeToo movement, doesn’t seek to eliminate arbitration in all instances. Rather, it opposes mandatory binding arbitration that employees cannot opt out of and shields the matters from public disclosure. It was co-sponsored by the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Section of Civil Rights and Social Justice.

No ABA entity officially opposed it, but Resolution 300’s report noted that revisions were made in response to concerns raised by other entities.

The resolution was moved in the House by delegate Stephanie Scharf of Illinois, chair of the women’s commission. She said its broad support reflects the fact that “we are living in a time when men and women will no longer tolerate what really has been decades of staying silent about sexual harassment.”

She also noted recent research from the 2017-2018 Presidential Initiative on Achieving Long-Term Careers for Women in Law. Data cited in the resolution showed that 49 percent of female lawyers in America’s 350 largest law firms say they’ve had some kind of “unwanted sexual contact” at work.

“The ABA sets the gold standard in so many areas of law and policy,” said Scharf of Chicago-based Scharf Banks Marmor. “I ask you to set the gold standard here—that in our profession, victims of sexual harassment will choose how they wish to proceed and where.”

The resolution passed easily.

AID FOR PUERTO RICO

A nearly century-old shipping regulation is hampering Puerto Rico’s economic and physical recovery in the wake of Hurricane Maria last year, and Congress should enact legislation to permanently exempt the island, the ABA House of Delegates declared in another resolution.

The Jones Act, as the Merchant Marine Act of 1920 is known, places additional regulations and requirements on ships that travel between U.S. ports. It raises the cost of shipping, and every U.S. territory has been exempted from it, but Puerto Rico remains under its scope. “Estimates indicate that the Jones Act costs the Puerto Rican economy hundreds of millions of dollars every year, and in 2010 alone cost $537 million,” according to Resolution 10B’s accompanying report.

The presidents of the New York State Bar Association and the New York City Bar Association rose to speak in favor of the resolution. Michael Miller of the NYSBA said the resolution was the product of an unprecedented collaboration between the bar associations, and he joked that an issue would have to be important if the associations could put aside their traditional rivalry to advocate for it.

“Exemption from the Jones Act will not work miracles, but it would be a major step forward,” Miller said.

Resolution 10B passed overwhelmingly. The House also approved the following actions:

Resolution 116B urges that laws and policies be adopted to largely prohibit out-of-school suspension and expulsion for children in pre-kindergarten through second grade. The two exceptions cited would be if (1) the student poses an imminent threat of serious physical harm to self or others that cannot be reduced or eliminated through the use of age-appropriate school-based behavior interventions and supports and (2) the duration of the exclusion is limited to the shortest period practicable.

Resolution 116C urges courts and government entities to interpret Titles II and III of the Americans with Disabilities Act as applying to technology, and goods and services delivered via technology.

Resolution 101 amends ABA Model Rules of Professional Conduct 7.1-7.5,
Your ABA | ANNUAL MEETING REPORT

setting guidelines for lawyer advertising. Lucian Pera of Adams and Reese in Memphis, Tennessee, told delegates that in the decades since the 1977 U.S. Supreme Court decision in Bates v. State Bar of Arizona allowed lawyers to advertise their services, there’s been a "breathtaking variation in advertising rules" among states. The amendments were necessary to clarify and simplify these rules, said Pera, chair of the Center for Professional Responsibility.

Resolution 100B calls on Louisiana and Oregon to end the practice of permitting felony convictions by a less-than-unanimous jury vote.

Resolution 114 includes guidelines aimed at stopping incarceration of people solely because they can’t pay court fines and fees. The resolution adopts the Ten Guidelines on Court Fines and Fees from the ABA Working Group on Building Public Trust in the American Justice System. The guidelines are provided to jurisdictions as a best-practices guide to avoid creating debtors’ prisons in the ordinary course of administering justice.

Resolution 104C supports an interpretation of the Affordable Care Act that would include discrimination on the basis of sexual orientation and gender identity in the definition of sex discrimination.

