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LEGAL REBELS RISE

Regarding the article “Building It Up,” September, page 36, while the subjects of the article should be congratulated on discovering a niche and, hopefully, profiting from it, I found it interesting that few—if any—of them are still practicing law. Perhaps that should be the subject of a future article: When presented with an opportunity to prosper elsewhere, how many of us would cut and run? And why?

Steven Shulman
Melville, New York

MORE MOVIE TRIVIA

Regarding the reference to Anatomy of a Murder in “The 25 Greatest Legal Movies,” August, page 36, the novel was written by John D. Voelker (as Robert Traver). Not only was he a Michigan trial court judge, but he was also one of Michigan’s most esteemed supreme court justices and greatest authors on trout fishing.

John A. Scott
Traverse City, Michigan

CORRECTIONS

On page 42 of the September issue, photographer Sung Park’s name was misspelled. On page 72 of the September issue, Joan Berry’s name was misspelled. The Journal regrets the errors.
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America: The Resilient Land of the Free

Our nation confronts frequent challenges, but our institutions sustain us

Many Americans today, no matter what part of the political spectrum they occupy, believe American values face historic threats.

We do face challenges as a nation. At times, it seems that compromise is beyond reach, and our great experiment in democracy could falter.

But at times like this, it is important to remember that the powerful institutions of our democracy—an independent judiciary, the rule of law, free speech and a free press—have helped us weather political scandal and extremism that tested the central philosophies and traditions of America’s society.

From the xenophobic 19th century Know-Nothing Party; the corruption of Reconstruction, including the rise of the Ku Klux Klan; McCarthyism; the Watergate scandal and many other challenges—our institutions have been tested and strained. In the end, the rule of law prevailed. Our system of checks and balances held. When some checks failed to work, others ensured that our democracy was protected.

Our institutions are indeed strong, but they are not invincible. They still require the support and protection of the people to endure. As lawyers, we are required to be well-versed in civics and knowledgeable about the Constitution. Given this grounding in the Constitution and our duty to defend it, we have a special obligation to get involved and ensure that our institutions and rights emerge from the current challenges intact and unscathed.

This is especially important today, when our democratic institutions are attacked by some government officials and others who look to disrupt and mislead.

Our independent judiciary is one institution under assault. Yes, clashes between presidents and the judiciary have been a tradition in this country. Starting with Thomas Jefferson and including Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, through to Barack Obama, presidents have expressed dismay with court rulings. But these were battles between government branches fought mainly on constitutional grounds, not personal terms.

Disparaging judges with personal rhetoric has no place in our society and will only serve to erode the public’s confidence and trust in an institution that is a critical pillar of our democracy.

Attacks on free speech and a free press also have no place in our society. Criticism of citizens for exercising their right to dissent or be heard and calling the press the “enemy of the people” cannot be tolerated.

It is impossible to imagine our country without a free press and the right to speak freely. Even as technology has reshaped how these freedoms are exercised, these rights have proven to be resilient.

Both free speech and free press will be the theme of Law Day next May as we explore these freedoms’ importance and consider their future.

Another powerful institution of our democracy is free and fair elections. This month, we will go to the polls, where all eligible voters can express their voice to their representatives. But this institution also faces tests as foreign powers attempt to meddle in our elections and influence our choices.

All Americans have the responsibility to exercise their rights to speak out and to vote. Democracy is not served when the people do not participate. In the past 20 years, midterm election turnout has averaged under 39 percent, and we, as a nation, simply can and must do better.

If things sometimes seem hopeless, do not despair but act instead. As lawyers, we can accomplish this by teaching civics in schools, contributing pro bono time to support access to justice, defending our judges and institutions at the local level from political attack, and keeping elections honest and untainted.

Our country will endure, because citizens will continue to put in the work to sustain the institutions that uphold us. As Abraham Lincoln wisely said, “It is with your aid, as the people, that I think we shall be able to preserve—not the country, for the country will preserve itself, but the institutions of the country—those institutions which have made us free, intelligent and happy—the most free ... people on the globe.”
As Adolf Hitler rose to power in Nazi Germany, the first casualty was the rule of law. The Third Reich’s ensuing purge included systematically targeting “undesirables,” including Jewish lawyers, crippling their ability to practice law.

Lawyers Without Rights: The Fate of Jewish Lawyers in Berlin after 1933 by Simone Ladwig-Winters is a chilling portrait, through photos and narratives, of how Jewish lawyers and jurists were degraded and debarred as the Holocaust began. Attorneys were arrested, imprisoned or forced to flee the country.

The book, first published in 2007, describes the terrors experienced by Jewish attorneys, including Alfred Apfel, who was arrested and later fled to France after being labeled one of the “traitors to the German people”; Ludwig Barbasch, imprisoned for six months and stripped of his license; and Hans Litten, who spent years in concentration camps until his suicide.

Lawyers Without Rights is about remembrance and honoring Jewish lawyers during this time, and it is also a cautionary tale for the world today. To reach a wider audience, the book was translated from German by the American Bar Association this year in partnership with the German Federal Bar.

“Too many non-Jewish lawyers in Germany during the Nazi era stood by and were not vigilant,” says ABA President Bob Carlson. “That is the first lesson from the 1930s. We cannot do nothing. The slippery slope starts when the rights of lawyers to practice their profession and defend against oppression are
The book has a directory of 1,404 attorneys of Jewish origin during the war.

compromised.”

The German Federal Bar created the “Lawyers Without Rights: Jewish Lawyers in Germany under the Third Reich” exhibit in the late 1990s after researching the fate of Jewish lawyers during World War II.

The ABA partnered to bring the exhibit to the United States, where it’s been hosted by bar groups and law schools across the country. The exhibit has been shown in dozens of cities around the world, and there was an overwhelming response to release an English version of the book.

“The problem was the book we had was in German; now we have this translation. People are interested—that’s why we got this translation,” says Stephan Göcken, executive director of the German Federal Bar.

“The idea behind the book and exhibit is not only remembrance but also to let people think about the situation—can that happen again?” says Göcken, citing the rise of extremism around the world. “It’s important to bring this exhibit and give them a feeling and let them know what can happen if the rule of law is disturbed.”

Lawyers Without Rights also includes a biographical directory recounting the destinies of 1,404 Berlin attorneys of Jewish origin during the war. About half were able to emigrate; some stayed and survived. Many others died in concentration camps.

The book’s U.S. release will coincide with the 80th anniversary of Kristallnacht, the Nazi pogrom against Jewish people that happened from Nov. 9 to 10 in 1938. It destroyed businesses, synagogues and other properties, and it launched the first wave of the Holocaust.

The book’s publishers say it’s important that recollection of the widespread atrocities of Nazi Germany remain part of the public consciousness so that the lessons are never forgotten. Nor has it been in vain.”

In his foreword, U.S. Supreme Court Justice Stephen G. Breyer encouraged vigilance against the sort of “perpetual evil” revealed in Lawyers Without Rights, noting the law and the legal profession are the first lines of defense when the judicial system is attacked.

“It is important that we and future generations remember the misuse of laws in Germany and how it permitted a society to effectively purge a significant group of lawyers solely because of their religion, sending many in exile or to their deaths,” Breyer wrote. “It is about the misuse of law.”

—Liane Jackson
CROWDFUNDING CAMPAIGN BRINGS BOOKS TO TEXAS JAIL

PUBLIC DEFENDER SAW NEED AND WORKED FOR CHANGE

IN JUNE, Amalia Beckner asked her Facebook friends for help buying books for inmates at the Harris County Jail in Houston, where she works as a public defender. That post was shared with other friends, who shared it with their friends, until it took on a life of its own and the story landed in the newspaper. From there, things really took off. To date, about $5,500 in donations via Amazon.com have rolled in.

“I remember we got one $500 donation, and I just sat there with my mouth open,” Beckner says. “I was just shocked.”

For years, Beckner had been bringing her clients books from her own collection. She knew they were eager to read anything they could get their hands on, but the jail would only allow five books at a time per “pod” of more than two dozen inmates.

Through better book access, she saw an opportunity to expand her clients’ minds and maybe even give hope at the jail, where most of the inmates are awaiting trial and haven’t been convicted of a crime.

“Reading pushes you to think about your life and your choices and your relationships with people. It promotes introspection, it promotes processing your emotions, your past and what you’re hoping for,” she says. “I think that’s really important, especially for people who are locked up.”

When she put the request on social media, Beckner admits she felt uncomfortable asking for help. But she focused on the benefits to her clients. Initially, Beckner’s campaign received about $1,400 in donations. Then, after it appeared in the Houston Chronicle, that number multiplied. From there, the public defender’s office hosted a book drive that brought in about 670 more books.

“My secret wish is that we can get to about 1,000,” Beckner says.

The Harris County Jail isn’t the only detention facility that’s cracked down on access to books. Alan Mills, executive director of the Uptown People’s Law Center, a Chicago-based nonprofit legal services organization specializing in prisoners’ rights, says he’s seeing more jails and prisons restrict or attempt to restrict access to books, often through arbitrary book bans and censorship.

For example, the Texas Department of Criminal Justice’s 2017 banned book list included best-sellers The Color Purple, Memoirs of a Geisha and Freakonomics.

Mills thinks prison and jail libraries should be stocked as well as public libraries because reading is one of the most productive outlets for inmates.

“Instead, prisons are adopting increasingly vague policies, which allow individual mailroom officers to ban any book they find objectionable,” he says. “This is a clear violation of the First Amendment: pure content-based discrimination with no penological purpose.”

In Houston, change is already taking place. Since the Chronicle story ran in early July, restrictions on the number of books have been lifted. A representative at the jail also invited Beckner to start a book club for prisoners, and they had their first meeting in late September. The book chosen was The Cuckoo’s Calling, a 2013 crime fiction novel by J.K. Rowling, published under the pseudonym Robert Galbraith.

While Beckner says vast improvements are needed when it comes to the criminal justice system, she thinks granting better access to books is an important step. “This is just one really small way that we can make the jails more humane,” she says.

—Kate Silver

Beckner’s book wish list can be found on Amazon.com.
A Great Responsibility

Ramsey Clark’s 70 years of political and legal activism memorialized on film

RAMSEY CLARK’S career defies categorization. Those who came of age in the 1960s know Ramsey Clark for his leadership in the Department of Justice, where he worked with President John F. Kennedy and Attorney General Robert Kennedy and became attorney general under President Lyndon B. Johnson. A key player in the civil rights movement, the Dallas-born lawyer helped draft the Voting Rights Act of 1965 and the Civil Rights Act of 1968.

Those who came of age in the 1970s know Clark for his criminal justice advocacy and his alignment with causes considered radical at the time, like anti-war activists and the Black Panther Party.

Years later, in the ’80s, ’90s and 2000s, Clark was known for his global anti-war activism and for representing clients ranging from controversial to despicable, including Yasser Arafat, Branch Davidians, Slobodan Milosevic and Sheikh Omar Abdel-Rahman. Clark regularly traveled into active conflict zones to document human rights abuses, and he even wrote a book detailing what he described as war crimes committed against the people of Iraq by the U.S. government. A former law partner described him this way: Clark goes where he thinks people are hurting.

The new documentary Citizen Clark ... A Life of Principle, currently on Amazon.com, provides an overview of Clark’s incredible decades-long, multidimensional career and his intense, complex and often-controversial commitment to justice and the rule of law.

As the American people search for meaning in the lives of mavricks and activists, it may be the perfect time for a new generation to discover Clark, a 65-year American Bar Association member.

Not that he’s gone anywhere. Although he’s admittedly slowed down since leading a delegation to Syria in 2015 (he’s approaching 91, after all), Clark remains dialed in to current events and optimistic about the future—as long as Americans continue rising to their responsibility.

You served the entirety of the Kennedy administration and were LBJ’s attorney general. Could you tell at the time that you were in the middle of what would be such a legendary period of history?

I knew it was an exciting time, but I don’t know if I was able to identify its comparative place in history. I know that JFK was just an incredibly inspiring guy.

Do you remember where you were when you heard he had been assassinated?

I [was] at my desk and a guy in my office called and said, “Turn on the radio,” and I turned it on, and heard that Kennedy was assassinated in my hometown. I had helped to plan the trip, and they had wanted me to go, but I didn’t want to go and didn’t. I didn’t want to go because I wanted the focus to be on him—not that I would be much of a distraction, but there would be people shouting at me. I had done what I could in organizing, and of course, it ended in unbelievable tragedy and sorrow. That was about the only time in my life where I thought, “This is it—I will never be happy again.”

You were front and center during the civil rights era. Not only did you draft landmark legislation, but you were actually there, participating. Tell me about your role in the 1965 Selma to Montgomery march.

I was in charge of protecting the marchers. I spent the whole night going back and forth through Selma, all the way down the 60-mile march, looking for any sign of anybody intruding. And I found places for them to camp. The first night, a farmer had agreed [to host the marchers on his land]. I think I tried to pay him. [He said], “I am sorry, here’s your money, you can’t stay up on my property. I’ve been threatened, and my wife says you can’t stay.” Fortunately, there was a little park on the way. … That first night, I felt like we were in the Civil War. We had campfires, and we were looking out for people to come to shoot us. But we got through to the big rally in front of the state capitol. I was on a plane going to fly back to Washington after eight days … when we got the call that a woman had been killed; a labor leader from the Midwest. She was helping drive people back to Selma. She was in a car with three or four African-American people, … And somebody pulled up alongside with a pistol and shot and killed her. I think they also killed the guy in the front seat with her and the car wrecked.

I got that message while we were over Richmond, starting to come and land in D.C., at an Air Force base on the east side of the river, close to Washington, D.C. We turned right back around. Our happy ending was marred by the murder of those two people. You always wonder whether, if we had had our guard up, we could have avoided it, but I doubt it. There’s no way of stopping all the cars. … This car just pulled up and fired a pistol into the car. … We turned around and flew back to the capital to see her body and carry it back home.

What do you think about what’s going on today with race in America and movements such as Black Lives Matter?

I am not involved
anymore... But I am all for its aspirations. I don’t think we’ve overcome our history of racism, which involves human slavery. It’s incredible that a country that talks so much about freedom would come from a country that practiced human slavery for so long. It’s up to each generation to do better.

Do you have any advice for today’s organizers?
Organize, organize—same word but twice. You just have to work at it. Don’t think there’s a magic formula that fits all circumstances. You have to look at the circumstances and the issues and determine what’s right and how to get there.

As a lawyer in private practice, you’ve had what some might consider a rogue’s gallery of clients. Do you have any advice for lawyers on how to defend people who have done bad things?
The worse the public perception, the more important the effective defense is. That’s where you really measure whether our rights are applicable in the most hateful circumstances.

I guess there’s the argument that somebody has to do it. That is how a legitimate justice system functions, right?
If we don’t take responsibility for seeing that we live up to the ideals of equal justice, we are not worthy of having them. We can’t expect a Santa Claus picture of everything. That’s the challenge of life; you have to exert your energies to support equal justice for all, especially those with whom you have the biggest grudge or difference.

As the son of former Attorney General and U.S. Supreme Court Justice Tom C. Clark, you’ve been around justice systems your entire life. You’ve also had a long history witnessing the horrors and devastation of war, beginning when you joined the Marines at age 17 and worked as a courier during the Nuremberg trials. Do you feel it’s America’s responsibility to promote peace and justice in the world?
I do. If we are not the luckiest ones on earth, we are certainly high on the list, and out of gratitude, we ought to seek to share it with those who weren’t so fortunate. The temptation is to condemn them for their failure—what’s the matter with those people?—while you tee off another round of golf at the club. But we haven’t walked 1,000 miles in their moccasins, so we have no basis for condemning them. We are people who care about humanity. We need to see that if they’re deprived or suffering, we must seek to address it and overcome it. It’s the highest calling, reaching out to those who are needy.

As you look back on your life and career, what would you like your message to be to this generation?
We have to believe that each generation has a responsibility to be involved in the problems of their lifetime and to struggle to resolve them justly and nonviolently. Because you can’t fix it forever. If one generation is successful in avoiding hatred and war and conflict and deprivation of major parts of the population, that doesn’t mean that you don’t have to do it all the time, for all the generations. ... It’s not a gift that can be passed down from one generation to the next. ...

In a sense, that’s what makes it so valuable. You can’t take it for granted—you have to earn it. If you take it for granted, you are not going to have it for very long.

Do you feel like you were successful doing that for your generation?
I never think of it that way, but obviously there is a lot more that has to be done. There probably always will be.

—Jenny B. Davis
Opening Statements

MAKING IT WORK

Not All at Once, And Not All Alone

by Erin Johnston

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

I am a quintessential working mother, devoted to both my career and my children. A litigation partner at Kirkland & Ellis, I have three beautiful children—ages 8, 6 and 4—who are the center of my world.

How do I do it?

As soon as I became a mother, it became apparent that two of my children’s genetic health conditions were going to be acutely stressful and time-consuming, and my husband was just as committed to his career as I was to mine. I distinctly remember early in my career asking for yet another leave of absence just after returning from maternity leave, and my mind was flooded with thoughts about how my circumstances just didn’t fit with a career in BigLaw.

My success has not been the result of a perfectly executed master plan. But I can say that I have unapologetically asked for what I needed and was pleasantly surprised by the responses I received. No one above me assumed they knew what I wanted, or that what I wanted would always be the same. At times I turned down opportunities to avoid travel or to focus on my family; other times I chose to take that trip or work long hours. I’m grateful that it was my choice.

I would not have my career today if I didn’t have my family by my side. I learned that pressure to decide on or off a career, particularly short supply. Focusing on the affirmative steps you can take to improve your legal skills requires a lot of energy that as a working mom I often found to be in particularly short supply. Focusing your energy on improvement will ultimately maximize your skill set and do the most to advance your legal career. The less energy spent on unproductive self-assessments, the more energy you’ll have for what will really make a difference in your career.

ONE. STEP. AT. A. TIME.

Every mom quickly scraps whatever plan she had for motherhood once confronted with the unique joys and challenges that each child brings. Legal careers are no different; it is incredibly difficult to plan out your legal career from the start. For me, I had no idea at the start of my career that I could become a law firm partner while still being the mother I wanted to be.

A successful career requires continually moving forward, one step at a time. Your legal career should work for you and your family at least in the short term, and attaining this near-term goal alone can be plenty on a working mother’s plate. I’ve learned that pressure to decide on or strive toward long-term career goals as well can be an unnecessary additional demand, particularly when those goals are likely to change over time. When you’re struggling with the challenges of work and family, be kind to yourself by letting it be enough to focus on one step at a time.

RELATIONSHIPS MATTER

Having a successful legal career as a working mother is not something that can be achieved alone. A working mom needs sponsors, mentors and peers—all in the plural tense. I am humbled by and grateful for just how many supporters I have had over the years, each of whom supported me in different but equally important ways by exposing me to training opportunities, sharing their connections and offering a listing ear. I will also note that nearly all of them were men, and the failure to look to men as a resource in your journey is undoubtedly a mistake.