Resolution 104D calls on jurisdictions to pass legislation providing job-guaranteed paid sick days and job-guaranteed family and medical leave.

Resolution 104E calls on jurisdictions to adopt rules preventing and addressing gender-based workplace violence, including sexual harassment, pregnancy discrimination, discrimination on the basis of sexual orientation or gender identity, and discrimination on the basis of domestic violence victimhood. It also asks employers to adopt robust policies against workplace gender violence.

Resolution 106A condemns "the harassment, arbitrary arrest and detention, arbitrary disbarment, denial of due process, other ill-treatment and killings of judges, lawyers, other members of the legal profession and their extended families throughout the world for serving in their designated capacities."

Resolution 106B recognizes groups outside the legal profession for the "important role that nonlawyer human rights defenders, journalists and others play in protecting justice and the rule of law" and saying the ABA "deplores attacks on those professions, as well as on individuals, aimed at silencing or intimidating human rights voices."

Resolution 118 supports transgender service members in the military and calls on the federal government "to recognize that service by persons who otherwise meet the standards for accession or retention, as applicable, in the United States Armed Forces should not be restricted, and transgender persons should not be discriminated against, based on gender identity."

Resolution 113 offers model rules of conduct for administrative law judges and urges jurisdictions to adopt ethical principles consistent with those model rules. State ALJs aren’t covered by judicial conduct rules for judicial-branch judges, but many states don’t have adequate rules for protecting their independence, North Carolina chief administrative law judge Julian Mann III told the House. Mann said ALJs are subject to executive-branch control, which puts them outside the ambit of state judicial conduct codes and makes them vulnerable to inappropriate interference from executive-branch officials. Most often, ethical rules that apply to lawyers apply to ALJs, he said, even though they’re not designed for people in judicial roles.

ROSENSTEIN DEFENDS ZERO-TOLERANCE IMMIGRATION POLICY

Deputy Attorney General Rod Rosenstein received a rock-star welcome during the opening forum of the ABA Annual Meeting.

Speaking to a standing-room-only crowd, Rosenstein received multiple standing ovations as he discussed the importance of preserving and promoting the rule of law while defending U.S. Department of Justice policies regarding efforts to combat foreign meddling in U.S. elections and the recent zero-tolerance policy on illegal immigration.

"The rule of law is indispensable to a thriving and vibrant society," he stated. "It shields citizens from government overreach. It allows businesses to invest with confidence. It gives innovators protection for their discoveries. It keeps people safe from dangerous criminals. And it allows us to resolve differences peacefully through reason and logic."

In a Q&A session with then-ABA President Hilarie Bass, Rosenstein affirmed his belief that zero tolerance was consistent with the rule of law, and that the DOJ was simply doing its job in enforcing the laws and treating everyone equally.

"It would be wrong to say we’re prosecuting everyone without regard to the law," said Rosenstein, who also stated that there were large numbers of people "blatantly violating the immigration laws of this country." He added that "if the facts of the law justify prosecution, then we’re committing the resources to ensure everyone is treated equally rather than picking and choosing who will be prosecuted."

CLASSIFIED ACTIONS

Rosenstein also assured those in attendance that federal agencies are doing a lot to combat foreign meddling in elections and propagation of fake news. "Because a lot of the information we learn is from classified intelligence, there’s a lot we don’t talk about publicly," Rosenstein said.

He noted that federal agencies—including the FBI, DOJ and Department of Homeland Security—are constantly briefing state and local election officials about cyberthreats and attacks. He also said federal agencies are taking steps to combat hacking of political campaigns and candidates and pointed to the July indictment of 12 Russian nationals by Special Counsel Robert Mueller as evidence of this commitment.

When asked about the opioid crisis and safe injection sites as a means of combating the ongoing issue, Rosenstein was dismissive. "It’s illegal; it’s a crime," he said. "I think you can anticipate that..."
if someone would try that in the U.S., they would face litigation by the Department of Justice and they wouldn’t have much of a defense.” Adding that while he was “100 percent committed” to prevention and treatment, he said he believed these sites sent the wrong message, giving illegal and dangerous drugs the imprimatur of government approval.