Working moms should focus on building their network of supporters. No amount of excellence can overcome a lack of connections. Do not set yourself up for failure by isolating yourself in your work.

Likewise, your colleagues need you, too. Legal careers present challenges for everybody, and you shouldn’t underestimate how much you can offer others even early in your career. For me, the most effective way to get what I needed from others was to be willing to give them what they need, too. It also happens to be the most rewarding path to success.

Put the work down and interact with your colleagues for a minute; you’ll be glad you did.

Erin Johnston is a litigation partner in the Washington, D.C., office of Kirkland & Ellis. Johnston is chair of the D.C. office’s Women’s Leadership Initiative. She has received Kirkland’s Pro Bono Service Award multiple times.
DINE 'N' DASH

A man accused of racking up restaurant tabs and leaving his dates with the bill told police he did it because he was broke, had physical ailments, and “the only way he ever felt better” was if he ate really good food. Despite his explanations, prosecutors accuse Paul Guadalupe Gonzales of taking financial advantage of at least eight women, most of whom he met through online dating sites between 2016 and 2018. The Los Angeles County District Attorney’s Office says Gonzales left more than $950 in restaurant bills that were either paid by his dates or covered by the restaurants. A Pasadena, California, judge dropped extortion charges originally filed against Gonzales, but the alleged dine ‘n’ dasher, who has pleaded not guilty, still faces misdemeanor counts.

Source: cbs8.com

BETTER HALF

Law firm revenue is at its best since the recession, according to a report by Citi Private Bank’s law firm group. Demand for services and higher pricing pushed law firm revenue up a half-point better in the first half of 2018, compared to the same time period last year. Experts note that law firms will need to keep an eye on growing expenses, including large associate compensation increases. The lawyer head count at the 186 firms sampled went up by 1.8 percent, while the number of equity partners went down by 0.5 percent, part of a downward trend over the past seven years.

Source: biglawbusiness.com

POWER

A bill to promote pro bono legal services as a critical method of empowering domestic violence survivors has been signed into law by President Donald Trump. The Pro bono Work to Empower and Represent Act of 2018—the POWER Act—requires the chief judges of all 94 federal district courts to partner with domestic violence service providers to hold annual events encouraging attorneys to volunteer their time. The act was sponsored by Sen. Dan Sullivan, R-Alaska, based on a similar program in his home state, which has the highest rates of domestic violence and sexual assault in the country. ABA President Bob Carlson released a statement that applauded the act.

Source: biglawbusiness.com

$250 MILLION

... is the amount State Farm agreed to pay to end a 20-year-old class action lawsuit alleging the company manipulated the election of an Illinois Supreme Court justice in order to influence the vote on a case before the court. The suit claimed State Farm and its in-house counsel recruited candidate Lloyd Karmeier to run and funneled dark money through political action committees in one of the most expensive judicial campaigns in Illinois history. Karmeier later voted to overturn a $1 billion judgment against State Farm. The insurance company has denied liability and says the claims are “without merit.” State Farm could have faced $8 billion in damages under the RICO statute if it lost at trial.

Source: law.com
Home(less) Court Advantage

Programs around the country are taking the courthouse to the streets to help homeless people clear cases  By Julianne Hill

Every other Wednesday morning at the Denver Rescue Mission’s Lawrence Street Shelter, dozens of homeless people stand in line waiting to write their names on a sign-up sheet.

But they’re not looking for a place to stay. They’re signing up to have outstanding court cases heard that morning in a room where a folding table functions as a judicial bench and Bibles fill the bookshelves.

Like many specialty courts around the country—teen courts, girls’ courts, veterans’ courts—Denver’s Outreach Court aims to serve a specific population and reduce their interactions with the justice system. Like many courts focused on those experiencing homelessness, the Denver court goes to where defendants gather. In the Mile-High City, court is held at one of the city’s largest, most centrally located shelters.

“We wanted to serve the homeless population in efficient numbers and cut down on failure-to-appear rates,” says Magistrate James Zobel, who oversees Outreach Court.

For homeless people, having an open case causes several problems. “You can’t get housing. You even are excluded for special programs for people dealing with homelessness. You can’t get a proper ID—and you need that to get health care,” Zobel says. “It’s depressing for the people who have these pending cases, and they make them feel not good about themselves.”
Denver’s move is one of the latest examples of programs that have sprouted up around the country, making courts more accessible to homeless people who face lower-level misdemeanor charges.

ROOTS IN SAN DIEGO

The movement began in San Diego in the late 1980s when then-public defender Steve Binder visited Stand Down, an annual event held by Veterans Village of San Diego for homeless veterans. One in five told him their greatest need was to resolve outstanding bench warrants. At the 1989 Stand Down event, Binder helped bring about the first San Diego Superior Court session to be held in a tent on a handball court. “We thought we’d give it a try for one day that weekend. We would then resolve their cases and work to reintegrate them into society,” says Binder, who retired from the court this year. “It was well worth the effort.”

In fact, the line of those looking to have their cases heard spilled out from the tent. The Homeless Court returned to the veterans’ event the following year. Over the past 30 years, Homeless Court has grown, held monthly at various locations around San Diego.

Before Denver’s Outreach Court launched in December 2016, the city’s Homeless Court was held at the Denver City and County Building. Only those who had been referred by a social worker could have their cases heard. However, about 50 percent of the defendants did not make their court dates.

In 2016, a partnership including Denver County Court, the Denver Sheriff Department, the Denver City Attorney’s Office, Denver’s Office of the Municipal Public Defender and the mission researched the specific challenges homeless people face to get to court.

“We found many people had no money for public transportation, and in fact some had encountered a problem on a city bus or train and been kicked off,” Zobel says. “Other people were disabled. And many had nowhere to store documents with court dates and summons. Many are afraid of entering the building. Or they don’t have a calendar.”

Like in San Diego, Denver’s program moved into a location where many people already receive services—the mission. The name was changed to emphasize the opportunity instead of the defendant’s misfortune, Zobel says. In addition, the court aims to establish triage processes to find health care services for those in need.

“There are people in the margins. They are struggling with different things—mental illness, addictions, homelessness,” says Alexxa Gagner, the mission’s director of public relations.

PROTOCOL DIFFERENCES

“At check-in at the Denver Rescue Mission, a clerk runs the person’s name and birthdate through a computer to locate all pending cases. Every case will be added onto that day’s docket,” Zobel says. The number of people appearing before the magistrate on any given Outreach Court date can range from 30 to 138, he added.

This approach differs from the American Bar Association’s manual of best practices for developing homeless courts, written by Binder. That model requires defendants to meet with caseworkers and receive certificates proving their commitment to improve their life situation—staying sober, using job training resources, receiving mental or physical health treatment—before going to court to ensure the defendant is on the right track. The ABA model is used in about 70 locations around the country, says Binder, now special adviser to the ABA Commission on Homelessness and Poverty.

At check-in at the Denver Rescue Mission, a clerk runs the person’s name and birthdate through a computer to locate all pending cases. Every case will be added onto that day’s docket.

“Mostly, the charges are low-level—public consumption of alcohol, trespassing, sleeping in a doorway, park curfew violations, urinating in public,” Zobel says. “While certainly these are crimes, those are the types of things that occur because people have nowhere to live.”

Felony cases that involve victims—robbery, assault—are sent on to the courthouse.

“We are not here to try involved legal arguments,” says Mattson Smith, a criminal defense attorney contracted by the public defender’s office in Denver. “It is designed to be simple, and thankfully it is.”

“At Denver Rescue Mission, our ultimate goal is to meet people at the physical and spiritual points of need and help them become self-sufficient. This is a small piece of the puzzle,” Gagner says.

If someone is rightfully accused and willing to plead guilty, they will not be given fines that they can’t pay, but they will receive two to 20 hours of community service.

“We never jail anyone at Outreach Court,” Zobel says. About six defendants are taken by Sheriff Community Work Program representatives that day to start working off their service hours—picking up trash, cleaning up graffiti or helping elderly people shovel their snow.

ABA best practices, however, do not call for community service in sentencing. Instead, jail time and fines are replaced with participation in life skills or addiction counseling and meetings, computer or English literacy classes, or job training and employment searches.

As of July 31, 2018, Outreach Court had heard 1,768 cases, helping 267 homeless people clear their records. It was so successful that the Homeless Court closed the same month Outreach Court launched.

“There has been overwhelmingly positive feedback for clients coming through the system,” Smith says. “Often, we see their burdens lifted, we see a sense of relief. It is gratifying work to do, seeing how it helps

“The cost of a jail bed for 24 hours is $70.20. Every time we clear a warrant without having to make an arrest, that money is saved.” – James Zobel
The Docket

them focus on how to get themselves back on their feet and being a contributing, tax-paying community member of society.”

RETURN ON INVESTMENT

In 2017, Outreach Court had a $124,000 budget. Zobel estimates Denver City and County saved about $235,000 with this program. “If someone is arrested, there are costs that come up: the cost of the warrant and arrest, police officer time, booking time in jail. We estimate that to be $695 per arrest,” Zobel says. “The cost of a jail bed for 24 hours is $70.20. Every time we clear a warrant without having to make an arrest, that money is saved.” In addition, holding open a docket with so many no-shows wasted money.

Also, clearing records avoids arrests, which can sometimes trigger dangerous situations. “This program is making Denver safer,” he says. According to the ABA homeless court program manual, recidivism is much lower, and from 80 percent to 90 percent of the cases are dismissed.

“There is a human piece to this. Individuals don’t need to have more contact with the justice system. Here they are treated with respect. Everyone says thank you for coming. It is a very different environment, and yet they still have consequences, and the decision is rendered right then,” says Nikole Bruns, interim executive director of the City and County of Denver’s Office of Behavioral Health Strategies.

There is talk of adding more outreach courts in different geographic areas of the city. “But it is very difficult to set up an offsite court,” Zobel says.

Officials from neighboring Colorado towns of Aurora and Westminster have come to observe Outreach Court.

“I would love to see this model spread throughout Colorado,” Smith says. “Homelessness is not something that just exists in the city, but in the suburbs and rural areas as well. The model of getting someone out of the system and connected to services would be fantastic to expand on. It is special and successful.”

Supreme Question

A quirk in Florida law has set up a political showdown over upcoming state high court appointments

By Lorelei Laird

When the sun rises over Florida on Jan. 8, 2019, three state supreme court justices—Fred Lewis, Barbara Pariente and Peggy Quince—are supposed to step down because of the state’s mandatory retirement law.

That same day, whoever is elected this November to replace Gov. Rick Scott will take office, which has led to a sticky question: Is it the outgoing governor or his successor who has the right to appoint replacements to the court?

The unusual circumstance prompted the League of Women Voters of Florida to petition the Florida Supreme Court last year for a writ stopping Scott from making the appointments. As a matter of law, they argued, Scott may not do so before there’s any vacancy.

But in early 2018, the court declined to step in, saying the case wasn’t ripe for review until Scott made any appointments.

In September, after Scott started the process of choosing nominees, the league again petitioned for a writ forbidding him from making appointments. That means a second court battle could be in Florida’s future—putting Florida’s highest court squarely in the middle of an overtly political fight that would leave it open to accusations of partisanship no matter how it rules.

Such a development would be another example of a growing trend toward the politicization of judicial appointments and elections, court watchers say. Though judicial appointments have always been somewhat political, Douglas Keith of the Brennan Center for Justice says judicial campaign spending for retention elections—an indicator of contentiousness in a previously sleepy category of elections—jumped substantially around 2009 and remains high.

“This is no longer individual races that you could name 20 years later,” says Keith, counsel in the democracy program at the Brennan Center, which is part of New York University School of Law. “This is something that we’re seeing across the country.”

POLITICAL QUESTION

Fights over who appoints judges are not unheard of in other states. In 2017, the Vermont Supreme Court ruled that former Gov. Peter Shumlin could not make an appointment to a seat coming open a full three months after he handed over the state to Gov. Phil Scott.

But appointments are a particular problem in Florida, where the state constitution requires jurists to retire when they reach 70. If that birthday occurs more than halfway through the term, the jurist may finish it. But terms end in early January, just like governorships—and that’s created years of clashes between governors.

In the past, those disputes were generally resolved through negotiations. In a press release, that’s what Scott said he expected to do when he asked the Florida Supreme Court Judicial Nominating Commission to certify nominees by Nov. 10.

But the League of Women Voters and co-petitioner Common Cause said in their Sept. 20 filing that Scott also “made clear that he will purport to unilaterally make the appointments if the governor-elect does not agree to grant him veto power over the appointments.” That’s true, they said, even though Scott’s counsel had conceded that Scott had no power to appoint judges to seats that will be vacant after his term is over.

Although the League of Women Voters and Common Cause are both
officially non-partisan, the succession dispute is very much about politics. Scott, a Republican who has condemned “activist judges,” has been aggressive about ensuring that people who share his beliefs become judges.

Florida law requires the governor to choose from candidates put forth by judicial nominating commissions, whose membership is appointed by the governor. Four of the seats on each commission, though, must be filled by candidates suggested by the Florida Bar. Thanks to a 2001 change to the law, the governor may reject the bar’s list of nominees and ask for more until satisfied with the choices.

Scott’s two immediate predecessors never used that power, according to a 2013 article from the Tampa Bay Times. But according to the Florida Bar, Scott has done it 34 times, sometimes rejecting candidate lists more than once. This means the judicial candidates are chosen by people who share Scott’s politics.

“How right now, total control rests with Gov. Scott, and in a few cases, he’s appointed good judges,” says Talbot “Sandy” D’Alemberte, a former ABA president who helped create the judicial nominating commission system as a state legislator.

So far, Florida’s highest court hasn’t had enough vacancies to be much affected. But the three judges scheduled to retire in January are all part of what’s seen as a 4-3 liberal majority. That means their replacements could shift the court rightward—something Floridians of both parties are very aware of.

**POLITICIANS IN ROBES**

Despite or perhaps because of this, the Florida Supreme Court originally sidestepped the issue. With the new petition—this time triggered by Scott’s official actions—it may not be able to do that. If it does, and the new governor can’t come to an agreement with Scott, the matter is likely headed back to court.

John Mills, who represented the League in its petition, believes if Republican candidate Ron DeSantis wins the governorship, the two men might well come to an agreement on nominees. (The governor’s office did not respond to repeated requests for comment.)

If Democrat Andrew Gillum—a progressive endorsed by Sen. Bernie Sanders—wins, neither Mills nor D’Alemberte would expect a compromise. Gillum would have to choose from the candidates put forward by the judicial nominating commission, which is full of Scott appointees. There are ways for him to change that, but they’re largely untested, and the issue could easily wind up back in court.

Over the summer, Mills believed Scott wouldn’t make the appointments, as that would directly contradict the position his attorneys took in court. By October, he’d changed his mind.

“I think we are now forced to assume that Gov. Scott will purport to make the appointments before he leaves office,” says Mills, of the Mills Firm in Tallahassee.

Mills believes the law is pretty clear that the new governor makes the appointments; the Florida Supreme Court held unanimously in 2006 that a vacancy doesn’t normally exist until the retiring justice’s term ends. The high court may rule that way again on the current petition.

Potentially more interesting is what happens if the Florida Supreme Court gets the case after Jan. 7. The court would be missing three justices and therefore wouldn’t have a quorum. In the absence of new appointments everyone agrees are valid, Mills says the chief justice could ask the retiring justices to stay on as senior justices, or bring on judges from the appeals courts. But even with a full court, it’s possible that someone will move to disqualify the remaining justices—who, after all, would essentially be choosing their own colleagues.

“Would all seven of them have to recuse?” Mills asks. “If there’s any litigation over it, it’s going to be terrible.”

This sort of thing, Keith says, is why hyperpoliticization isn’t good for the courts. Though he thinks some amount of political input is inevitable and even appropriate, he says politicization can destroy public confidence in court decisions. If the public sees judges as “just another group of politicians in robes,” as he puts it, people may not trust court decisions—and state officials may feel freer to ignore them.

For another, Keith says there’s research showing that judges change their behavior during election or reappointment years. Presumably, they’re worried that light sentences or unpopular decisions could be used to unseat them.

That’s not hypothetical. In 2010, voters declined to retain three Iowa Supreme Court justices who had been targeted because of their votes to legalize same-sex marriage. In 2016, four Kansas Supreme Court justices retained their seats after an effort by conservative groups to unseat them, largely based on their votes to overturn high-profile death sentences.

And that creates the wrong incentives, Keith says. “Judges need to be comfortable deciding cases based on the law and the facts, not based on how far away an election is.”
Five years ago, Chief Justice John G. Roberts Jr. issued a brief opinion when the U.S. Supreme Court denied review of a challenge to the settlement of a class action against Facebook Inc. over a privacy practice.

Roberts said he agreed with the court’s decision to pass on the Facebook case, but he sent a signal that he, at least, was concerned about the growing use of a particular type of remedy in class actions known as cy pres. Stemming from the French phrase “cy pres comme possible,” the term refers to something that is “as near as possible” to direct relief.

Cy pres settlements emerged in the 1970s as a solution to class actions with large and diffuse memberships for whom individual cash awards might be paltry. Such settlements typically involve contributions to charities or nonprofit organizations that advance the goals pursued in the class action, such as tech privacy in the Facebook case.

Because of the more limited focus of the cy pres settlement at issue in the 2013 case *Marek v. Lane*, the chief justice wrote that year, the objector’s challenge “might not have afforded the court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation.”

Those concerns included when, if ever, such relief should be considered; how to assess its fairness; whether new entities may be established as part of such relief or how existing beneficiaries should be chosen; the proper roles of the judge and parties in shaping a cy pres remedy; and how closely the goals of any enlisted organization must correspond to the interests of the class, Roberts said. “In a suitable case, this court may need to clarify the limits on the use of such remedies,” the chief justice wrote.

Such statements from a justice are widely considered an invitation to lawyers to bring on “a suitable case.”

Now, the court has taken up the issue in the case *Frank v. Gaos*, which was scheduled for oral argument Oct. 31 as part of the court’s November sitting.

The defined class included as many as 129 million members who used Google Search in the United States between Oct. 25, 2006, and April 25, 2014. The two sides met in mediation and hammered out an $8.5 million settlement, which included $5,000 “incentive awards” for each of three named plaintiffs, approximately $5.3 million in cy pres payments to six organizations, and attorney fees for the class counsel that would later be set at $2.1 million.

The cy pres recipients were privacy-related groups in higher education or other organizations: the Center for Information, Society and Policy at the Chicago-Kent College of Law; the Berkman Klein Center for Internet & Society at Harvard University; Stanford Law School’s Center for Internet and Society; the World Privacy Forum; Carnegie Mellon University; and the AARP Foundation.

Google would be required under the settlement to alter the information it provides users about how their search terms might be used, but it would not have to change its practices. Other than the incentive awards to the named plaintiffs, other members of the class would receive nothing.