The embattled deputy attorney general has become a central figure in the ongoing probe into Russian interference during the 2016 presidential election. Confirmed in his post by a 94-6 vote in the U.S. Senate in April 2017, he soon found himself a fixture in the news. A couple of weeks after confirmation, he authored a memo recommending that FBI Director James Comey be fired. Less than 10 days later, he appointed former FBI director Mueller as special counsel overseeing the Russia investigation after Attorney General Jeff Sessions recused himself.

Since then, Rosenstein has been under near-constant pressure to fire Mueller amid reports that he could also be fired, and he has become a target of House Republicans.

Rosenstein basked in his warm reception while making light of some of his recent battles. Noting that Robert H. Jackson—attorney general from 1940 to 1941 before being appointed to the U.S. Supreme Court—once remarked about the unpleasantness of dealing with congressional inquiries, Rosenstein drew laughs from the audience when he stated that he could relate. —Victor Li

In spring 2016, Terri Carmichael Jackson was named director of operations for the Women’s National Basketball Players Association. She recalled the time as a bumpy introduction to the job of leading the WNBA players’ union during a panel titled “The Right (or Not) to Take a Knee: Social Activism and Freedom of Speech in Sports” at the ABA Annual Meeting.

Sparked by police shootings of unarmed black men and the killings of police officers around the country, the players Jackson represented wanted to make a statement. “They understood the power of their voice and the power of consensus,” she said. “And that’s really important and cannot be underestimated in a union setting.”

Specifically, her players wanted to wear T-shirts to demonstrate concern and solidarity against the violence. But to do so was a clear violation of the league’s uniform rules.

Even so, many players wore shirts that read “#BlackLivesMatter #Dallas5”—the latter a reference to five Dallas police officers killed in 2016—and “Change Starts with Us.” The players were fined $500 each before public outcry led the league to rescind the fines, according to a 2016 NPR story.

Jackson said this all happened within her first 90 days on the job. “Nobody could have prepared me for that,” she said.

As player protests and league responses continue to make headlines, the panel at the annual meeting made clear where in the legal realm these issues fall.

“We’re largely in the federal labor area, not federal constitutional law,” said Matthew Mitten, a professor at Marquette University Law School.

Cari Grieb, a partner at Chapman and Cutler in Chicago, and Mitten said some argue that President Donald Trump’s direct communication with NFL team owners, public subsidies for teams and the interpretation of stadiums as public forums may trigger First Amendment protections.

However, Grieb called these arguments flimsy. “The NFL is a private employer; they aren’t a state actor,” she said in reference to the First Amendment’s prohibition on the state to infringe on freedom of expression. “I don’t think First Amendment claims are going to hold up in court.”

While the appropriate forums for political statements are debated and litigated, the panel agreed that athletes’ demonstrations will continue over the next decade.

“I’m just so proud that we are in a space and time where folks are more engaged,” Jackson said.

—Jason Tashea

Eric Holder Jr. accepts the Thurgood Marshall Award from Robert N. Weiner, chair of the Section of Civil Rights and Social Justice.
Women’s experiences differ from men’s—and affect their longevity in law, survey finds

Women in law already face unique challenges, and a new study appears to show that a large number of female attorneys with more than 20 years of practice are leaving the profession.

That issue was highlighted during the ABA panel discussion “Long-Term Careers for Women in Law: What’s Pushing Women Out and What Can We Do to Keep Them in the Profession?” during the ABA Annual Meeting in Chicago.