Two lawyers—Theodore H. Frank and Melissa A. Holyoak—with the Center for Class Action Fairness, which is affiliated with the Competitive Enterprise Institute in Washington, D.C., objected to the settlement. “There are lots of aspects to it that are unseemly,” says Frank, who argued the case before the high court.

For one, he says, Google and the lawyers representing the class had existing relationships with some of the cy pres recipients. Google had been a donor to some of the organizations, especially Stanford. And three of the higher-education institutions—Harvard, Stanford and Chicago-Kent, were the alma maters of some of the class counsel.

Frank and Holyoak also objected to the attorney fee request on the basis that its calculation assumed that the district court should treat cy pres funds as equivalent to...
actual monetary compensation. When Frank raised these and other objections before U.S. District Judge Edward J. Davila of the Northern District of California in 2014, the judge seemed sympathetic. The proposed settlement “doesn’t pass the smell test,” Davila said during one court hearing.

With regard to the alma mater institutions, “what is important here on multiple levels is that there are no affiliations with the actual centers receiving money,” Michael J. Aschenbrener, a Denver lawyer who is representing the class, told the judge.

Despite his concerns, Davila approved the settlement, saying it was a “superior process” for such a large class, and that the alternatives were not preferable. The 9th U.S. Circuit Court of Appeals at San Francisco affirmed, observing that after attorney fees, a direct payout to the class would be 4 cents for each class member. The panel split 2-1 in rejecting the objection over the relationships with the cy pres recipients.

Judge J. Clifford Wallace dissented on that point, concluding that “the fact alone that 47 percent of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further.”

**BETTER THAN 4 CENTS**

Frank and Holyoak have an ambitious list of requests for how the Supreme Court should rule in the case. First, they say, any class action settlement that compromises a class’s claims but seeks attorney fees that are disproportionate to the actual benefit to the class is not fair or reasonable under Rule 23 of the Federal Rules of Civil Procedure.

Next, cy pres awards are inappropriate in class action settlements when it is feasible to distribute settlement proceeds to class members. If such a settlement cannot provide direct relief to the class, the class should not be certified in the first place, they argue.

And if cy pres is to be permitted at all, they argue, no payouts should go to recipients with any current or significant ties to the parties, attorneys or judge.

“Theres been a lot of abuse out there,” Frank says. One example highlighted in his brief involves a 2009 class action against AOL Inc. over email advertising. In that case, a cy pres settlement approved by the district judge included a payout to a legal aid group—but the judge’s husband was on the group’s board. In 2011, the 9th Circuit upheld the judge’s decision not to recuse herself. Google and the class representatives, who are the separate respondents in the high court, either declined or did not respond to interview requests.

The class respondents argue in their merits brief that Frank and Holyoak offer “a dissertation—largely based on dubious anecdotes—assailing class actions generally.”

Google argues that cy pres relief “provides the best available mechanism to resolve low-settlement-value claims in a way that provides widespread, meaningful benefits to large and indeterminate classes.”

William B. Rubenstein, who is a professor at Harvard Law School, an expert on complex litigation and the author of a treatise on class actions, filed an amicus brief in support of the class and Google, arguing that “full cy pres” actions such as this one are exceedingly rare. Cy pres is more typically used to distribute unclaimed class settlement funds to charitable groups, he wrote.

The American Bar Association also filed a brief providing some defense of cy pres settlements. Although it does not take sides or address the specific question before the court, the ABA argues that cy pres awards in class actions are important in funding legal services for low-income and indigent litigants.

Meanwhile, U.S. Solicitor General Noel J. Francisco filed a brief in support of neither party, arguing that “cy pres relief has little basis in history, creates incentives for collusion, and raises serious questions under Article III” of the Constitution.

**FAUX FIXES?**

Martin H. Redish, a professor at Northwestern University’s Pritzker School of Law who also teaches public policy, has written widely about cy pres class actions, and he has many choice phrases to describe their faults.

“They are “pathological,” they are “camouflage for faux class actions” and “a danger,” he says.

Redish adds that he did not file an amicus brief in the case because he simply did not have time.

“Many defendants love cy pres because it is a way they can tie up [a settlement] with a nice bow,” says Redish, referring to the fact that such cy pres settlements often don’t require defendants to admit liability but do allow them to get credit for a charitable contribution.

Cy pres settlements “are a transformation of the class action process in a pathological way,” he says. “Lawyers should have the interests of the members of the class.”
For Jerome Bruner
The law is made of stories

By Philip N. Meyer

Jerome Bruner, who died in 2016 at the age of 100, was one of most influential psychologists and interdisciplinary thinkers of the 20th century. The Watts professor at Oxford (the school of education building is named after him), Bruner was co-founder of the Center for Cognitive Studies at Harvard and the recipient of the Balzan Prize “for lifelong contribution to human psychology.” Bruner's interests were eclectic, and he was an intellectual raconteur.

Late in his career, Bruner became fascinated with the law. Beginning in the 1991-1992 academic year, Bruner joined Anthony Amsterdam and Peggy Davis, convening the weekly Lawyering Theory Colloquium at New York University School of Law. I attended many sessions. In 2000, based upon their work in the colloquium, Amsterdam and Bruner published their densely brilliant book, *Minding the Law*, appropriately subtitled: *How courts rely on storytelling, and how their stories change the ways we understand the law—and ourselves.*

Bruner, who loved literature, was a fascinating “literary” character in his own right. Blind at birth, he later had an operation that restored his sight. Perhaps this is why Bruner never perceived rigid boundaries between various intellectual disciplines. Bruner wore heavy glasses with thick corrective lenses that exaggerated the dimensions and spheres of his eyes, making them seem huge.

When engaged in conversation, rather than shifting his eyes directionally in their sockets, Bruner would swivel his large head and gaze intensely upon the speaker. It was mesmerizing if unintentional effect, and it was easy to lose focus and become lost in Bruner's intelligence and godlike beneficence.

One night in 2016, after rereading *The Great Gatsby*, I awoke from a vivid and unsettling dream: I was trapped inside the book, driving across the wasteland of F. Scott Fitzgerald's Valley of Ashes separating West and East Egg from New York City of the 1920s. When I looked up, there was the visage of Jerry Bruner, captured where the billboard of T.J. Eckleburg was supposed to be, looking down. Eckleburg now had Bruner's glasses with thick corrective lenses, Bruner's playfully compassionate demeanor and his huge all-knowing eyes.

Some weeks later, I picked up the *New York Times* and opened it to Bruner's obituary.

**TWO MODES OF THOUGHT**

Anticipating the work of behavioral economist and Nobel Prize-winner Daniel Kahneman (see *ABA Journal*, January 2016), Bruner proposed that there are two discrete modes of thought: the narrative (or story) mode and the analytical or “paradigmatic” mode (think of scientific experiments, of logic and algorithms, and of appellate opinions’ purported reliance upon analytical positivism and syllogistic reasoning).

Our dominant and intuitive mode is narrative. We even narrate our own lives: We construct our world through the stories we tell others and ourselves. Some of our story templates are flat and functional: We employ rudimentary schemas and stock scripts navigating our daily experiences (e.g., ordering food at a restaurant). But then there are more complex stories that we need to tell to help make sense of the more conflict-ridden aspects of our lives—and that consequently inform our best literature as well.

Even our identities, Bruner believed, are compositions of layered stories; we are our own best creative creations. We derive life lessons from experiences via stories, and in doing so provide meaning to our lives. Bruner's early experiments revealed how even young children are preternaturally gifted storytellers.

But what has this to do with legal storytelling? Plenty. Certainly, trial lawyers employ the power of storytelling to, in Bruner's words, "go beyond the information given." For example, a prosecutor enters the mind of a criminal defendant and tells a story that proves the accident necessary to obtain a first-degree murder conviction. Alternatively, a plaintiffs lawyer in a negligence case argues that the defendant should have reasonably foreseen the accident as a result of his carelessness—she tells a counterfactual story about how, had the defendant taken reasonable precautions, the accident would never have occurred.

Appellate judges—and, yes, even justices of the U.S. Supreme Court—are likewise suckers for a good story. Although as narrative theorist Peter Brooks has observed, the justices are careful to seldom say the word “story” in an opinion, or recognize self-reflexively the deterministic role narrative plays in the law.

**ONE BRIEF ILLUSTRATION**

In previous *Journal* columns, I have discussed the importance of narrative techniques, including choice of “perspective or point of
view” (see ABA Journal, October 2014). I quoted novelist and writing teacher David Lodge’s admonition: “The choice of point(s) of view from which the story is told is arguably the most important single decision that the [storyteller] has to make, for it fundamentally affects the way readers will respond emotionally and morally to the story.”

In Minding the Law, Bruner (and Amsterdam) go Lodge one better. Analyzing civil rights cases decided by the Supreme Court, the authors reveal how fundamental and axiomatic storytelling choices (including choice of narrative perspective) are outcome-determinative.

The authors explore the pre-Civil War fugitive slave case of Prigg v. Pennsylvania, an appeal from the criminal conviction of a slave catcher for capturing a fugitive slave without adhering to the procedures and protections established by Pennsylvania law. The fundamental conflict was between the federal Fugitive Slave Act, permitting the slave catcher to return the fugitive to the slave owner in the home state, and the procedures and protections provided to Pennsylvania residents under Pennsylvania criminal law.

In overturning Edward Prigg’s conviction, the high court adopted an omniscient (biblical) narrative perspective, set in an expansive historical time frame. Legal storytelling often involves telling stories about the law itself and not just the facts of the case. And here, the story told is an “origin” story about the law.

The court returns to the crucial historic compromise at Philadelphia’s Constitutional Convention between slave and free states and reaffirms the necessity of compromise of the various characters’ (states’) interests forming and guaranteeing a unitary federal government. The federal Fugitive Slave Act was purportedly adopted in service of this higher and exalted purpose.

The choice of a godlike omniscient perspective predetermined the narrative logic and fitness of the outcome of Justice Joseph Story’s, um, “story.” The result was never in doubt: A nonslaveholding state cannot punish as an abduction, “the very act of seizing and removing a slave by his master, which the Constitution of the United States was designed to justify and uphold.”

Absent the politics of the day, could the court have adopted a different narrative perspective and told a different tale about the relationship between the Constitution, the Fugitive Slave Act and Pennsylvania state law? Of course it could have.

It might have employed third-person “limited” perspective, set in the then-current day, telling the story of the slave seized by the slave catcher without recourse to laws applicable to all other residents of Pennsylvania. Simply put, the plot would be about whether a slave catcher could take it upon himself, under the protection of the federal Fugitive Slave Act, to determine that another is a fugitive slave, human cargo for transportation back to another state, in violation of the procedures Pennsylvania has rightfully put in place to protect its residents from the horrific and unjustified consequences of kidnapping.

EYEING THE OUTCOME

Bruner believed that the storytelling choices we make give meaning to our lives and to the law as well. Today, as I look back on the story told by Justice Story in Prigg, I still see the billboard of T.J. Eckleburg looking down from above.

The eyes no longer belong to Jerry Bruner and are no longer ineluctably wise, all-seeing and beneficent. The faded image here is of Justice Story and the deadened eyes of the court behind him, upholding the evil of slave catching as it watches grimly over that Valley of Ashes, telling a law story that makes the outcome seem preordained.

Bruner’s and Amsterdam’s analysis suggests that the Supreme Court could have told a different story, one that might have helped to rescue and sustain a moral universe. Bruner’s work argues that our storytelling choices, including telling stories about the law, are ultimately creative moral and intellectual acts. And, if we are honest about it, these are necessary acts as well—and we can never simply defer to the power of an all-seeing God (or court, or fate, or even of an Eckleburg) to tell us the right thing to do.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.
Our Shifting Meanings
Test your knowledge of modern usage
By Bryan A. Garner

As we all know, language isn’t static: Every aspect of it—grammar, syntax, spelling, pronunciation and meaning—evolves over time. Fortunately, most changes are gradual, even glacial. But changes in the semantic content of words can occur quickly. Think of the new meanings that technology has brought to such words as cloud, drive, friend, monitor, profile, scan, snipe, spam, surf, troll and tweet.

The sources of change are sometimes puzzling. When my young nephew told me recently that my kitchen was “dank,” he was surprised that I wasn’t chuffed. Far from meaning “unpleasantly damp, musty and cold,” the word to him meant “cool” or “nifty.” I was unaware of this new slangy meaning, but he and his sister insisted that all their friends understand the word this way. A little investigating revealed that the new sense derives from marijuana culture: Dank pot is sticky, gooey and potent—hence “really good.” Somehow this sense permeated teenage slang, and by 2017 kids everywhere were using dank to describe things they liked.

Whether this new use of dank will become standard English is debatable. I’m not betting on it: Most slang never becomes elevated to the level of standard. Rather, it tends to be evanescent, rising and falling with the tides of pop culture: Think of such now-dated precursors of dank as the 1960s’ groovy, the 1970s’ boss, or the 1980s’ bad. And if my nephew’s dank did start to creep into print, it would surely cause widespread confusion among many readers.

Like change, and often because of it, confusion is a linguistic constant. Whenever two words sound similar, it’s almost inevitable that some speakers and writers will swap one for the other. If a mistake is considered an outright blunder (corollary misused for correlation, testa-
mentary misused for testimonial, or virulent misused for virile), it’s called a malapropism—after Mrs. Malaprop, a linguistically challenged character in a famous 18th-century play (The Rivals, by Richard Brinsley Sheridan). Shakespeare, too, invented several such characters, but Mrs. Malaprop became the eponym.

As a matter of linguistic epidemiology, if a malapropism becomes common enough, it becomes a nonstandard usage; if it continues to spread more widely, it can gradually become standard. But this process can take centuries.

Some years ago, I invented a Language-Change Index that allows a charting of these changes. In Stage 1, a new form or meaning emerges among a small minority of the language community—often simply as a mistake. It’s either unknown or widely stigmatized. (They was there!) In Stage 2, it has spread to a significant fraction of the language community but remains nonstandard (one criteria—using the plural form as a singular). In Stage 3, it becomes commonplace even among well-educated people but is still avoided in standard written English (straightlaced as a misspelling of straightlaced). In Stage 4, it becomes virtually universal, even in print, but it still attracts opposition from linguistic stalwarts (the reason is because in place of the reason is that). And in Stage 5, the form or meaning becomes universally acceptable at copy desks everywhere; the only people who oppose it at this point are eccentrics (self-deprecating, which is now standard even though it originated as a mistake for self-depreciating).

Many linguistic mutations never progress beyond Stage 1. They stay in the shadows of the language, emerging now and again, mostly to the annoyance of sticklers. Arguments frequently erupt about words and phrases in Stages 2 and 3. But if a mutation makes it to Stage 4, its long-term progress to Stage 5 is all but certain. It’s just a question of the passage of time, whether decades or just years. Quiz time. In each question that follows, one choice is a Stage 2 or Stage 3 misusage that wouldn’t pass muster with a good copy editor. See whether you can recognize the traditionally correct forms.

Some, by the way, might scoff that an “incorrect” choice never causes any confusion, so it shouldn’t matter at all. But that misses the point. Usage isn’t about intelligibility; probably nobody would misunderstand. Good usage is about credibility—inducing people to trust you. It depends on established linguistic custom. That’s all.
### USAGE QUIZ

1. We waited with [(a) bated, (b) baited] breath.
2. Why don’t you have my colleague Jan and [(a) me, (b) I] attend the meeting?
3. In the scheme of things, this problem is [(a) miniscule, (b) miniscule].
4. It depends entirely on what values [(a) the children are inculcated with, (b) are inculcated into the children].
5. We must recognize the depth of the problems [(a) afflicting, (b) inflicting] our school systems.
6. An effective regimen must take account of [(a) preventative, (b) preventative] medicine.
7. After dinner, we had some [(a) sherbet, (b) sherbert].
8. Judicial nominees are increasingly vetted based on [(a) ideology, (b) idealogy].
9. All of us have our [(a) idiosyncrasies, (b) idiosyncracies].
10. The [(a) idyllic, (b) ideal] situation would involve a broad consensus on the legislative amendment.
11. National magazines—[(a) i.e., (b) e.g., (c) i.e., (d) e.g.,] Readers Digest, People and Parade Magazine—were lavish in their coverage.
12. The conference faces [(a) a lot, (b) alot] of problems.
13. We hope to [(a) assure, (b) ensure, (c) insure] that no serious problems arise.
14. The [(a) continuous, (b) continual] interruptions were frustrating.
15. You need to read [(a) farther, (b) further] into the book!

### USAGE QUIZ ANSWERS

1. (a). The phrase is *bated breath* (despite jokes about fishy breath). The idea is that the breath is abated, or stopped. Shakespeare was the first to use the phrase, in *The Merchant of Venice*. In print sources today, *bated breath* outnumbers *baited breath* by a 9:1 ratio. (The asterisk before a word or phrase denotes nonstandard language.)
2. (a). Why don’t you have my colleague Jan and me attend the meeting? Both my colleague Jan and me are objects of the verb *have*. The verb *attend* is a “bare infinitive” (the *to* is omitted before it). After all, without Jan, you’d say, “Why don’t you have me attend the meeting?” No native speaker of the language would say: “Why don’t you have I attend the meeting?”
3. (a). *Minuscule* is the antonym of *majuscule* (a rarer term). The word’s history has nothing to do with the prefix *mini*.
4. (b). Parents and teachers inculcate values into children (or indoctrinate them with values). The object of *inculcate* is traditionally not the recipient, but the thing received. In modern print sources, instances of the phrasing *inculcated into him* outnumber *inculcated him with* by a 4:1 ratio.
5. (a). Problems *afflict* schools; schools are *afflicted* with problems. Bad people *inflict* harm on others; harm is *inflicted* by bad people on others.
6. (a). The traditional word has three syllables: *preventive*. In print sources today, *preventive* outnumbers *preventative* by a 5:1 ratio.
7. (a). The word is *sherbet*. In print sources today, the spelling *sherbet* outnumbers *sherbert* by a margin of 32:1.
8. (a). Although the word *ideology* is etymologically related to *idea* in ancient Greek, the spellings diverged long ago. It’s true, though, that an ideology necessarily involves a collection of ideas.
9. (a). *Idiosyncrasy* isn’t a form of government. In fact, it’s the only word in the English language ending in -*crazy*. Like many other exceptional terms, people want to regularize it to conform to words following a recognizable pattern: *aristocracy, democracy, plutocracy*, etc.
10. (b). *Idyllic* traditionally means “extremely pleasant, beautiful or peaceful.” It corresponds to the noun *idyll*, which denotes a poem or prose work dealing with rustic life and pastoral scenes.
11. (b). *E.g.* (exempli gratia) means “for example”; *i.e.* (id est) means “that is.” So *e.g.* introduces examples; what follows *i.e.* exhausts the category. The abbreviations have been fully naturalized; for many decades now, style manuals have prescribed that they should appear in roman, not italic, type.
12. (a). *A lot* has always been standard; *alot* has always been stigmatized. In print sources today, there is a disparity ratio of 659:1.
13. (b). In the best usage, you *assure* people of things; you *ensure* that things will happen; and you *insure* valuable items. In print sources today, the wording to *ensure that outnumbers* *to assure that* by a ratio of 22:1.
14. (b). What is *continual* is frequently recurring or intermittent (*continual interruptions*); what is *continuous* is nonstop or unceasing (*a continuous hum*).
15. (b). This particular distinction probably isn’t very valuable. (Naturally I think this, given that I’m often corrected on this point.) The traditional difference is that *farther* refers to physical distances (*farther down the street*), further to figurative ones (*farther along in the song*). In print sources today, read *farther outnumbers* *read further* by a ratio of 19:1.