Preliminary results from a survey of 1,300 respondents from the nation’s 350 largest firms, conducted in partnership with ALM Intelligence, underscored the disparate challenges, stereotypes and burdens female lawyers face compared to their male colleagues, even at the senior level. For example:

• 81 percent of women say they were mistaken for a lower-level employee, but this didn’t happen to men.
• 60 percent of women said they’d left firms because of caretaking commitments, compared to 46 percent of men.
• 54 percent of women said they were responsible for arranging child care, as opposed to 1 percent of men.
• 39 percent of women said the task of cooking meals fell on their shoulders, compared to 11 percent of men.
• 34 percent of women say they leave work for children’s needs, versus 5 percent of men.

“Too many great minds are leaving the profession,” said JoAnne Epps, executive vice president and provost of Temple University and former dean of Temple Law School. “Everyone needs to care about that—not just women, not just men. I really believe that what we bring is valuable, and our loss is significant. If people recognize it’s a crisis, it’s a step in the process to fix this.”

FIX THE WORKPLACE

Dismal longevity statistics for senior female lawyers prompted a groundbreaking focus on the issue by the ABA under the leadership of then-President Hilarie Bass. Her initiative, “Achieving Long-Term Careers for Women in Law” included focus groups and research to determine best practices to promote success for senior female attorneys.

“We don’t say ‘fix the women;’ we say let’s fix the workplace so these talented women have a good basis for staying in the legal profession,” said Stephanie Scharf, co-chair of the presidential initiative’s advisory council and a partner at Scharf Banks Marmor in Chicago.

Joyce Sterling, senior researcher for the presidential initiative and emeritus professor of legal ethics, said: “The set of social constraints had a much larger impact on women than men.”

But there was one common denominator: Men and women both had comparable overall satisfaction with the practice of law, a statistic that researchers say underscores that women don’t want to leave—they feel pushed out.

“Just having the data is critical,” said Roberta Liebenberg, co-chair of the initiative’s advisory council and senior partner at Fine, Kaplan and Black in Philadelphia. “We really hope to switch mindsets so law firm leaders start understanding the importance of retaining senior women lawyers. Because if senior women lawyers keep leaving the profession, we are never going to get over 20 percent equity partners because we won’t have the bodies to do it.”

—Liane Jackson
### FALL 2018 • Save the Date

For the latest info, go to americanbar.org and click on Calendar.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Location</th>
<th>Division/Section</th>
<th>Credit Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oct. 26</td>
<td><strong>Legal Skills Conference</strong></td>
<td>Washington, D.C.</td>
<td>Government and Public Sector Lawyers</td>
<td>CLE Credit</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Division</td>
<td></td>
</tr>
<tr>
<td>Nov. 1-4</td>
<td><strong>11th Annual Fall Institute and Council &amp; Committee Meetings</strong></td>
<td>Washington, D.C.</td>
<td>Criminal Justice Section</td>
<td>CLE Credit</td>
</tr>
<tr>
<td>Nov. 6-9</td>
<td><strong>ABA International Conference, Mexico City</strong></td>
<td>Mexico City</td>
<td>Section of International Law</td>
<td>CLE Credit</td>
</tr>
<tr>
<td>Nov. 7-10</td>
<td><strong>12th Annual Labor and Employment Law Conference</strong></td>
<td>San Francisco</td>
<td>Section of Labor and Employment Law</td>
<td>CLE Credit</td>
</tr>
<tr>
<td>Nov. 14-16</td>
<td>**2018 Professional Success Summit: Networking and Advancement for Racially and</td>
<td>Houston</td>
<td>Section of Litigation</td>
<td>CLE Credit</td>
</tr>
<tr>
<td></td>
<td>Ethnically Diverse Litigators**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nov. 15-17</td>
<td><strong>2018 Business Law Section Fall Meeting</strong></td>
<td>Washington, D.C.</td>
<td>Business Law Section</td>
<td>CLE Credit</td>
</tr>
<tr>
<td>Nov. 21</td>
<td>**ABA GPSolo Podcasts—Mastering Voir Dire and Jury Selection: Gain an Edge in</td>
<td></td>
<td>ABA Solo, Small Firm and General Practice Division</td>
<td>Cost: Free</td>
</tr>
<tr>
<td></td>
<td>Questioning and Selecting Your Jury**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dec. 10-11</td>
<td><strong>16th Annual Washington Health Law Summit</strong></td>
<td>Washington, D.C.</td>
<td>Health Law Section</td>
<td>CLE Credit</td>
</tr>
<tr>
<td>Dec. 18</td>
<td><strong>Bad, Bad Boys of Employee Benefits: Ethics Webinar</strong></td>
<td></td>
<td>Joint Committee on Employee Benefits</td>
<td>CLE Credit</td>
</tr>
</tbody>
</table>

**Podcast:**

ABA GPSolo Podcasts—Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury

**Cost:** Free
Your ABA || ANNUAL MEETING REPORT

Would Pope’s Rejection of Death Penalty Have Changed Scalia’s Opinion?

Just hours after Pope Francis declared the death penalty “inadmissible” in all cases, Cardinal Blase Cupich of Chicago urged elected officials and leaders to recognize their responsibility and vested interest “in defending the sacredness and value of every human life.”

The timing of the pope’s declaration and the cardinal’s remarks proved serendipitous for an ABA panel discussion, “Has the Death Penalty Become an Anachronism? The Future of a System That Has Evolved in the Opposite Direction from Our Standards of Decency,” during the association’s annual meeting. The panel was sponsored by the Section of Civil Rights and Social Justice.

Cupich, already a longtime opponent of the death penalty, said that if Justice Antonin Scalia—a devout Catholic—had lived to hear the pope’s proclamation, he might have reconsidered his position supporting capital punishment.

The cardinal’s comment came in response to moderator Ronald J. Tabak, chair of the section’s Death Penalty Committee. The Skadden, Arps, Slate, Meagher & Flom attorney quoted Scalia as saying, “For the believing Christian, death is no big deal. Intentionally killing an innocent person is a big deal. It is a grave sin.”

Of Scalia, Cupich said: “I think that his understanding of salvation has great limitations. It’s an atavistic view of salvation—that is, as individuals.”

ABA Presidents Share Views from the Top

New ABA President Robert M. Carlson, President-elect Judy Perry Martinez and outgoing President Hilario Bass each addressed the House of Delegates in the last days of the 2018 ABA Annual Meeting.

Carlson, whose term began at the end of the House session, emphasized his role as the steward of the ABA.

“It is not about me. It is about the American Bar Association,” said Carlson, a shareholder with Corette Black Carlson & Mickelson in Butte, Montana. “I will do everything in my power every single day to advance our association and fight for America’s lawyers and the public that we serve.”

Carlson noted that the ABA is the only national voice for the American legal profession, giving it the power and responsibility to speak for lawyers.

“Some may say we are driven by ideology, and they are absolutely correct,” he said. “Our ideology is the essential role of an independent legal profession and an impartial judiciary. We are the protectors of equal justice under law in a free, democratic society.”

Martinez is of counsel at Simon, Peragane, Smith & Redfearn in New Orleans, and her presidential term will begin in 2019. She called on the association to face its challenges with “smart, resourceful and agile thinking.”

“As to those challenges facing our association, you have already, in this House, undertaken actions during this meeting that will drive greater stability,” she said, referencing the new membership model approved by the Board of Governors and the House. “As to what lies ahead, it will be sacrifice. There must be focus. I will share my commitment to doing what is necessary so that there will emerge an even stronger association.” That ABA will, she said, have the capability to “assist our members as they embrace the changes that lie ahead in the legal sector” and “will help shape those changes.”

And Bass, co-president of Greenberg Traurig in Miami, told the House that she’s proud of all the association has accomplished during her year as president.

She put the main focus on the ABA’s active response to the separation of families at the nation’s southern border, which she saw personally in late June. She recalled her visit to the Port Isabel detention center in Texas, where mothers separated from their children were being held. Many had legitimate asylum claims, she said, but would happily have returned to the dangers they’d fled to get their children back.