**NOTE:** Take the 25-question quiz in the online version of this story at ABAJournal.com/usage.

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.
Family Way
Lawyers on balancing motherhood or choosing a child-free life
By Jeena Cho

Motherhood is more demanding than ever. Parents spend more time and money on child care. They feel more pressure to breastfeed, to do enriching activities with their children, and to provide close supervision. And women underestimate the costs of motherhood. This was the recent finding reported in a New York Times article, “The Costs of Motherhood Are Rising, and Catching Women Off Guard.”

Whether and when to have a child is a complex issue for which there is not much guidance. I recall a mentor suggesting that having a child in my 20s would be career suicide, and I should put off having children as long as possible. I learned the hard way that the biological clock doesn't wait for your career—that waiting could mean missing the opportunity to have your own biological child.

Female lawyers struggle and come up with various solutions for balancing motherhood with their careers. Some also make the very deliberate decision to be child-free. And it certainly affects one's sense of well-being—no matter what one chooses.

CHOOSING CHILDREN

Chelsie Lamie, a personal injury lawyer in Safety Harbor, Florida, had a greater vision when she started her own law practice. “I created a baby-friendly law firm. I instituted a paid family leave policy—six weeks paid at 100 percent—and encouraged my employees to bring their babies to work. We eventually opened a day care in the office,” she says.

She is very clear about her priorities. “I always put my kids and family vacations on my calendar first, then trials,” Lamie says. She is able to do this as a plaintiffs lawyer because she has more control over the trial calendar than if she was on the defense side. She also intentionally keeps her caseload at about 100 cases so that she doesn’t feel overwhelmed.

Kelly Erb is a tax attorney in Paoli, Pennsylvania. She practices with her husband, also a lawyer. She has three children and says she thinks about how her decisions will impact them all the time.

“A significant portion of my brain is devoted to my children. We’re also of a generation where we’re also responsible for taking care of our parents. So now we have to figure out how to take care of not only our children but also our parents,” Erb says.

Erb and her husband decided not to send their kids to day care until the children were old enough to speak, so they brought the kids to the office. “Anybody that interviewed for a position at our firm, I made it very clear that my children were going to be at the office. Having staff that was aware of what my priorities were was very helpful,” she says. She also set expectations early with her clients and her staff. “I try to be a parent first, then a lawyer second,” Erb says.

She finds it empowering that she can balance motherhood with lawyering. “I look back and see that I’ve been responsible for these kids, and they are thriving. And [I can] still be successful at work,” she says.

Merle Kahn is of counsel at the Law Offices of Daniel Shanfield in San Jose, California. She had children later in life. She decided to work part time because “both my teenagers developed health issues necessitating that one of us be able to be home with them at all times,” she says.

She always assumed that once her youngest was in high school, she would be working full time, but that never happened. “Very fortunately for me, I found a position as of counsel at a local immigration firm. I set my own hours and work on the cases that need time, patience and expertise. I don’t get paid as much as I would like, but I have the flexibility that I need,” she says.

She readily admits that the choices she has made were right for her and her family, but still she wonders on occasion where she would be if she had not made those choices. “Would I be at the ACLU running their immigration department? But [this choice] was worth it for me,” Kahn says.

Danielle Pener, principal attorney at Alta Employment Law in San Francisco, has a 2-year-old child. She has refined her employment law practice to limit litigation so that she can have time for her son and meet the needs of her clients.

She was almost 41 when she had her son. She stresses the importance of normalizing being a parent and a working lawyer. All three of the other lawyers at her firm also have children. “They’re all very good lawyers and also are the primary parent, like I am,” Pener says.

It’s important for Pener to be transparent with her clients about her boundaries. She isn’t shy about telling her clients: “I’m sorry, but I don’t have child care. I can take the call now, but there will be background noise from my toddler. Or we can speak later this evening.”

Like many lawyer moms I spoke to,
Pener struggles with feeling overscheduled. She tries to reduce the overwhelm by practicing being present with her son, even if it’s just one to two hours before bedtime.

Each day is a new learning opportunity. There are many days where she feels like she is a bad lawyer and a bad mom. But the next day, she feels like she’s a great lawyer and a great mom. The next, great lawyer, bad mom. Every day is different, and when something gets out of balance, she just tries to right the ship before it gets too far off course.

**SINGLE MOTHER BY CHOICE**

Colette Vogele, a senior attorney at Microsoft in Seattle, is a single mom by choice. She had a great career at Microsoft but felt she hadn’t figured out her personal life. When she was in her late 30s, she knew she wanted to have children and began exploring the options—adoption, foster-to-adopt programs and getting pregnant herself. At 42, she pursued in vitro fertilization and was able to get pregnant.

“I couldn’t imagine not having this experience. It didn’t really matter to me that I was pregnant. But having gone through it, I’m so glad I had the experience of going through pregnancy,” she says.

Shortly after she got pregnant through IVF, she had an opportunity to pursue an overseas role with Microsoft in Belgium. “This is my opportunity to lean in, so I decided to do both,” she says.

Vogele says she would recommend that women in their late 20s or early 30s consider egg freezing. “It’s powerful to have options. I think if you think it’s something you want to do, keep those options as open as you can. I was lucky that I was able to have children and freeze embryos,” she says.

**PRESERVING FERTILITY**

Shannon McMinimee, a partner at Cedar Law in Seattle, always wanted the possibility of having children and having her own biological children. She chose to keep the door open to motherhood by choosing to freeze her eggs, and she says she is prepared to pay for surrogacy if needed.

She spent her 20s and 30s very focused on her career. She decided in her late 30s to freeze her eggs after watching others close to her experience fertility issues and learned the statistics associated with egg viability after 35. McMinimee describes going through the egg-retrieval process as the “hormonal equivalent to being nine months pregnant and going through menopause at the same time.”

They were able to retrieve 18 viable eggs. She suggests that any women who want children consider having her eggs frozen. McMinimee was in the financial position to pay the $10,000 to freeze her eggs and thinks it was well worth doing to preserve her fertility.

**CHILD-FREE BY CHOICE**

Some women choose to be child-free so that they can pursue their legal careers. Chelsea Murfree, an associate attorney at Leslie Wm. Adams & Associates in Houston, decided to give up a child for adoption when she was 20 so she could become a lawyer.

She recalls being at the hospital after delivery and spending the entire night with her son, so she could know for certain that she was making the right decision.

Her son was adopted by a loving couple who has stayed active in Murfree’s life. They are very supportive of her, and they even attended her law school graduation. She has stayed active in her son’s life, and her son sees her as a very protective aunt.

The adoption was the “hard bottom” she needed to hit to motivate her to pursue her dream of becoming a lawyer. The adoption experience helped her realize she doesn’t want kids.

For other lawyers in a similar situation, Murfree says it’s important to have at least “one person that is supportive of your decision.” She had a co-worker in her late 30s who also gave up a child through adoption.

Her experience has helped her be more empathetic toward people who “make stupid business or life decisions. It doesn’t make it OK, but I get it,” Murfree says.

Melinda McLellan, a partner at BakerHostetler in New York City, never wanted kids and considers BigLaw a challenging environment for new parents. “Other career paths seem better suited to motherhood, in my view,” she says.

She feels privileged to be free of parenting responsibilities and is hearing the same from more female professionals. “BigLaw clients expect and deserve our full attention as their service provider. But babies deserve their parents’ full attention, too,” she says.

She appreciates not feeling torn between being an absentee mom or a distracted lawyer. Further, she says her child-free lifestyle has facilitated the intense focus necessary to develop deep expertise in her practice area.

“I always wanted to be a dad; I never wanted to be a mom,” McLellan says. She sees the roles as very different, even today. “Men often get a pat on the back for basic parenting, for doing things that aren’t even recognized when a mom handles them,” she says.

Female lawyers are exercising their right to choose. This includes choosing to not have children, choosing to start her own practice, or choosing to change jobs. All the women I interviewed talked about overcoming obstacles and challenges when it came to entering motherhood or choosing to remain child-free.

Our profession certainly has more progress to make for creating family-friendly environments, a more inclusive workplace, and to allow each woman to choose the path that makes sense for her.

Jeena Cho consults with Am Law 200 firms, focusing on actionable 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.
Longtime Lawyers Offer Advice for Newcomers

From January through May, the ABA ran a contest asking members to offer words of wisdom to new lawyers in four categories: young lawyers, business lawyers, litigators and solo practitioners.

In the ABA’s Briefly Speaking contest, the lawyer in each category with the tip that received the most votes received a $200 American Airlines gift card and a travel pillow.

The ABA received 1,005 entries, and 2,500 votes were cast to select the best tips. Two lists are published here, and two will run next month.

The contest winner in the young lawyers category was Brijesh Patel of the Pinellas (Florida) County Attorney’s office; and Andrew Clark, of Ricketts Co. LPA in Pickerington, Ohio, won the solo lawyers category.

**TOP TIPS FOR YOUNG LAWYERS**

**SUBMITTED BY ABA MEMBERS**

1. Don’t doubt yourself! Of course you should ask questions when you have them, but you should also have faith in your education and intellect. You have the training, you passed the bar, and you are just as much an attorney as a partner who is 30 years in practice. Own it!

   Jenny Cameron
   Hodgson Russ
   Buffalo, New York

2. Develop your leadership skills early by taking on new challenges, seeking mentorship from top performers, building your expertise in a practice area, developing your signature brand, and becoming actively involved in your local/ABA YLD Chapter.

   Artika R Tyner
   Planting People Growing Justice
   St. Paul, Minnesota

3. Own your mistakes. You’re going to spend the rest of your life trying to convince people they should take your word for things. It’s easier to convince people you’re right if they’ve learned you will admit it when you’re wrong.

   Judge William Bedsworth
   California’s 4th District Court of Appeal
   Long Beach, California

4. Climbing the ladder in the competitive legal arena requires the support of a sponsor who is an advocate for your success. Simply, a sponsor bets on your success and has your back. They are a stakeholder in the organization who has a seat at the table with the people who make the decisions. Your sponsor will require you to rise to challenges, do the best work possible and be respectful to others. It’s a two-way street.

   Stephanie Ball
   National Arbitration and Mediation
   New York City

5. Remember that the mountains of advice everyone is eager to give you is filtered through the lens of their own experience. Identify what brings you joy in the workplace, and work with your employer and mentors to build on those experiences.

   Emily Farrell
   University of Oregon School of Law
   Eugene, Oregon

6. Ensure that you have developed positive coping mechanisms. Take intentional time for yourself every day—be it meditation, yoga or a walk outside the office. Be self-aware and recognize if stressors are flaring up and you need to talk to someone! If you do not yet have a trusted office colleague, reach out to the state Lawyer Assistance Program (LAP) for confidential assistance.

   David Jaffe
   American University
   Washington College of Law
   Washington, D.C.

7. Never burn your bridges! People leave workplaces all the time—and encounter each other at different stages of their careers.

   Mona D. Miller
   Mona D. Miller, Attorney at Law
   Los Angeles

8. Make sure to get client software from the start. It makes it so much easier to work remotely. Don’t forget to scan all your files!

   Heidy Orellana
   The Law Office of Heidy L. Orellana
   Pearland, Texas

9. Take ownership. Act like you are the only person responsible for the project, and treat it as if you are preparing the final product for submission. If you take ownership of your assignments, you will succeed.

   Larry Schiffer
   Squire Patton Boggs
   New York City

10. Develop your leadership skills early by taking on new challenges, seeking mentorship from top performers, building your expertise in a practice area, developing your signature brand, and becoming actively involved in your local/ABA YLD Chapter.

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   Mona D. Miller
   Mona D. Miller, Attorney at Law
   Los Angeles
TOP TIPS FOR SOLO LAWYERS
SUBMITTED BY ABA MEMBERS

Remember every potential client can become your biggest client. Don’t take every person who knocks on your door, but don’t be too selective, either. If you are confident you can represent them, then don’t be afraid to take that big case!

James Phan
Law Offices of James Phan Inc.
Cherry Hill, New Jersey

Be deliberate in all that you do. This profession is incredibly time-consuming, but be deliberate about protecting time for you and your loved ones. Billing (and collecting) is the foundation of your firm, but be deliberate about feeding your passion for the law in addition to the bottom line. A good mentor is worth their weight in gold for helping you navigate the stress and challenges of your practice, but be deliberate about recognizing your own strength and building your own professional self-confidence. Hard work and focused dedication got you here, so be deliberate about being true to yourself and this noble profession.

Andrew Clark
Ricketts Co. LPA
Pickerington, Ohio

Don’t join “civic organizations” with the intent of getting new business—too much competition there. Instead, do the social/civic things you like, especially if other attorneys don’t do them—you’re likely to be the only lawyer there and more likely to have things in common with your future/potential clients.

Richard Williger
Richard L. Williger, Esq.
Akron, Ohio

Get a mentor! You need someone to tell you that your ideas are all wrong. Someone to read that angry letter you just dictated and stop you from sending it. Most of all, you need someone to bounce ideas off of. Make a call to another attorney who practices in a firm. Most attorneys are more than willing to help.

Bill Grunewald
Jensen, Scott, Grunewald, & Shiffler
Medford, Wisconsin

Write personal thank-you notes for every referral! If the referral is from another attorney, I usually include gift cards to show my appreciation.

Valerie Horvath
Horvath Law Firm
Indianapolis

The best tip I received when opening my own law firm over 15 years ago was to buy the book Flying Solo. The best tip in the book was to take cases you want to work on, work with clients you like and get paid. If you aren’t doing one of those three things, then go spend the day doing what you want to do. Go to the beach, go to lunch.

Ellen Babb
Babb Law Firm
Mount Pleasant, South Carolina

Be flexible, have a vision, work hard, put in the time, and it will pay off. Remember: Clients are everywhere. You can find them at the gym, at the grocery store, basically everywhere. Mistakes will be made, but the bottom line is that there is a huge difference between managing a business and practicing law. Be aware of what you don’t know. Knowing when to ask for help is key.

Flavia Santos Lloyd
Santos Lloyd Law Firm
Irvine, California

Don’t hesitate to ask other attorneys for advice. Keep your word. Be friendly to everyone, especially bailiffs and court staff. Return calls promptly. Seek out favorable online reviews from clients and peers. Volunteer in your community. Don’t say yes to things you do not know just for the work. Exercise, eat healthily, and don’t make your work your life.

Kathleen O’Donnell
Law Offices of Kathleen O’Donnell
Keene, New Hampshire

Success doesn’t come overnight. You are not just practicing law, you are now a business owner. If you don’t have experience as a business owner, educate yourself. You can find free or inexpensive courses through your area technical school, community action centers or other groups. Like other small businesses, your practice is most likely to fail not because of your lack of professional skills, but the lack of ability to run a business. Good luck!

Kathy Wallis
Wallis Law Group
Edmond, Oklahoma
AS STATE ACTORS CONTINUE TO WAGE CYBERWAR ON THE UNITED STATES, THEY HAVE A POWERFUL ALLY—GAPS AND AMBIGUITIES IN THE LAW

BY HARVEY RISHIKOF, NICOLE CACOZZA AND GARRETT MULRAIN

Editor’s note: The views expressed in this article are those of the authors and do not reflect the official position or policy of the U.S. government.

A major hack on the firms Cravath, Swaine & Moore and Weil Gotshal & Manges a few years ago was linked to foreign nationals with ties to the Chinese government. Their target? Proprietary client information. In 2014, a group with links to the Russian state energy sector hacked into a website belonging to the British law firm 39 Essex Chambers looking for information.

Last year, the Department of Justice opened an investigation into whether the Chinese government had attempted to hack Clark Hill, a law firm representing a Chinese dissident. And those are just the directed assaults. Law firms also are vulnerable to more broad-based attacks. DLA Piper was devastated in 2017 by a ransomware worm that placed nearly 3,600 of their lawyers on temporary lockdown. The worm later was found to be the work of hackers linked to North Korea.

Cyber exploitations and attacks happen every day on a global scale. How do we characterize this new cyber reality? Are these network violations criminal activity or espionage? Or are they acts of war? Our existing international laws, domestic statutes and law of armed conflict frameworks, all conceived in the pre-internet age, are struggling to find principles to bring order to our digital era.

The legal rules for cyber incidents below the threshold of an “armed attack” live in a
gray zone as practitioners and scholars struggle to fill the legal doctrinal gaps on nonintervention under international law. The roles, responsibilities, authorities, accountability or standards for attribution are not universal, and there are no agreed-upon responses or norms for unlawful acts in cyberspace.

As the U.S. attorney general’s 2018 Cyber-Digital Task Force Report makes clear, although many government agencies are working on cybersecurity, and much has been accomplished, the DOJ is “keenly aware” that the current “tools and authorities are not sufficient by themselves” to keep America safe from cyberthreats.

THE LAW OF ARMED CONFLICT

The U.N. Charter’s Article 2.4 prohibits any nation from acts of aggression against other nations, and while in theory this extends to the cyber world, the international community has yet to determine where the threshold for a cyber use of force lies. One clear point of agreement, noted in 2012 by Harold Koh, who was the Department of State legal adviser, is “cyber activities that proximately result in death, injury or significant destruction would likely be viewed as a use of force.”

The most recent Department of Defense’s Law of War Manual later stipulated that a cyber operation that might be considered a use of force under the U.N. Charter might be one that triggered a nuclear plant meltdown, opened a dam to cause destruction, disabled air traffic control services, or crippled military logistics systems.

Cyberattacks that cause physical destruction have been rare, the notable exceptions being in Saudi Arabia and Iran. In 2012, the Saudi state oil company Aramco was hacked and its hard drives wiped clean of information. Two years earlier, centrifuges in one of Iran’s nuclear facilities fell victim to malicious code.

There is no international legal agreement on the answers to these questions yet. An attempt begun in 2013 by the U.N. Group of Governmental Experts in cybersecurity to establish a legal cyber framework has stalled after reaching some basic agreements.

The GGE recognized the applicability of existing international law to states’ cyber activities; the inherent right of self-defense as recognized in Article 51 of the U.N. Charter; and the applicability of the law of armed conflict’s fundamental principles of humanity, necessity, proportionality and distinction to the conduct of hostilities in and through cyberspace.

In the law of armed conflict, the principle of necessity dictates that only those cyberstrikes deemed necessary to counter a threat should be carried out, while the principle of proportionality ensures any risk of collateral damage to civilian networks or infrastructure must not be excessive.

The principle of distinction demands that only those aspects that are military in nature can be targeted; and finally, the principle of humanity prohibits military strikes that would cause wanton suffering. But further agreement has been elusive. Some in the private sector have called for a “digital Geneva Convention,” committing to not engage in cyberattacks against individuals or businesses. But it, too, remains a nascent effort.

The most comprehensive private international effort to codify the law on cyberwar came in the form of the Tallinn Manual on the International Law Applicable to Cyber Warfare, originally written by a group of international experts in 2013 and updated in 2017. The Tallinn Manual was informed by traditional law of war treaties, such as the Geneva Conventions, and translated those principles for the cyber age in a bid to set a standard for cyber rule-making around the world.

The key flaw, however, is that the Tallinn Manual does not have the binding authority of a treaty. So while it is one the most thorough legal manuals on the law of cyber operations, no nation is compelled to abide by its rules. The Tallinn Manual has appropriately focused on the issues of sovereignty and nonintervention as being two of the critical sticking points on how to achieve international consensus in this arena.

THE STATE ACTORS

As is the case in any international conflict, we have allies, adversaries and frenemies. While problems with attribution persist, it is generally known that there are four key American adversaries in the cyber realm: China, Iran, North Korea and Russia.

In 2011, the Office of the National Counterintelligence Executive’s annual report to Congress on economic espionage named China, Iran and Russia as advanced persistent threats that were focused on stealing American intellectual property. Even so, holding states responsible to ensure that unlawful actions do not emanate from their jurisdiction, as
well as the issue of attribution, continue to be difficult to apply in the cyber arena. Russia has particularly aggressive cyber capabilities, which it typically uses to advance its geopolitical agenda and aggressively target democratic institutions in many countries. Every agency within the U.S. intelligence community—and a recent criminal indictment—has determined that the Russian government repeatedly infiltrated the computers of U.S. political parties to exploit information and interfered in the 2016 presidential election.

As noted by the recent indictments in July by special counsel Robert Mueller, there is also evidence that the Russian government developed detailed cyber campaigns to influence elections and undermine democratic institutions of our allies. In April, the Department of Homeland Security and the FBI announced that they were tracking widespread targeting of U.S. routers by Russians searching for more network vulnerabilities.

Furthermore, in 2016, the Russian-linked NotPetya virus was deployed in Ukraine to further Russian interests. However, it spread across the globe, affecting numerous systems in the United States and United Kingdom.

China, on the other hand, has implemented a dedicated cyber campaign apparently motivated more by financial and commercial considerations. The United States has accused China of as much as $600 billion of intellectual property theft from U.S. companies—the scale of which is largely unprecedented, according to U.S. Army Gen. Keith Alexander, former National Security Agency director.

The United States countered China’s “voracious appetite for information” by indicting members of the Chinese military in May 2014 for cyber breaches involving trade secrets and confidential business information. Then in 2015, federal officials signed a groundbreaking cybersecurity agreement with China to restrict future financial and commercial cyberespionage. This agreement has had a measurable impact on Chinese-linked hacks.

However, there has been some question as to whether they have continued to abide by the pact. Most experts agree that it is only a first step, and that China still maintains its capabilities and cyber ambitions.

North Korean hackers are thought to have been behind some of the world’s most devastating cyberattacks. Last year, they propagated the ransomware cryptoworm WannaCry, which affected more than 300,000 computers across more than 150 countries, costing the world economy billions of dollars.

In 2014, a North Korean-linked group hacked into Sony Pictures and stole more than 100 terabytes of information (names, Social Security numbers, health records) and dumped that information on public websites in retaliation for the company producing a fictional film about the assassination of North Korean leader Kim Jong Un. This group also threatened “9/11-style consequences” on the United States, and the entire attack resulted in sweeping international sanctions and legislative proposals.

MOVING FORWARD

As we try to define this cyber gray zone, the State Department has proposed some principles and norms as outlined by its former legal adviser, Brian Egan.

First, a state shouldn’t conduct or knowingly support cyber-enabled theft of intellectual property, trade secrets or other confidential business information with intent to provide competitive advantages to its companies or commercial sectors.

Second, a state shouldn’t conduct or knowingly support online activity that intentionally damages critical infrastructure or otherwise impairs the use of critical infrastructure to provide service to the public.

Third, a state shouldn’t conduct or knowingly support activity intended to prevent national computer-security incident-response teams from responding to cyber incidents. A state also shouldn’t use these teams to enable online activity that’s intended to do harm.

Fourth, a state should cooperate in a manner consistent with its domestic and international obligations with requests for assistance from other states in investigating cybercrimes, collecting electronic evidence, and mitigating malicious cyber activity emanating from its territory. Achieving agreement on these norms internationally in the legal community would help define the contours of this emerging threat.

Domestically, one example of a structural legislative response to this new cyber world are the changes made in Rule 41(b)(6) of the Federal Rules of Criminal Procedure to expand the power of judicial warrants for multiple computers in multiple judicial districts. Another is the passage of the Clarifying Lawful Overseas Use of Data Act, which clarified the disclosure of information held by third parties abroad and reformed the Mutual Legal Assistance Treaty.

Tellingly, one of the areas that the Cyber-Digital Task Force Report highlights for deeper evaluation on its authorities, practices and resources is enhancing effective collaboration with the private sector. This includes issues such as information-sharing, data-breach notification standards and frameworks for joint-disruptive efforts such as botnet takedowns. 

Harvey Rishikof is chair of the Advisory Committee to the ABA Standing Committee on Law & National Security. Nicole Cacozza is a program assistant with the standing committee. Garrett Mulrain is a law clerk with the standing committee.
As the cryptocurrency craze spreads, the mainstream public is investing in bitcoin and other digital currencies. With dollar signs in their eyes, they might not think about what happens to their cryptocurrency when they die.

Cryptocurrency, such as bitcoin or Ethereum’s ether, could vanish into thin air unless estate-planning lawyers spur their crypto-loving clients to make inheritance plans. But there are traps for estate-planning attorneys to watch for in order to ensure that heirs will have access to a client’s cryptocurrency after death, while making sure the client won’t be giving up the keys to the castle prematurely.

“This is a whole new area for estate-planning lawyers,” says Pamela Morgan, an attorney and author who founded Empowered Law and trains lawyers about cryptocurrency and blockchain technology. “It’s an opportunity to grow your client base—to attract new people who never thought about this before.”

A full immersion into cryptocurrency is a good first step for other estate-planning lawyers wishing to break into the space.

“If you don’t actually understand the technology and how it works, you make assumptions about access,” says Morgan, who focuses one Empowered Law workshop on crypto-estate planning and is writing a crypto-inheritance guidebook geared toward lawyers. “Often the assumptions are wrong and will lead to loss.”

PLANNING IS THE KEY

The first step in creating a crypto-estate plan is figuring out whether clients even own cryptocurrency. Colorado estate-planning lawyer Matthew McClintock says his client intake forms now have a new category for crypto-assets. In one way, cryptocurrency is just another class of assets, but on another level, it’s unlike any asset that came before it.

“Possession equals control equals ownership. If someone gets the client’s private keys, they have unlimited access to the client’s crypto. This makes succession planning very challenging,” McClintock says.

When a person buys bitcoin, it’s associated with cryptographic public and private keys. The public key, visible to all, identifies that specific bitcoin and all of its transactions on the blockchain—a public ledger that records transactions on a network of decentralized computers across the world. The private key is the owner’s secret and proves ownership and authorizes transfers. The private key must remain secret until the owner dies, or else anyone could steal the cryptocurrency.

Morgan explains that unlike a bank, which must follow a probate court’s order to turn over a decedent’s account to an heir, with crypto-assets there is often no trusted third party who is subject to a court order. The inheritance plan must spell out for heirs how to access the cryptocurrency.

She says there are several methods for an owner to hold cryptocurrency—including online exchanges, software wallets and hardware wallets—and an estate plan needs something slightly different for each method. If held on an exchange such as Coinbase or Kraken, an heir can use the normal probate process to access the accounts.

For software wallets, the inheritance plan must say which program the client used, the device it’s installed on, the type of cryptocurrency in the wallet, and the place an heir can find the seed phrase—a security feature that allows a user to recover lost cryptocurrency. As for hardware wallets, including Ledger or Trezor, the estate plan must spell out where to find those USB-like devices and their seed phrases.

Morgan says it’s a good practice to keep hardware wallets and seed phrases in a safe deposit box because they’re secured during the client’s life, and an heir can go through the normal probate process to access the box after the client’s death.

Although succession planning is a large part of what estate-planning attorneys handle, they also help their clients manage their assets during their lives. Legally avoiding taxation is often high on clients’ to-do lists, and it’s no different with cryptocurrency.

“They’re usually very highly appreciated, so capital gains tax issues—and for many, estate-tax issues—have to be addressed with the strategy phase,” says McClintock of Colorado-based Evergreen Legacy Planning.

Indeed, many of Toronto attorney Aaron Grinhaus’ cryptocurrency clients come to him through referrals from accountants. Some of these clients ask Grinhaus, the managing partner of Grinhaus Law Firm, about creating a corporation to hold their crypto-assets in order to gain tax benefits and make it easier to pass the assets to beneficiaries.

“With crypto, the governments are still trying to figure out how to tax it and in what way,” he explains, noting that trading one cryptocurrency for another may trigger a tax consequence. “You have to anticipate how it’s treated for estate-planning purposes: whether it’s capital gains or current income.”

Because the law is unsettled and yet changes rapidly, some lawyers may shy away from representing cryptocurrency clients. Not Grinhaus, who says the niche practice area brings in business for his firm.

“Crypto clients are a different brand of client than everyone else. A lot of them are younger—we have a lot of multimillionaire clients under 25,” he says, revealing that he ditches his suit in favor of jeans and a T-shirt to meet with these newly wealthy clients.
Business of Law

Yesterday’s Technology, Today’s Problem

Any piece of technology that stores information could become problematic—even obsolete devices that get thrown out with the garbage. By Jason Tashea

In 2010, Affinity Health Plan, a Bronx, New York-based managed care provider, suffered a cybersecurity breach that put hundreds of thousands of health care records at risk. But the breach didn’t occur because of a socially engineered ruse or a malicious hack.

It happened because the lease was up on the copy machines.

“A lot of lawyers aren’t thinking that the copier has a hard drive in it,” says Joe Lazzarotti, a principal at Jackson Lewis where he co-leads the firm’s privacy, e-communication and data security practice.

Affinity’s photocopiers had hard drives. In the normal course of business, they were rolled out the front door along with the electronic health care information of more than 344,000 people, according to a 2013 settlement with the U.S. Department of Health and Human Services.

Affinity failed to consider copy machines as a potential security risk, costing the company over $1.2 million in a civil penalty. The settlement also required the company to expend resources to retrieve the machines, conduct a risk assessment and implement a new security plan.

“These peripheral devices of all kinds present risks that we’re not thinking about,” Lazzarotti says.

With so much attention paid to phishing attacks and hacking, ubiquitous technologies are being overlooked. Beyond photocopiers, fax machines, smartphones and USB drives create unique security vulnerabilities. For lawyers, overlooking these devices could have serious consequences for attorney-client privilege and create ethics violations.

UNDERSTANDING THE RISKS

In 2012, the ABA Model Rules of Professional Conduct increased attention on technology’s role in legal ethics. For example, Model Rule 1.1 regarding competency requires that lawyers be abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.

However, this is easier said than done. “Most lawyers are not trained to deal with the issues associated with inadvertent loss of information or unauthorized loss of information,” says John Barkett, a partner at Shook, Hardy & Bacon in Miami and a member of the ABA Standing Committee on Ethics and Professional Responsibility, referencing the updated Model Rule 1.6(a) on confidentiality. “They don’t understand technology well enough to be able to deal with that.”

He says that reasonable attempts to follow the ethics rules may include talking with IT professionals and reading privacy policies and terms of service agreements to understand a device or piece of software.

The risks created by easily accessible software are increasingly coming into focus. Recent research from Northeastern University in Boston has found that apps for Android phones were acting beyond their terms of use by recording users’ screens and sending that information back to the company. Of the 17,260 apps researched, they found over half had the potential to exfiltrate data collected through the phone’s camera, microphone or ability to record the device’s screen.

“It’s alarming, but there’s nothing you can trust in regard to your mobile phone or smart devices,” says Elleen Pan, previously an undergraduate researcher at Northeastern and now a software engineer at Square, a mobile payments company in Atlanta.

“Screen recording could be more of a privacy risk than access to your camera or microphone,” says Pan. This software could capture the typing of credit card numbers, passwords and other personal information. The research notes that these actions were not always clear in user agreements and can’t be turned off by users.

SMALL DEVICE, BIG BREACH

Smartphones aren’t the only ubiquitous threat. USB drives and the expanding world of internet-enabled products, termed the “internet of things,” also create and compound security vulnerabilities.

“The idea that you would take something that you know nothing about and put it in your machine is repugnant,” says Jason McNew, CEO of Stronghold Cyber Security based in Gettysburg, Pennsylvania. “You have no idea where the thing was manufactured.”

Comparing the ministorage devices to a dirty needle, he says they can come preloaded with malicious software and are used by hackers and penetration testers to exploit human vulnerabilities to access a network. While there is no Consumer Reports for secure devices, he notes that the National Security Agency does evaluate and validate some products for high-security purposes, such as hard drives, encryption devices and paper shredders.

Regarding the internet of things, including web-enabled cameras and smart thermostats, reports have shown that poor security has led to people’s devices taking part in denial-of-service attacks while the owners were unaware. In other instances, device manufacturers built in secret “backdoors” so devices could be accessed remotely, which left the technology vulnerable to attacks.

“It’s important to consider those things when you bring them into your environment,” he says. “Once you get a toehold in the network—then it’s anyone’s guess to what you can and can’t do.”

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In 2000, two members of al-Qaida bombed the U.S. Navy destroyer the USS Cole in a suicide attack, killing 17 sailors and wounding 39 others. Two years later, Saudi national Abd al-Rahim Hussein Muhammad al-Nashiri was arrested for orchestrating the crime and turned over to the U.S. government.

Al-Nashiri spent the next four years at CIA “black sites” overseas, eventually ending up at the infamous U.S. prison for terrorists at the Guantanamo Bay Naval Base. His current trial, at which he faces the death penalty, began in 2011 and still has no end in sight.

His case was still in preliminary hearings in the fall of 2017, when al-Nashiri’s civilian defense team quit. Lawyers Richard Kammen, Rosa Eliades and Mary Spears left because they found a microphone in the room where they met with their client. The government says that microphone was never turned on, but thanks in part to a history of spying on defense lawyers at Guantanamo, they didn’t trust those reassurances. After consulting a legal ethics expert, the lawyers decided they had no choice but to quit, even though that left al-Nashiri with no attorneys other than a Navy JAG, Lt. Alaric Piette, who had never tried a death penalty case. Piette politely but consistently refused to participate in most of the hearings thereafter, maintaining that he doesn’t qualify to defend a capital case under the military commissions’ own rules.

That clearly frustrated the judge, Air Force Col. Vance Spath. The judge made several unsuccessful attempts to compel the attorneys into court—including briefly imprisoning the head of defense at Guantanamo for refusing to order them back. In court, Spath repeatedly said the defense’s ethics concerns were a “strategy” intended to undermine the trial. Finally, on Feb. 16—after what he said was a sleepless night worrying about the case—Spath suspended the proceedings, saying he needed guidance from a higher court.
That guidance may be coming, but observers say it'll be slow—first a trip to the Court of Military Commission Review, an appeals court dedicated to Guantanamo cases, and then a nearly inevitable appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Meanwhile, both al-Nashiri and the Cole victims have been waiting for some kind of outcome for most of the 21st century. That's not unusual for the Guantanamo military commissions—and under those circumstances, some are wondering whether the commissions are still a good idea.

"I think that if this is the way the Military Commissions Act system was intended to function, then somebody ought to take a fresh look at the Military Commissions Act, because the current arrangement is unfair to the families who lost loved ones," says Eugene R. Fidell, who teaches military justice at Yale Law School and co-founded the National Institute of Military Justice.

ESPIONAGE

The Cole was docked for refueling in Aden, Yemen, on the day of the bombing. Members of the crew were lining up for lunch when a small boat pulled up alongside the much bigger ship. It was so close that sailors on watch said hello to the two pilots.

Then the explosion came. Those who made it out alive describe chaos afterward as water rushed in and the crew scrambled to survive. One sailor told the Norfolk Virginian-Pilot in 2010 that he had to swim out into the harbor, glasses blown off and eardrums ruptured, as water rushed into the ship.

Two years later, authorities in Dubai arrested al-Nashiri, believed to belong to al-Qaida, and turned him over to the United States.
the next four years, he was transferred around CIA “black ops” sites—overseas prisons loaned to the U.S. by foreign governments, where he was subjected to interrogations federal authorities believed fell short of the definition of torture. Those included waterboarding al-Nashiri at least three times; stripping him and shaving him; shackling his arms over his head for extended periods to deprive him of sleep; and force-feeding him rectally. According to a CIA report declassified in 2014, this treatment resulted in “essentially no actionable information.”

In 2006, al-Nashiri was transferred to the Guantanamo Bay Naval Base, where he was eventually charged with orchestrating the Cole bombing, as well as the suicide bombing of the French tanker MV Limburg. From the beginning, his legal team included Kammen, an experienced death penalty defense lawyer from Indiana who filled the statutorily required role of “learned counsel.” By the summer of 2017, the team also included Piette, the Navy attorney, and assistant defense counsel Eliades and Spears, both currently at the Military Commissions Defense Organization.

A prosecution filing obtained by the Miami Herald’s Carol Rosenberg (who won a 2018 ABA Silver Gavel Award for her Guantanamo reporting) details how that team found the microphone where they met with al-Nashiri. After defense lawyers discovered that a different meeting room for defense lawyers had been bugged, military authorities invited the al-Nashiri defense team to have a look at their own room. Piette didn’t expect to find anything.

“It’s difficult to imagine a lawyer for the CIA signing off on something like that,” says Piette, who is stationed in Virginia. “Or any intelligence agency.”

But they found the microphone.

The prosecution filing, dated March 5, explained it was a “legacy microphone” left over from when the room was used for interrogations, and asserts that it was “not connected to any listening/recording device.”