“After listening to their heartbreaking stories, I gave them my personal commitment that the lawyers of America would not rest until every one of them was reunified with their children,” Bass said. “We are committed to ensuring that every one of these separated children and every one of their parents who want to make an asylum claim in court will have the legal assistance they need.”

“The ABA has never been more important in the U.S. and throughout the world,” Bass said. “It has been the greatest privilege of my life to have the honor of serving you as president.”
Immigration Lawyers Must Deal with ‘Manufactured Crisis’

Attorneys who’ve spent their careers concentrating on immigration law and child welfare have been scrambling to deal with the fallout of the Trump administration’s immigration crackdown.

Attorney General Jeff Sessions’ April announcement of a zero-tolerance policy for unauthorized border crossings and the family separations that followed seized public attention in the spring. But some immigration attorneys and child advocates noticed the effect of these policies much earlier.

“We started seeing these cases in September of 2017—the government was separating children in different parts of the border,” said Maria Wolftjen, founder and executive director of the Young Center for Immigrant Children’s Rights at the University of Chicago Law School.

But Sessions’ April directive to U.S. attorneys caught many other government agencies and nonprofits off guard.

“When zero tolerance was announced, this was actually new news for the individuals running the Office of Refugee Resettlement and the deportation officers, and policies and details were not in place,” said Anne Chandler, executive director of the Tahirih Justice Center’s Houston office. “This was orchestrated to be a manufactured crisis.”

Chandler and Wolftjen spoke as part of the ABA Annual Meeting panel “Families on the Precipice: Navigating the Separation, Detention, and Reunification of Families at the U.S. Border.”

Pro Bono Asylum Representation Project in Harlingen, Texas—the first inkling that the government’s immigration policies had changed came when her staff members went to conduct their usual screenings, referrals and “know your rights” presentations.

ProBAR traditionally serves adults and unaccompanied minors, but staff were suddenly encountering large numbers of children separated from their families.

“We are very used to working with children who’ve experienced trauma in the past, but these kids were—they may have experienced trauma in the past, they may have experienced trauma during their journey, but they’d just experienced a severe trauma that was perpetrated by the government against them when they were separated from their parent,” Jackson said.

“As a director, I had to do a lot of things to give our staff the tools to work with this different population that was experiencing a trauma unlike anything we’d ever seen before.”

In the immediate aftermath, the need was very specific: immigration attorneys with Spanish-language skills, Jackson said. But now a much broader range of volunteers are needed and being welcomed. ProBAR is also using an influx of donations and funds to add permanent staff positions, including for attorneys. Then-ABA President Hilarie Bass shared some of what she witnessed during a trip to Texas she made in June to meet with ProBAR and visit the Port Isabel detention center. Bass urged attorneys wanting to do pro bono work on behalf of immigrant children to go to ambar.org/immigrantchild to find out ways to assist.

Fluency in a foreign language is not required for attorneys to be helpful. “We’ll take you with your linguistic skills,” Chandler said. “We have a lot of interpreters who want cases. The reality is that, as has been described, this zero tolerance is ongoing.”

Later during the ABA House of Delegates meeting, the House overwhelmingly voted in favor of Resolution 119, adopting standards on the care and treatment of unaccompanied immigrant minors, and Resolution 10C, calling on Congress and the executive branch to end the separation of immigrant families and protect their legal claims.

Speaking on behalf of Resolution 10C, former ABA President Michael Greco of Boston recalled coming through Ellis Island from Italy with his family in 1950, when he was 7.

“It has occurred to me in the last few months, especially in the last few weeks, that might not have been here 13 years ago, taking the oath as president of the ABA,” said Greco, a retired partner from K&L Gates.

“We were fortunate. What is happening in this country right now, it is an abomination.”

—L.R. and L.L.
Behind thousands of successful cases, you’ll find The TASA Group.

When quality and variety matter, trust TASA when choosing an expert.