Kammen did not believe this, in part because of a long history of interference in the work of Guantanamo defense lawyers. As he detailed in a later filing in Indiana federal court, the base openly read detainees’ legal mail for two years. In 2013, there was a two-month recess in al-Nashiri’s trial because the government had been caught reading his defense team’s email. The military
had monitored defense lawyers’ on-base internet use and sent some of their files to the prosecution. And in 2014, the FBI recruited a member of the civilian defense team for Ramzi bin al-Shibh, who is accused of helping plan the Sept. 11 attacks.

Piette would have liked to see something demonstrating that there was no spying. Unfortunately, Guantanamo authorities dismantled the room two months after the discovery, removing any chance of independently verifying the government’s claims. That happened after Spath denied the defense team’s request to investigate the microphone and hold a hearing on the matter.

Spath’s reasoning remains classified, but he’s said in court that declassifying it would prove his decisions right. (“Both Spath and the prosecution team declined to speak to the ABA Journal.”) Kammen and Piette strongly disagree. Piette likens his reaction to the incredulous looks frequently assumed by the character Jim from the NBC sitcom *The Office.*

“I made this little meme … of the judge saying that, and then me, and it was Jim’s face looking at the camera,” he says. “Because how could you think that if this stuff is declassified, anybody is going to be on your side?”

**ETHICAL QUAGMIRE**

With the discovery of the microphone, the defense team had a dilemma: How could they talk to their client about his case without violating attorney-client privilege? The phone was forbidden, they couldn’t trust the confidentiality of written communications, and now the privacy of in-person meetings was suspect.

Kammen got in touch with ethics expert Ellen Yaroshefsky, a professor at Hofstra University Maurice A. Deane School of Law who runs the school’s Monroe H. Freedman Institute for the Study of Legal Ethics. Her opinion ultimately said the attorneys had no choice but to leave the case.

“It was a very difficult choice,” says Yaroshefsky. “But ultimately, if you cannot—and they could not—ensure that they could have confidential communications with their client, and they couldn’t even tell their client why they couldn’t do that, then it would be a violation of the rules of professional conduct, and they were required to withdraw.”

That’s when the case ran into a second major issue: Who had the legal authority to excuse the attorneys? Kammen, Spears and Eliades went to Brig. Gen. John Baker, the chief defense counsel for the Guantanamo military commissions. Under one set of rules for the military commissions, the chief may excuse defense lawyers “for other good cause shown on the record.” But the rules of court for the commissions say defense counsel “will not be excused without permission of the military judge.”

Professor Stephen Vladeck of the University of Texas School of Law, who teaches national security law, says there are genuinely plausible arguments for both procedures.

“I absolutely think of all the questions [in al-Nashiri’s case], this is the one that’s perhaps the most closely divided,” says Vladeck, who has written about al-Nashiri’s case on the Just Security and Lawfare blogs. “The text is ambiguous, and there are sort of decent policy arguments for both.”

Spath saw it differently. He ultimately decided that the rule favoring Baker doesn’t indicate who decides whether good cause has been shown, and that he himself, as the military judge, had that authority. Then he found no good cause for the excusal, and ordered Baker to rescind his decision excusing the lawyers. When Baker refused, Spath held a con-
tempt-of-court hearing—at which he didn’t permit Baker to speak—convicted him and confined him to quarters (house arrest) for 21 days.

Within three days, Baker’s sentence was suspended by his “convening authority,” which in military justice terms means someone with authority over the legal proceedings.

But to the civilian defense lawyers, this seemed like a preview of what they could expect if they came back to trial.

Another cautionary tale was the experience of Stephen Gill, a former Navy attorney who worked on al-Nashiri’s case at the Pentagon. In 2016, Spath ordered Gill—by then a civilian—to testify about that work. Gill moved to quash the subpoena, and when he got no answer, he didn’t go to Virginia to testify.

According to an affidavit Gill later filed, 15 U.S. marshals and five local police officers showed up at Gill’s Massachusetts home the next day. They arrested him at gunpoint, flew him to Virginia and jailed him overnight pending his testimony, without a lawyer or even his personal effects. Gill filed an affidavit last fall indicating he plans to sue the federal government.

With all of that in mind, Kammen pre-emptively petitioned an Indianapolis federal court for a writ of habeas corpus, arguing that the military commissions had no jurisdiction over him. Within a week, the court agreed to restrain Spath and the U.S. Marshals Service.

Kammen’s co-counsels, Eliades and Spears, took up Spath’s invitation to show good cause as to why they couldn’t come back to Guantanamo. That route caused more problems. Their attorney, Todd C. Toral of Jenner & Block in Los Angeles, says they were improperly subpoenaed: Not only did notice come to him rather than his clients, but it came only about 15 hours before the attorneys were supposed to show up in Virginia. Furthermore, Toral was in
London at the time—where it was 10 p.m. when he was served—and he says the government knew it.

Working overnight, his team convinced Spath to order new subpoenas, and Toral attempted to litigate the underlying conflict over who had the authority to dismiss defense lawyers. He doesn’t believe the judge took that seriously.

“Certainly from our perspective, notwithstanding having entered into a briefing schedule on the merits, there wasn’t a serious interest on the part of Judge Spath of actually grappling with the merits of the underlying argument,” says Toral, a former Marine whose practice normally focuses on complex commercial litigation.

JUDICIAL TEMPERAMENT

Indeed, Spath’s comments during this time—early 2018—seem to reflect increasing frustration. His comments about the absent defense lawyers were highly critical; he frequently repeated the prosecution’s argument that the ethical problem was a strategy for undermining the legal proceedings. He faulted the defense lawyers for “abandoning” al-Nashiri, and repeatedly noted the length of time that Kammen had been on the case and his total compensation.

Piette, as the only defense lawyer left on the case, heard it all firsthand. He’d never left the case because he was waiting on a separate ethics opinion from military authorities. By the time that came back, Piette felt he should stick around in order to get his client new learned counsel.

But in order to do that, Piette had to avoid being part of any substantive proceedings, insisting for months that he couldn’t engage without learned counsel.

“It’s the only thing I could do, but at the same time … it was painful to watch these folks testify without being able to cross-examine them,” Piette says. “Even their direct testimony was exposing the just terrible weaknesses in the government’s case.”

Piette got no understanding from the judge, who pushed back, suggesting that Piette bone up on capital defense. Kammen and Piette believe the case became personal for Spath.

“I think he just thought his authority was being disrespected,” Piette says. “He would say weird things that … told me he was taking this more personally than he ought to.”

Not long before he ended the proceedings, Spath seemed to be trying to appeal to a higher authority. In mid-February, he questioned senior Pentagon lawyer Paul Koffsky about why he couldn’t order the defense lawyers back to court. After that didn’t work, Spath suggested calling U.S. Defense Secretary Jim Mattis as well.

Instead, Spath decided the next day to stop the trial. The hearing transcript shows that Spath spoke at length about that decision, saying he hadn’t slept the night before and was considering retiring.

He later did retire, effective in November. He was later photographed at a welcome event for
immigration judges, triggering a complaint from al-Nashiri’s defense team that Spath’s desire for the job might have biased his rulings in favor of the Department of Justice, which employs some of the prosecutors. The Justice Department said in September that it can’t confirm any hiring before it’s effective.

Within a week of Spath’s decision, the prosecution appealed to the Court of Military Commission Review, an appellate court created for the commissions. That appeal, which was still pending as of October, focuses on the conflict over who had the authority to dismiss defense lawyers. Eliades and Spears, as interested parties, moved to intervene.

The CMCR said no, so they appealed to the Court of Appeals for the D.C. Circuit, where al-Nashiri prosecutors opposed them. As part of that appeal, the D.C. Circuit asked the government to file a declaration detailing the microphone issue. That was on a Friday. The following Monday, the government abruptly reversed its position, mooting the appeal. Its filing said it “seeks speedy resolution of this interlocutory appeal.”

Some military justice observers had a different take.

“From where I was sitting, it certainly looked like they didn’t even want the D.C. Circuit to see what’s in those files,” says Vladeck.

‘NANOJURISDICTION’

Vladeck doesn’t think the government was necessarily trying to cover up improper behavior. He thinks that’s one possibility, along with genuine national security concerns. The problem, he says, is that the public doesn’t know which—and that exposes the government to charges of bad faith it might not deserve.

That’s one reason Vladeck believes trials such as al-Nashiri’s should be in federal court rather than in military commissions. Another is simply that federal courts have well-established precedents and rules—for example, about who may dismiss defense lawyers. In the commissions, Vladeck says, nearly everything is a question of first impression.

Fidell agrees, but he frames it as a question of size. The military commissions are “a nanojurisdiction, with very little law, started from scratch.”

“On its own terms, there’s almost no law in this tiny little jurisdiction,” he says.

And then there’s the speed of the commissions. Though it’s not unusual for complex criminal cases to take time, the military commissions have dragged even by that standard. The trials of the 1993 World Trade Center bombers took one to two years in New York City federal court. The Virginia terrorism trial of Zacarias Moussaoui, who represented himself despite questions about his sanity, took about five years. By contrast, al-Nashiri’s military commissions trial is still in preliminary hearings after seven years.

Vladeck believes it will go back to the D.C. Circuit when the CMCR is finished, a process that will add another year or more.

It’s not an outlier, Guantanamo-watchers say. The five alleged Sept. 11 conspirators held at Guantanamo were indicted in 2011; they’re in preliminary hearings with no scheduled start date. Also still in preliminary hearings is Abdul al-Haidi al-Iraqi, who arrived at Guantanamo in 2007 and was charged in 2014 with commanding al-Qaeda in the early 2000s. His trial has been complicated by serious spinal problems that his lawyers say Guantanamo authorities ignored too long. Majid Khan, a detainee accused of conspiracy and murder in connection with al-Qaeda, was captured in 2003, pleaded guilty in 2012 and is scheduled to be sentenced in 2019.

“Most cases have kind of a normal flow to them, and you can see a progression towards the end,” says Kammen. “Certainly not in the military commissions.”

That’s why some military justice observers believe the military commissions aren’t working and should be shut down.

Fidell says he’s come to that conclusion after long deliberation “and watching one Laurel & Hardy episode after another in the commissions.” Vladeck always preferred federal court, but he says it’s getting harder to find someone who disagrees with him.

Piette says he started out idealistic about the commissions. When he first served in the Navy, he saw military tribunals working in the former Yugoslavia. But now that he’s been involved, he thinks the delays, the secrecy and the “enhanced interrogation techniques” have made the situation unfixable.

That extends to his own client, who he believes was peripheral at best to the Cole bombing. Most of the real masterminds, Piette says, are dead or in custody. He feels that way not despite having been a Navy SEAL at the time—he extended his enlistment expecting to retaliate for the bombing—but because of it.

“It gets me angry, frankly, that the government has sort of sold this line to the victims’ family members that my guy is the guy,” says Piette. “Especially knowing what they know, I find it very offensive. Especially because I’m a sailor.”
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DEVASTATED BY OFFICE CHEMICALS, AN ATTORNEY HELPS OTHERS FIGHT TOXIC TORTS

BY ALAN BELL
After years of prosecuting hardcore criminals, attorney Alan Bell, then 35, took a private-sector job in South Florida’s newest skyscraper as he planned his run for the U.S. Senate. But starting in November 1989, he began suffering such bizarre medical symptoms that doctors suspected he’d been poisoned by the Mafia. He eventually discovered he wasn’t poisoned by a criminal but by his office building. His illness was diagnosed as being caused by exposure to toxic chemicals at work, and he became disabled in 1991. His rapidly declining health forced him to flee his glamorous Miami life to a sterile bubble in the remote Arizona desert for eight years. He lost his career and his marriage.

Bell’s book, Poisoned: How a Crime-Busting Prosecutor Turned His Medical Mystery into a Crusade for Environmental Victims, relates how, despite his precarious health, he began collaborating with top scientists dedicated to raising awareness about this issue and finding treatments. As his health improved, he collaborated with toxic tort lawyers, including some connected to the true stories depicted in the films Erin Brockovich and A Civil Action, to help other victims win justice in court.

The following edited excerpt from the chapter “Chemicals Take Down a Football Coach” describes one case Bell helped through medical and legal arenas.

Dan Allen was a beloved head football coach at College of the Holy Cross in Worcester, Massachusetts. His wife, Laura, contacted me through my Environmental Health Foundation. She reached out to me because her husband suffered from multiple chemical sensitivity, and they were searching for treatments.

“Dan’s been coaching from a wheelchair on the sidelines, but now they’ve fired him because he can’t do it anymore,” Laura said, obviously near tears as she told me her husband’s story.

Dan was working in his office, located inside the gymnasium at Holy Cross, in early 2001 when he saw men wearing white suits and gas masks working on the gym floor. The coach left his office, walked over to the gym, and asked what was going on. The workers told him they were resurfacing the floor.

“Do I need to leave?” Dan asked. They assured him he would be fine in his office.

Dan’s health problems began shortly afterward. He developed a headache first. Then a toe went mysteriously limp. Within 18 months, he was in a wheelchair with a lifeless right arm and had to rely on his family to feed and bathe him. Hearing this made me wince in sympathy; my own days as a wheelchair user and dependency on others hadn’t been that long ago.

Laura, a registered nurse, was trying to find answers for him. They’d been to many medical specialists. She said, “I’m convinced he developed MCS when they resurfaced the floor of the gym, but his doctors won’t make the connection to the chemicals. I was hoping you might have some experience with this kind of injury.”

“If he has MCS, the best place you can go is to Dallas,” I told her.

“What about stem cell treatments in the Bahamas?” she asked desperately.

“No, don’t go there. That’s quackery,” OK. Thanks,” she said.

The next time she called, Laura told me they had gone to the Bahamas and spent a hundred grand on stem cell treatments to no avail. I suggested that she take Dan to Richardson, Texas, to see Dr. Alfred Johnson because he’d helped me.

“No,” she said. “That’s too far.”

As we continued to talk and I heard more about how the company had resurfaced the gym floor knowing Dan was in his office, I realized Dan had a solid legal case against the company. Despite the fact that Laura had already consulted several lawyers who refused to represent him because they said he had no case, I was convinced otherwise. “Let me send you to a doctor I know,” I said. “She can evaluate your husband.”

I wanted Dan to visit her primarily to help him medically. If her evaluation also helped his legal claim, that would be a bonus. However, when I said the doctor was at Boston University, near where Dan and Laura were living, Laura balked, saying Dan had already been there.

“You don’t understand,” I argued. “It’s not the university that matters. It’s the particular scientist. You need to see Dr. Marcia Ratner at Boston University. She’s an internationally recognized neurotoxologist.”

I knew Dr. Ratner from the Scientific Advisory Board of the Environmental Health Foundation that I founded years earlier. When she examined Dan, Dr. Ratner came up with a shocking diagnosis: Dan had amyotrophic lateral sclerosis, also known as Lou Gehrig’s disease. We both wondered if the coach’s chemical exposure triggered his early onset of ALS. Was that possible?

I called Laura after Dr. Ratner had
seen Dan. “Look, this is serious,” I said, after saying how sorry I was about her husband’s diagnosis. “Holy Cross College isn’t paying your husband anything, right?”

“Right,” she said. “Nothing.”

“Let me talk to your husband.”

When she put him on the phone, I said, “OK, Dan, here’s what we’re going to do. I’m going to get a lawyer for you, so you can sue Holy Cross College for terminating you without giving you workers’ compensation for injury on the job. Is that all right with you?”

“Yes,” Dan said.

“OK, great. Mind if I talk to your wife again?”

When Laura came back on the line, I told her I was going to arrange for a colleague to work up the workers’ compensation claim. “Can you find out what exact product was used on that floor?”

“Sure,” she said. “I’ll talk to the maintenance guy. He has the stuff in the shed.”

Once I knew what the resurfacing product was, I obtained its material safety data sheet—an itemized list of chemicals it contains. I was shocked to discover that these chemicals included benzene, toluene and isocyanates, all of which are classified as ultrahazardous substances in Massachusetts.

Slowly and meticulously, I proceeded to build two lawsuits on behalf of Dan Allen. The first was against his employer, Holy Cross, seeking workers’ compensation because he had been injured on the job. The second was a lawsuit against the manufacturer of the resurfacing compound.

I arranged for a workers’ compensation expert to file a claim. Next, I contacted a dosing expert I knew at Harvard University, who calculated the exact chemical dose Dan had been exposed to. Based on our data—including the square footage of the area, the cubic feet of air in the space where the compound was applied, the location of Dan’s office, the doors and windows, and so on—we calculated the exact chemical dose Dan inhaled as a result of the floor resurfacing. We now had the right pieces in place to prove that Dan’s injury was caused by his exposure to the chemicals used in resurfacing the floor.

We knew Dan was in the building when the floor was being refinished with chemicals known to be neurotoxic—in fact, the floor refinishers were required by their employer and Occupational Safety and Health Administration regulations to wear respirators. They had sealed off the area where they were doing the work, but somehow Dan’s office, adjacent to the gymnasium, became part of the sealed area instead of being sealed off. He was therefore working without a respirator in the same area as the toxic chemicals.

Dr. Ratner told me that Dan’s initial symptoms—nausea, headaches, dizziness—made a great deal of sense to her.

“We have an area of our brain called the area postrema that alerts us to something poisonous,” she said. “When toxic chemicals penetrate the nervous system, this part of the brain signals the body to get rid of it by triggering the vomiting reflex. That’s one of the reasons why people inhaling these chemicals inside buildings report feeling nausea and vomiting as well as dizziness, headaches and other symptoms.”

PROVING THE CONNECTION

Once Dr. Ratner diagnosed Dan Allen with ALS, and the dosing expert from Harvard had calculated the exact dose of the isocyanates and toluene Dan was exposed to, I recruited Dr. Mohamed Bahie Abou-Donia of Duke University, a world expert on isocyanates, as a medical expert on Dan’s legal case.

Dr. Abou-Donia had conducted research studies exposing mice to the same chemicals used in the flooring compound that caused Dan to fall ill. Like humans, some mice are born with a gene that predisposes them...
to developing ALS after exposure to certain chemicals.

The result? Basically, his studies proved that mice with the gene developed ALS after chemical exposure, while the animals without the gene stayed healthy. Dr. Abou-Donia concluded that it wasn’t the coach’s fate to develop his fatal disease. Like Dr. Ratner and me, he believed that Dan’s exposure to isocyanates and toluene triggered his onset of ALS.

Like all diseases, whether you get ALS depends on a combination of your genetic predisposition toward the condition combined with environmental triggers, including chemical exposure. ALS usually affects older people, he explained. “Although you can see it in younger people in their 40s and 50s, it’s rare.” Dan was only in his mid-40s.

“We know chemical exposure can alter the DNA of a human being,” Dr. Abou-Donia said, “and make people more susceptible to disease, causing upregulation and downregulation of many genes that cause disease.”

What does this mean in layman’s terms? Each of us begins life with a particular set of genes—about 20,000 to 25,000 of them. Scientists are gathering evidence proving pollutants and chemicals are altering our genes—not by mutating them but by sending signals that switch them on when they otherwise might remain dormant, or even silence the genes altogether.

Exposure to gene-altering substances can lead to disease long after the toxic exposure is gone, permanently injuring glands, organs and cells throughout your body. Animal studies show that some environmental chemicals cause epigenetic changes that trigger breast and prostate cancer, obesity, diabetes, heart disease, asthma, Alzheimer’s, Parkinson’s disease, learning disabilities—and ALS.

When genes are turned off due to chemical exposure, they can’t direct the manufacture of proteins essential for healthy cell function. Chemicals can also cause chromosomes to uncoil and genes to “express” or be “turned on,” when they otherwise might have remained dormant. Dan’s brain chemistry had been altered on a cellular level by his exposure to the toxins used to resurface the gym floor, causing his onset of ALS at a tragically young age.

Dr. Abou-Donia believes that chemical exposure is one of the primary causes of today’s chronic diseases like asthma, autism, birth defects, cancers, developmental disabilities, diabetes, endometriosis, infertility, Parkinson’s, Alzheimer’s and others.

In his 2015 textbook, *Mammalian Toxicology*, he cites statistics that should terrify us all, like this one: “In 1900, U.S. chemical consumption was less than 100 million metric tons, but by 2000, this had increased to more than 3.3 billion metric tons.”

In his estimation, there are over 5 million man-made chemicals, of which only 70,000 are in commercial use today, with many more to come. The isocyanates that Dan was exposed to were also linked to thousands of human deaths in 1984 after the explosion of a chemical plant in Bhopal, India, owned by the Union Carbide Corp. Yet somehow this chemical is still finding its way into our everyday products.

**BUILDING MY TEAM**

With my experts on board, I had the scientific support necessary to prove this case. Next, I needed legal boots on the ground in Massachusetts to walk the case into the courtroom. I recruited Michael Hugo, a well-known attorney who had been a partner of Jan Schlichtmann in the now-closed law firm of Schlichtmann, Conway, Crowley and Hugo.

The case eventually nearly bankrupted Schlichtmann, the lead attorney. In the eyes of many, this outcome served as a cautionary tale depicting the risks inherent in pursuing complex environmental injury cases.

To some, Schlichtmann was a hero, a noble lawyer willing to risk it all for a worthy cause. To others, Schlichtmann was a crazy man. I didn't care either way because
Schlichtmann had won, and I would, too. (Bell was admitted pro hac vice and was co-counsel in the case.)

During the trial, my team presented solid evidence that most human disease and death is the result of the interaction between our genes and environmental exposures. In Dan’s case, the disease was a horrid one that vastly reduced his life span.

Dr. Ratner believes Dan had a predisposition to develop ALS, which made him more sensitive to chemicals. She noted, “Genetic predispositions and past insults to the body, including previous chemical exposures, can make a person hypersensitive to future chemical exposures, which in turn can exacerbate or unmask latent liver, kidney or neurological disorders like ALS.”

When filing a toxic tort lawsuit, case law requires that the claim be based on science generally accepted by the scientific community. This is called the Daubert standard, the standard used by trial judges to determine whether an expert’s testimony is based upon scientifically valid reasoning or methodology.

This standard has been the subject of intense criticism over the years. Plaintiffs attorneys claim this restriction bars many worthy claims by disallowing juries to hear cases and denying victims their day in court.

The legal team representing the chemical manufacturing company tried to get Dan Allen’s case thrown out of federal court using the Daubert standard, claiming our case wasn’t based on sound science. Dr. Ratner’s testimony was critical to our case because it logically connected the dots.

Up until that point in the legal arena, ALS was thought to be purely genetic. Now, together with my local legal counsel and experts, we were attempting to prove in court for the first time that chemical exposure can trigger the onset of ALS. The Dan Allen case would potentially break new ground. (Go to ABAJournal.com to see Dr. Ratner’s report, The Allen Case: Our Daubert Strategy, Victory, and Its Legal and Medical Landmark Ramifications.)

A SOLID, SAD VICTORY

On Sept. 24, 2008, U.S. District Judge F. Dennis Saylor (of the District of Massachusetts) handed down his decision regarding whether the testimony of Dr. Marcia Ratner and other experts could be heard by a jury. The testimony of Dr. Ratner was allowed, as well as that of Dr. Christine Oliver, an assistant clinical professor of medicine at Harvard Medical School, who concluded that Dan Allen had sporadic ALS.

When the judge ruled in our favor, saying we could proceed to a jury trial based on the science involved, the chemical company panicked. They knew the floodgates were open, not only to our lawsuit but...
for many more to follow. We had shown in court that chemicals can trigger the onset of a previously dormant disease.

Sadly, by then, Dan had died of the disease, causing heartbreak for Laura and a deep sorrow among all of those who knew and loved this amazing man. The only thing we could say to comfort his family was that we had won the decision, which meant the defense knew their chances of winning at trial were dismal.

Testimony from a sympathetic widow, combined with powerful evidence that the chemicals Dan was exposed to caused him to die long before his time, would smash their case to bits. The defense opted to seek a settlement. The case settled in 2009.

For the Allen family, and for us, too, it was a bittersweet victory. While the case broke new legal ground and exposed the truth behind what had really happened to Dan Allen, it couldn't erase the pain and suffering he and his family had endured.

I was left feeling both triumphant and grief-stricken, but I vowed to keep fighting for those who needed me.

Attorney Alan Bell prosecuted organized crime cases for Florida before developing multiple chemical sensitivity. He founded the Environmental Health Foundation, which advocates for victims of environmental injury. Bell lives in Capistrano Beach, California, and he focuses on toxic tort cases. Bell can be contacted at alanbell.me.

WHY TOXIC TORTS ARE HARDER THAN USUAL TO LITIGATE AND WIN

By Lorelei Laird

In movies such as Erin Brockovich and A Civil Action, viewers spend about two hours watching lawyers investigate a serious environmental problem and then sweep a jury off its feet with the force of their evidence.

In reality, environmental litigators say it can take years, depending on the type of case. A big reason for that is the Daubert standard, which governs whether an expert witness’s opinion is admissible in court.

Expert witnesses are vital for proving a toxic tort case—which often involves substantial science—but the Daubert standard gives the other side a way to discredit and exclude those witnesses.

Allan Kanner, a plaintiffs toxic tort lawyer and founder of Kanner & Whiteley in New Orleans, says many defendants practice "carpet-bombing with Daubert."

"It’s getting to the point where if you have a case now with 16 expert witnesses, you’ll see 16 Daubert challenges," says Kanner of the ABA Section of Litigation and the Section of Environment, Energy and Resources.

With a Daubert hearing for each of those witnesses, that can mean a lot of hearings—and therefore a lot of extra time and money. That can make toxic tort cases difficult to litigate.

"It’s sort of my belief that these type of cases are won or lost at the Daubert stage," says James Ray, an environmental litigator and partner at Robinson & Cole in its Hartford, Connecticut, office and a former co-chair of the litigation section’s Environmental & Energy Litigation Committee.

SHOW CAUSE

Causation also can drag out toxic tort cases: showing that the injury was caused by the substance at issue.

For example, Ray says in a case in which the plaintiff argues that chemical exposure caused a certain cancer, you’d have to look at all the factors that could cause that cancer, including each plaintiff’s genetics, lifestyle and other relevant factors. That’s in addition to examining whether the chemical causes the cancer in the amount to which the plaintiff was exposed.

Kanner says plaintiffs may do it, too, looking for a “smoking gun” showing the defendant knew the substance would sicken people. That all drags out discovery, often for years.

Kanner has been approached for advice by lawyers who are five or six years into a toxic tort case and not close to finished.

For lawyers working on contingency, as many personal injury lawyers do, that’s a big investment. But because toxic tort cases, particularly class actions, can generate very high verdicts and settlements, there’s a lot of incentive to keep going.

“They view it as a big damage case,” Kanner says. "But all other things being equal relative to other areas of litigation, toxic torts cost more and take longer.”

The jury is another complication. Both sides want people who may be sympathetic to them, but Ray says toxic tort defendants also need jurors who are willing and able to consider complex scientific evidence.

Kanner cautions, however, that it's easy to get so involved in the scientific side of things that you can lose the jury.

"You’ve got to deal with [the science],” he says. "But at the end of the day, you’ve got to try … a case that jurors can get behind."
Cybersquatters have taken advantage of BigLaw mergers to beat those firms to the trademark registry in China

By Abigail Rubenstein

Squire Patton Boggs is one of the largest and richest law firms in the world. Boasting more than 1,500 lawyers in 47 offices across 20 countries, the firm was formed in 2014 as a result of a merger between two Am Law 100 firms, Squire Sanders & Dempsey and Patton Boggs.

Like many law firm mergers, the union between Squire Sanders and Patton Boggs had been complicated and had been made infinitely more difficult because of the latter’s entanglement in long-running litigation involving Chevron and allegations of pollution of a rainforest in Ecuador. The matter already had knocked out another potential merger for Patton Boggs and was threatening to scuttle the Squire Sanders deal, too.

In May 2014, the two firms finally were able to make it official. In the months after the announcement, the merged firm unveiled its branding in the form of a newly designed website (at the URL squirepattonboggs.com) and logo consisting of the firm’s name and a circle made of green and black petal shapes.
Along with the usual biographies and pictures of its lawyers, locations and descriptions of the firm’s practice areas, the page also displayed the firm’s mission statement: “Squire Patton Boggs is a full-service global law firm. ... It is a seamless service that operates on any scale—locally or globally. It encompasses virtually every matter, jurisdiction and market. And we place you at the core of everything we do.”

One thing the firm forgot to do: file for a trademark in China before anyone else could beat it to the punch.

And sure enough, someone beat the firm to the punch. Days after the merger announcement, a Chinese company registered the trademark for “Squire Patton Boggs” in China, giving it the right to provide legal services under that name.

Qinhuangdao Hongshun Technology Development Co. Ltd., the Chinese intellectual property agency that claimed the right to the name in China, went further, claiming the similar URL squirepattonboggs.net and running an English-language site that appeared to ape the firm’s homepage.

There was a circular logo constructed from green and blue petal shapes that bore a striking resemblance to that of the BigLaw firm. There was also a mission statement that contained near-identical language: “It is a seamless service that operates on any scale—locally or globally. It encompasses virtually every matter, jurisdiction and market. And we place you at the core of everything we do.”

The only difference was the first part of that statement. Unlike the BigLaw firm, the firm sitting at squirepattonboggs.net was, ironically enough, an intellectual property firm that,
is new, whatever is emerging,” says Seagull Song, an associate clinical professor and director of the Asia-America Law Institute at Loyola Law School and a senior adviser at Hogan Lovells’ Los Angeles office.

That means as the legal industry continues to gain prominence in China, and as BigLaw stalwarts make international news when they merge with other firms to grow even larger, law firms may find themselves increasingly likely to be facing the same kinds of aggressive Chinese intellectual property theft they have long counseled others to avoid.

It also means if they are not careful, these firms will be just as frustrated by China’s first-to-file trademark regime as any other unwitting foreign brand owner.

TRADEMARK TROUBLES

In contrast to the U.S. common-law trademark system, which gives priority to the first to use a name in commerce, China’s trademark law follows a first-to-file system that prizes registering a trademark with the government as opposed to use.

There is no requirement to show use of the trademark when applying for a registration in China, leaving open the door for trademark squatters to take advantage of any lag in filing.

The first-to-file system doesn’t mean there are no opportunities to reclaim a trademark short of paying the squatter the price they name if they apply for registration first. But it does make doing so extremely difficult.

Once the squatter applies for the trademark, the target has the chance to file an administrative opposition proceeding within three months of the publication of the application in the China Trademark Office’s Gazette. If that opposition fails and the mark is granted, then the opponent can move on to filing an invalidation procedure with the Trademark Review and Adjudication Board.

From there, the party opposing the trademark would have to move on to trying to get the trademark shot down by the court system, with the option to appeal as far as the land’s highest court.

Even if the squatter’s trademark is knocked out through this process, the company that applied for the mark first also has the opportunity to appeal at each of these stages. And if it does, the mark remains valid until a final decision invalidating it is issued, says Dan Plane, a Hong Kong-based partner at SIPS, a Chinese IP consultancy.

“These things can drag on for a very, very, very long time,” he says. “Even if the wind is in your sails and the law is on your side, you can be looking at a year, two years, three years, four years before you get a final decision that fully invalidates that mark.”

In general, a law firm trying to wrench its trademark back from a squatter who filed first would have to prove that the brand is famous in China, and that the entity registering the trademark did so in bad faith.

In theory, this should be relatively simple for a law firm that has been using its name internationally for years. But in practice, it can be extremely difficult—even for popular consumer brands and world-renowned celebrities.

Apple had to shell out $60 million for a settlement to get the use of its iPad trademark in China in 2012. More recently, a high-profile case has given hope to foreign brand owners. Pro basketball player Michael Jordan won a ruling in 2016 giving him back the rights to his own name from a squatter from China’s highest court, the Supreme People’s Court of the People’s Republic of China, after previously losing the fight.

The decision overturned previous rulings and has been hailed as an example of China’s efforts to take trademark squatting more seriously to create a more business-friendly environment.

“The supreme court decision gives confidence to the public that the court is intending to protect the rights owner rather than the squatters,” says Nancy Qu, a Beijing-based patent attorney at Chang Tsi & Partners.
A major problem that remains for law firms or any brand owner trying to get back the rights to their own name in China is that the standards are nebulous. So it can be hard to know whether the day will ultimately be won, even with recent efforts to lower the standards for proving bad faith, attorneys say.

“This is more about how you interpret [bad faith]; if you just sit back and ask the person to prove reputation in China, it is difficult,” says Linda Chang, the Shanghai-based country manager for global IP consultancy Rouse. “And what is the extent? How much evidence do you need to convince [someone] that this is a pirate?”

For example, Chang recently prevailed in a case in which she was able to show that the opposing party had acted in bad faith by registering 60 trademarks at the same time. However, she points out that she has read previous cases in which the registration of 80 trademarks was not deemed sufficient to show bad faith.

**AN OUTLIER?**

For Squire Patton Boggs, it certainly seemed like the firm had a slam-dunk case of bad faith against Qinhuangdao Hongshun. In addition to the physical similarities between the BigLaw firm’s website and the .net site, there were other indications that the latter may have been a fraud. The address listed on the site for the supposed Squire Patton Boggs matched the one listed in government business registration records for Suzhou-based Guanghua Intellectual Property Co. Ltd., another IP agency.

The site prominently featured a person named Zhijun Fang as a partner and trademark attorney, and while such a person is indeed named as an executive on Guanghua’s business registration, the photo that purported to be him on the .net website was actually a stock photo from Getty Images titled “Mixed Race male lawyer at desk.”

The other supposed partners and intellectual property specialists at the firm, all of whom were identified by Western-sounding names, also were represented by generic photographs of professionals available on the Internet.

Emails sent while the site was still live to the addresses listed on the .net site seeking comment on the firm’s business and its relationship to the larger Squire Patton Boggs received no response.

Even with what looked like a solid case, Squire Patton Boggs struggled in its initial efforts to reclaim its rights in China. The trademark office rebuffed the firm’s opposition to Qinhuangdao Hongshun’s trademark application, granting the mark.

Squire Patton Boggs then filed an invalidation procedure with the Trademark Review and Adjudication Board while concurrently filing an arbitration request pursuant to the Uniform Domain Name Dispute Resolution Policy with the Asian Domain Name Dispute Resolution Centre.

In August 2017, a Beijing-based arbitrator with the Asian Domain Name Dispute Resolution Centre denied the BigLaw firm’s bid to get the .net domain transferred to it, finding that Qinhuangdao Hongshun had a right to use the domain name.

The BigLaw firm had demonstrated that it had been using “Squire Patton Boggs” internationally and had even proffered evidence that the Chinese firm had demanded $450,000 for the rights to the name.

Nevertheless, the arbitrator ruled that Qinhuangdao Hongshun’s use of the .net domain was not malicious, noting that the company possessed the valid Chinese trademark for the name “Squire Patton Boggs” and concluding that unless the trademark was invalidated, it would be difficult for the international firm to show the Chinese entity should not be allowed to keep the domain.

The site therefore remained live until mid-May, when...
name “Norton Rose Fulbright” in November 2012, mere days after Norton Rose and Fulbright & Jaworski announced their intention to merge to become Norton Rose Fulbright.

The merger was completed in 2013, and the firm did not file its own trademark registrations in China until 2014.

Then, in May 2014, Qinhuangdao Hongshun set up a website at norton-rose-fulbright.com, a URL identical to the real firm’s website except for the dashes, and began using the firm’s name on the website to advertise Chinese intellectual property services.

Norton Rose won a series of UDRP cases in Hong Kong in 2014 and 2016, convincing arbitration panels it was the one with the legitimate rights to its own firm name despite the Chinese entity’s earlier Chinese trademark filings.

When it came to Osborne Clarke, Qinhuangdao Hongshun took a different approach, using a more basic cybersquatting route. It registered a domain name for a slightly incorrect version of the firm’s name seemingly out of the blue in December 2015. While the UK law firm’s real website is located at osborneclarke.com, Qinhuangdao Hongshun sought to set up shop at osbornclarke.com, leaving off the letter “e” in “Osborne.”

Then in March 2016, the Chinese company filed for the Osborne Clarke trademark several months before the British firm—which did not have a presence in mainland China until 2017—sought to get the name protected in China.

Osborne Clarke managed to wrest control of the site in March 2016 after convincing a World Intellectual Property Organization arbitrator that Qinhuangdao Hongshun had maliciously registered a site with a name very close to its European Union trademark—in part by pointing out that the Chinese firm also had registered websites using the names of other law firms, including Norton Rose.

According to the panel decision, Qinhuangdao Hongshun had not set up an active site on the disputed domain before Osborne Clarke lodged its complaint seeking to reclaim it.

Representatives from Norton Rose and Osborne Clarke declined to make attorneys available to comment on the firms’ experiences with the Chinese squatter. However, the Chinese government’s trademark database listings for the firms’ trademarks currently have registrants that match Norton Rose’s and Osborne Clarke’s London locations.

LESSONS FOR LAW FIRMS

The most important question for law firms looking for a lesson from the experiences of the firms that have faced these problems in China, however, is how to avoid the problem in the first place. The answer is simple. Experts on Chinese intellectual property agree that for law firms, as for any other business, the best bulwark against trademark squatters in China is to file the trademark first.

“The best tactic is to register early,” says David Shen, a Shanghai-based partner at Allen & Overy who heads the firm’s IP practice in China. “Registering the mark doesn’t cost that much, and getting the trademark if you do not file first is sometimes not even possible and can get really expensive,” Shen says. “Getting your name into the trademark office early is the best defense.”

Large inter-national law firms announcing mergers have to make combating these squatters part of their strategy, something that can be less of a priority for small- to midsize firms, according to Dresden of Harris Bricken.