When you want the shortest route to the largest range of experts, think The TASA Group.

The TASA GROUP
Since 1987
The Best Source For Experts Worldwide

800-523-2319
experts@tasanet.com
TASAnet.com

Wolle (New Jersey). To view their biographies, go to ambar.org/DALresults.

2019 REGULAR STATE DELEGATE ELECTION
Pursuant to Section 6.3(a) of the ABA’s Constitution, 17 states will elect State Delegates for three-year terms beginning at the adjournment of the 2019 Annual Meeting. The deadline for filing petitions is Dec. 4. For rules and procedures, go to ambar.org/2019StateDelegateElection. If you are interested in filing or have questions, contact Leticia Spencer (leticia.spencer@americanbar.org, 312-988-5160).

2018 DELEGATE-AT-LARGE ELECTION RESULTS
The 2018 Delegate-at-Large Election was uncontested. The following persons were elected to three-year terms as Delegates-at-Large to the House of Delegates at the 2018 Annual Meeting: Hon. William C. Carpenter Jr. (Delaware), Kelly-Ann F. Clarke (Texas), Barry C. Hawkins (Connecticut), Llewelyn G. Pritchard (Washington), Andrew M. Schpak (Oregon) and Saul A.
ATTORNEY-ENDORSED MEDICAL EXPERTS
Find Experienced, Qualified, Credentialed Expert Witnesses for Free at:
ExpertPages.com

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

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

INSURANCE EXPERT WITNESS
Nationwide
Robert E. Underdown, ANW, MA, AIC, ARM
The Insurance Archaeologist®
Agent Standards, Bad Faith Claims
Claims Handling, Coverage Opinions
Insurance Industry Standards
Life Insurance Suitability Opinions
www.Insurance-Expert.com
Call for complimentary consultation 480-216-1964

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

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

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

DID YOU KNOW WE’RE ON INSTAGRAM?
FOLLOW THE
CREATIVE MINDS
BEHIND THE DESIGN
@ABAJOURNAL

OCTOBER 2018 ABA JOURNAL || 69
New Books from the Health Law Section

Cancer Rights Law
An Interdisciplinary Approach

Product Code: 5360144
List Price: $159.95
Health Law Section Member Price: $127.95

Also Available:

October is Breast Cancer Awareness Month

ORDER TODAY
ShopABA.org (800) 285-2221
@ABAPublishing @ShopABA @ABAPublishing
CONGRATULATIONS to Matthew Pagano of New York City for garnering the most online votes for his cartoon caption. Pagano’s caption, below, was among more than 175 entries submitted in the Journal’s monthly cartoon caption-writing contest.

“They are taking some pretty extreme measures against suspected cybercriminals.”
—Matthew Pagano of New York City

JOIN THE FUN Send us your best caption for the legal-themed cartoon below to captions@abajournal.com by 11:59 p.m. CT on Sunday, Oct. 14, with “October Caption Contest” in the subject line.

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

ABA Free CLE Series

Facing a CLE deadline this year?

Sign up for the ABA Free CLE Series — All Access Pass and receive registration alerts before every monthly webinar.

THE ABA FREE CLE SERIES FEATURES

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

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

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

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

Like us fb.me/AmericanBarAssociation
Join us linkedin.com/company/american-bar-association
Follow us @abaesq

LEARN MORE at ambar.org/freecle

OCTOBER 2018 ABA JOURNAL || 71
The San Francisco courtroom of Judge Michael Roche was crowded with gawkers the morning of Oct. 6, 1949. They awaited the sentencing of Iva D’Aquino, 33, a Japanese-American convicted of treason the week before. As a radio propagandist during World War II for Imperial Japan, she was known among American soldiers and sailors for her distinctively husky voice and excellent command of English as “Tokyo Rose.”

D’Aquino was an American, born Iva Ikuko Toguri in California in 1916 on the 4th of July. She graduated from UCLA with a degree in zoology and had hoped to become a medical doctor. Her parents, both Japanese immigrants, ran a grocery store in Los Angeles, and in December 1941 she was in Japan visiting her mother’s sister when Japanese planes attacked Pearl Harbor.

Precisely because she was American, Toguri found herself quarantined in Tokyo by the Japanese government. She had traveled not with a passport but a travel certificate issued by the U.S. State Department. When she tried to return to the U.S., readmission was denied. By many accounts, including those of Allied prisoners of war, she had faced immense Japanese pressure to renounce her U.S. citizenship but refused to do so. Thus, abandoned in wartime Japan with little or no familiarity with the language, she began taking a series of jobs until 1943, when she was recruited to be a host on a Radio Tokyo broadcast known as The Zero Hour.

Designed as propaganda, it featured popular big-band music and nostalgic cultural references intended to undermine the morale of American troops. English-speaking female voices portrayed their situations as helpless, loved ones as distant and the Japanese military as unstoppable. But to U.S. troops, the broadcasts provided both a welcome musical respite and a source of hearty ridicule.

In fact, there was no Tokyo Rose. The name was a generic moniker concocted by Americans to describe any of the dozens of female voices they heard during the wartime broadcasts. Toguri’s personal scripts usually referred to her as Orphan Ann or simply Ann. She always denied any disloyalty to the U.S., and by the end of the war, she had married Portuguese businessman Felipe D’Aquino and sought return to her homeland.

However, after an interview in which D’Aquino described being Tokyo Rose, she was taken into custody for more than a year before military investigators concluded she had done nothing treasonous. She again applied to return to the U.S., only to attract the attention of radio commentator Walter Winchell, who began a public campaign to have her charged with treason. In 1948, she was arrested in Japan and returned to the U.S. to face charges.

Racial animus against Americans of Japanese descent endured long after the war. Toguri’s mother had died during the family’s internment in Arizona. Her 12-week trial in San Francisco on eight counts of treason crackled with issues of allegiance. Witnesses gave conflicting accounts of her loyalties. Tapes of The Zero Hour were played to the jury, though none of the voices were identified as belonging to Toguri. Australian Charles Cousens, a former POW and Zero Hour producer, testified for D’Aquino, saying he created the broadcasts to be exactly the kind of farce U.S. troops perceived them to be.

After four days of deliberation, she was convicted on a single count of treason. The verdict was based on testimony by two witnesses, both of whom later recanted, that after the October 1944 Battle of Leyte Gulf, Toguri had uttered: “Orphans of the Pacific, you really are orphans now. How will you get home now that all your ships are lost?”

D’Aquino was sentenced to 10 years in prison and a $10,000 fine. She served six years before being released to work in her family’s curio shop in Chicago.

In 1977, with vigorous support from veterans’ groups and Japanese-Americans, she was pardoned by President Gerald Ford. She died in 2006 at the age of 90.
The right protection is the foundation of any strong financial plan. QuickDecision from New York Life speeds up approval for securing the vital life insurance you need. You can apply online for group term life insurance for group term life coverage up to $500,000 in minutes. There's no medical exam – just answer some questions about your health and other information. You’ll know if you’re approved in as little as one day.

The American Bar Endowment (ABE) is a not-for-profit public charity. We offer experience-rated group life and disability insurance plans from New York Life, exclusively to ABA members. ABE-sponsored insurance plans are designed to generate dividends, which you can choose to donate through a tax-deductible contribution to ABE. These contributions help support law-related research and public-service programs.

Find out as soon as today if you’re approved!

FOR DETAILS, VISIT ABENDOWMENT.ORG/QD OR CALL US AT 1-800-621-8981.

1 Underwritten by New York Life Insurance Company, NY, NY. Policy form GMR.
2 Dividends are not guaranteed.
3 Including features, costs, eligibility, renewability, exclusions and limitations.
Artificial intelligence now has a few thousand law degrees.

Introducing WESTLAW EDGE™. The most intelligent legal research platform ever.

WESTLAW EDGE