“Law firms need to realize that they are definitely big enough [to pique squatters’ interest]. They need to read the stories and know that it happens because if it happens why wouldn’t it happen to you? Especially because there are plenty of mergers and acquisitions among law firms,” Dresden says.

“Because the law firm name is a brand, law firms need to protect it, just the same way that Nike and Starbucks and all the other big consumer brands protect theirs,” he adds.

Shen adds that once firms have a concrete idea of which name they plan to use, they should file immediately. “Pre-merger, this could be tricky
because there could be a question among the two firms of who owns this new name, but maybe they could reach a tentative agreement between them in order to do this early." Shen says. "It’s not current standard practice, I have to say, but then this is a new problem. And you have to deal with this creatively, and this could be one way to do that."

While making sure to be the first one to file a trademark registration in China is ultimately a simple and winning strategy to combat trademark squatters, preemptively taking on cybersquatting can be trickier.

Any law firm is likely to take the time to secure all the important top-level domains for its firm name. But there are endless permutations that a cybersquatter can snag, as shown by the different variations that Qinhuangdao Hongshun came up with for domains similar to those of the three international firms it targeted.

It is neither practical nor prudent for a law firm to try to buy up every possible domain, so instead firms must make choices about which domains they most wish to possess and what steps, if any, to take should a squatter reach out demanding cash for a similar domain.

"At that point, it becomes a balance test of whether you think that the domain name taken by a third party in bad faith is worth taking it back, as well as whether you really want to keep 200 domains when you really only use one official version," says Song of Hogan Lovells.

For a law firm looking to take on a squatter, it is important to be creative in attacking from as many avenues as possible, experts say, as the firms targeted by Qinhuangdao Hongshun did by going after the domain names and the trademarks. Lawyers who regularly advise clients on these kinds of trademark issues say it is also important to look for moments when a favorable settlement might be possible to put the matter to rest more quickly.

"You look at every one of these cases holistically. You look at every single aspect of what the pirate is doing," says Plane of IP consultancy SIPS.

Abigail Rubenstein is a journalist with more than a decade of experience covering legal issues, law firms and lawyers. Her work has been featured in national and international publications in the United States and Asia.
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### ABE 2017-2018 Policy Dividends

The American Bar Endowment recently announced the amount of policy dividends available from its group insurance programs. For each program, the approximate amount of net policy dividends as a percentage of premium paid is reported below.

- **Life Insurance**: 18 percent of premiums due and paid for the period June 1, 2017, through May 31, 2018.
- **Disability Income**: 21 percent of premiums due and paid for the period November 1, 2016, through October 31, 2017.
- **Hospital Money**: 51 percent of premiums due and paid for the period November 1, 2016, through October 31, 2017.
- **Accidental Death & Dismemberment**: Premiums due and paid for the period August 1, 2016, through July 31, 2017 were less than claims and expenses incurred, consequently there will be no dividend.
- **Excess Major Medical**: 10 percent of premiums due and paid for the period March 1, 2017, through February 28, 2018.
- **Office Overhead Expense**: 31 percent of premiums due and paid for the period July 1, 2017, through June 30, 2018.

### AMERICAN BAR ENDOWMENT Grant Payments Made for 2018 And 2017

<table>
<thead>
<tr>
<th>Grant Payments Made for 2018 And 2017</th>
<th>2018</th>
<th>2017</th>
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<td>$2,930,998</td>
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<td><strong>$6,205,811</strong></td>
</tr>
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</table>

Members may request a refund of the available dividends attributable to their participation by submitting a written request by mail to the American Bar Endowment, 321 N. Clark Street, 14th Floor, Chicago, IL 60634-7684, fax to 312 988-6401, or email to dividends@abendowment.org. (Please be sure your member number is on the request.) Requests for refunds can be sent starting January 1st, but must be received no later than December 15th each year. When a request for refund is received, a confirmation will be mailed to you acknowledging the request. If the confirmation is not received within three weeks, contact the ABE to confirm receipt. Members who leave their dividends with the ABE to support its charitable mission are eligible for a charitable contribution deduction on their individual income tax returns. Notice of the exact amount of contribution will be mailed in late January. Written requests for refunds must be submitted each year.

To view the 2018 ABE Annual Report in its entirety, please visit: abendowment.org/about/report.asp
Olympic gold medalist Nancy Hogshead-Makar started receiving calls around 2010 about the sexual abuse of athletes participating in Olympic and club sports. The star American swimmer-turned-lawyer had by then established herself as an expert on Title IX, the groundbreaking federal statute mandating equal opportunities for women in sports at educational institutions. Her efforts to ensure the law was being properly implemented later shifted toward addressing concerns of rampant sexual assault on college campuses.

But sexual abuse in the Olympic movement, which covers millions of athletes across a large age range, was not a topic Hogshead-Makar had closely examined before. The calls she received prompted her to research the issue, and the results were not encouraging. Hogshead-Makar discovered to her dismay that the national governing bodies for sports under the United States Olympic Committee’s umbrella asserted they did not have a legal duty to protect athletes from abuse. They also lacked sufficient insurance to cover such claims.

“My first thought was, ‘You know, I’m an Olympian, and I know all the players at the Olympic Committee, so let me call them, and let’s sit down and let me explain to them just how bad the situation is,’ ” Hogshead-Makar says.

BUILDING MOMENTUM

In early 2012, Hogshead-Makar met with the USOC officials, including then-CEO Scott Blackmun. She says the officials initially told her they appreciated the issues she raised, and they pledged to closely consider her ideas to address them.

But Hogshead-Makar says she realized a year or so later that the USOC was not committed to taking serious action to combat sexual abuse.

“They would say, ‘We’ll start a committee that will investigate this,’ ” Hogshead-Makar says. “And then I would present at the committee … and, like, nothing would happen.”

She believed economic factors, such as increased legal liability, spurred the resistance to change. The stalling prompted Hogshead-Makar to speak with the media and develop proposed policies she took to the USOC’s board rather than to Blackmun.

In late 2012, she helped convince the USOC’s board to adopt a rule prohibiting coaches from having romantic or sexual relationships with athletes they were coaching, regardless of age or consent. The national governing bodies were given a year to implement the rule.

Hogshead-Makar later played a leading role in the successful effort in 2014 to get the International
Swimming Hall of Fame to rescind the planned induction of USA Swimming’s then-executive director, Chuck Wielgus. His critics argued that Wielgus had not effectively combated sexual abuse in swimming during his tenure.

The hall of fame controversy was a driving force behind the USOC announcing in 2014 the planned creation of a new center to address claims of misconduct, according to Hogshead-Makar.

“Every step to get the USOC to act was laborious, and almost all improvements were a direct result of public pressure,” she says.

She saw further evidence of the USOC’s lack of commitment to truly address abuse in sports based on the fact that the U.S. Center for SafeSport did not officially open until March 2017.

By that time, Hogshead-Makar had already been working with Congress for several years to try to get a law passed featuring reforms the USOC was unwilling to adopt on its own.

She says progress was slow until the sexual abuse former USA Gymnastics and Michigan State University doctor Larry Nassar had inflicted on hundreds of women drew national attention.

IN NASSAR’S WAKE

In January, more than 200 Nassar victims gave impact statements during the disgraced doctor’s sentencing proceedings. Nassar was sentenced to up to 175 years in prison for decades of abuse.

Days later, Congress gave final approval amid broad bipartisan support to the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act. President Donald Trump signed the bill into law Feb. 14.

Later that month, Blackmun, who disclosed that he had been diagnosed with prostate cancer, stepped down from his position as head of the USOC. The New York Times reported that the board of USA Gymnastics had resigned in January at Blackmun’s urging.

Hogshead-Makar says the Nassar victims were a united and vital force in bringing about the statute’s passage.

“I could have been working at the margins,” she says. “The earthquakes that we’ve had required truly exceptional victims who were eloquent and were together.”

The new law gives the USOC and its national governing bodies a legal duty to prevent the sexual, physical and emotional abuse of amateur athletes.

The statute requires those involved with U.S. Olympic and amateur sports to report any allegations about the sexual abuse of amateur athletes to law enforcement within 24 hours of a complaint.

In addition, the law extends the statute of limitations for victims and makes clear they can recoup at least $150,000 in statutory damages, as well punitive damages and attorney fees. Though not part of the legislation, the insurance issues Hogshead-Makar and others raised were gradually improved as well.

“About 60 percent of all children will play a sport, and up until now, many of them had been really unprotected,” Hogshead-Makar says. “Piece by piece, we have built a legal basis to protect kids in the Olympic movement.”

However, Hogshead-Makar says more work remains to be done. She highlighted that as of August, the U.S. Center for SafeSport had already received 1,200 complaints of sexual abuse since its opening last year. A majority of the claims stemmed from recent incidents.

But Hogshead-Makar is hopeful the broad coalition of groups that supported the federal safe sport law will help ensure it is effectively implemented to protect athletes.

She also wants to continue her work to help athletes gain confidence in speaking out against all types of misconduct.

Han Xiao, chair of the USOC’s Athletes’ Advisory Council, says Hogshead-Makar has long been an inspiration to competitors concerned about abuse in sports.

“Nancy was one of a handful of attorneys who were very courageous early on in the movement when it was
still a very difficult topic to talk about,” says Xiao, who competed internationally in table tennis. “There was a lot of skepticism and defensiveness in our community before the Larry Nassar situation came to the forefront.”

‘TRAUMA IS NOT A PERMANENT STATE’

Hogshead-Makar knows from personal experience how challenging it can be to speak about sexual abuse. During her time as a student at Duke University in the early 1980s, she was pulled into the woods by a man while she was out running and raped. Her attacker was never caught.

With the strong support of the school and others, Hogshead-Makar was able to slowly heal from the traumatic experience and resume competitive swimming. At the 1984 Olympics in Los Angeles, she captured three gold medals and one silver.

But for many years, Hogshead-Makar preferred not to share the story of her assault.

It was human rights activist Richard Lapchick who helped convince her to do so. The two met not long after the 1984 Olympics, and she says Lapchick quickly became a mentor.

Lapchick is the endowed chair of the DeVos Sport Business Management Program at the University of Central Florida, but decades ago, he was a leading American advocate of using sports boycotts to protest apartheid in South Africa. In 1978, he and others helped convince the financial backers to pull out of a planned Davis Cup tennis match in Tennessee between the United States and South Africa.

Soon after, Lapchick was brutally attacked in his office at Virginia Wesleyan College (now Virginia Wesleyan University) by two men who called him racial epithets.

It took Lapchick a decade to speak publicly about the incident, the New York Times reported, and tennis player Arthur Ashe played a key role in convincing him to share what happened.

According to Hogshead-Makar, Lapchick helped persuade her that telling her own story would help other women who are trying to rebound from sexual assault.

That’s why she shares this message with victims of sexual abuse: “However bleak and bad that you think it is, there really is healing for trauma. Trauma is not a permanent state.”

“Every step to get the USOC to act was laborious, and almost all improvements were a direct result of public pressure.”

- Nancy Hogshead-Makar

ENTERING THE LEGAL LANE

By the mid-1990s, Hogshead-Makar began pursuing a legal career, having finished her competitive swimming at the 1984 Olympics. She graduated from Georgetown University Law Center in 1997.

She worked at Holland & Knight in Florida for four years before joining the faculty at Florida Coastal School of Law, where she taught for more than a decade. She has also served as senior director of advocacy at the Women’s Sports Foundation.

In 2014, Hogshead-Makar founded a nonprofit she leads called Champion Women, which advocates for equality for girls and women in sports.

She credits the ABA and its members with being longtime supporters of such efforts.

Hogshead-Makar was the co-chair of the Section of Civil Rights and Social Justice’s Committee on the Rights of Women from 2003 to 2012, and she has spoken at a number of ABA events. She has also worked with ABA members to file amicus briefs in cases of interest.

Hogshead-Makar’s work on behalf of athletes has earned her the respect of many in the legal community, including B. Robert Allard of Corsiglia McMahon & Allard in San Jose, California.

Allard, who says he led the first known legal team to successfully present claims against USA Swimming on behalf of sexual abuse victims, called Hogshead-Makar a staunch early ally in the movement to protect athletes from abuse. He also says she is a tireless advocate who is always willing to provide help.

“If I were to make one call to someone, and I needed information that I knew was necessary to protect a child, I would call her,” Allard says. “I know she would tell me the truth, fight for my client and would commit all of her resources to the cause.”

Hogshead-Makar says working with and learning from other attorneys such as Allard has been an enjoyable part of a legal career she has found deeply fulfilling. “Being an Olympic champion is something I will always be proud of, but it is being a lawyer and my legal training that has enabled me to make whatever difference I’ve been able to make.”
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September 2018-June 2019
Mastering the Art of Commercial Real Estate Deals
Webinar
Section of Real Property, Trust and Estate Law • CLE Credit

Nov. 6-9
ABA International Conference, Mexico City
Location: Mexico City
Section of International Law • CLE Credit

Nov. 7
Dispelling the Top Eight Myths of Arbitration Webinar
Section of Dispute Resolution • CLE Credit

Nov. 14
When Participants Say “No” to a Joint Session:
Lessons from the Left Coast Webinar
Section of Dispute Resolution • CLE Credit

Nov. 30
Capital Markets in the 21st Century
Location: London
Section of International Law • CLE Credit

Dec. 2-4
ABA/ABA Financial Crimes Enforcement Conference
Location: National Harbor, Maryland
Criminal Justice Section and the American Bankers Association • CLE Credit

Jan. 17-19, 2019
2019 Midyear Tax Meeting
Location: New Orleans
Section of Taxation • CLE Credit

Feb. 6-9, 2019
Midwinter Meeting of the Employee Benefits Committee
Location: Nashville, Tennessee
Section of Labor and Employment Law • CLE Credit

Feb. 14-16, 2019
2019 Corporate Counsel CLE Seminar
Location: San Antonio
Section of Litigation • CLE Credit
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5. Quarles & Brady
6. Thompson Coburn (tied)
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3. Mintz Levin
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2. Hogan Lovells (tied)
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4. Nelson Mullins (tied)
5. Polsinelli (tied)
6. Holland & Knight
7. Greenberg Traurig
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9. Latham & Watkins
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8. Crowley Fleck
9. Latham & Watkins
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10. Snell & Wilmer (tied)

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Your ABA

Miranda in Translation

ABA pilot project tests tools to help police deliver effective Miranda warnings in Spanish  By Jason Tashea

The Miranda warning is given in Spanish about 900,000 times every year, and a similar number of bilingual speakers would prefer being read their rights in Spanish, according to ABA findings.

Yet during preparations for the 50th anniversary of Miranda v. Arizona in 2016, members of the ABA Commission on Hispanic Rights & Responsibilities realized there was no universal Spanish translation of Miranda in the United States.

This realization was "like someone throwing a cold bucket of water over us," said Richard Pena, chair of the commission, at the 2018 ABA Annual Meeting in Chicago. "It was startling."

In response, the ABA House of Delegates passed Resolution 110 in 2016 calling for "federal, state, local and territorial law-enforcement authorities to provide a culturally, substantively and accurate translation of the Miranda warning in Spanish."

This was a problem that had been "lost in translation" because Spanish translations vary because of the difference in dialects across Spanish-speaking communities in the United States and because of the confederated nature of America's estimated 18,000 law enforcement agencies. In English, there are more than 800 versions of Miranda used in the United States, according to research by Richard Rogers, a psychology professor at the University of North Texas.

Finding a good translation of Miranda is not a new problem. Courts have been grappling with poor and incorrect translations since the 1970s.

The 9th U.S. Circuit Court of Appeals at San Francisco and the U.S. District Court for the District of Nebraska dealt with Miranda warnings that used the Spanish word puede, which means "could," "may" or "can." This changed the warning to "a lawyer may be appointed" as opposed to communicating the guaranteed right to a lawyer in a criminal trial.

In 1993, the U.S. District Court for the District of Oregon confronted a version of Miranda that told a suspect they had the "right to interrupt the conversation at any moment."

In other instances, an officer's use of Spanglish—a nonofficial amalgamation of Spanish and English—led to Miranda warnings with words not found in Spanish dictionaries.

Forging Tools

With the new set of tools developed by the ABA and its partners, there is a tempered hope that errors will be less common.

The Miranda Warnings Project team developed a laminated card with a small speaker—like a talking greeting card—and a web-based video called Sit & Watch Miranda that can be viewed on a squad car's computer, said Moire Corcoran, a student at the IIT Institute of Design and project design team leader.

With audio icons and written text, the layered approach for both tools is "meant to reinforce comprehension," she said during the Miranda Warnings Project panel at the 2018 ABA Annual Meeting in Chicago. The low-tech, laminated cards also were built with recording in mind. The warning is written on both sides of the card, allowing the officer's body camera to memorialize the event, said Jeremy Alexis during the
Alexis is a senior lecturer at the IIT Institute of Design. "They created something so innovative for our department," said Cmdr. Otha Sandifer of the New Orleans Police Department. "For far too long, we gave the officers the card and a little bit of a training and hoped they would pronounce the words correctly when they were out in the field."

Earlier this year, his department undertook a 45-day pilot with six of the new laminated cards, which cost a few dollars to make, spread out through the city. The results of the pilot are not yet public, but Janet Jackson, director of the ABA Center for Innovation, says the next phase is to test the cards and the video departmentwide. During this phase, she says, a way to measure suspects’ comprehension will be developed.

This project brought together a coalition of criminal justice stakeholders, leaving even the public defenders pleased, despite needing convincing. "I was skeptical," says Danny Engelberg, chief of trials at the Orleans Public Defenders. However, he came around to the project and says one way it improved current practice is "it slows down and clearly takes things step by step" through an audible and a visual presentation. "This project gets us one step closer to someone having a chance of understanding and making an informed decision," he says. Even with these improvements, "I still think there's a lot of hurdles to get over to make sure someone is truly making an informed decision to waive their rights."

CLEAR COMMUNICATION

Andrew Ferguson, a professor at the University of the District of Columbia David A. Clarke School of Law, has written at length about digitizing Miranda. He met with the ABA team early on to talk about the project.

Ferguson is supportive of the ABA tools and is developing his own app that he hopes will overcome the root problems he sees with Miranda warnings. "I don't think that mere translation will do enough to really deal with contextual understanding problems that everyone faces," he says. "Most suspects don't understand their Fifth Amendment rights, and Miranda warnings do a poor job of explaining that."

With many suspects chemically impaired or afflicted with a mental illness, he says there should be ways to make sure the warning is being understood and not just treated as a perfunctory constitutional requirement.

While Ferguson's app is not developed yet, based on a paper he wrote in 2017 with Richard Leo, a professor at the University of San Francisco School of Law, it will likely ask questions of the suspect to gauge comprehension as the warning is given. If the app is on a device with a camera, the tool also can capture the person's face, noting if a person seems impaired, for example.

While still new, the Miranda Warnings Project has been demonstrated for law enforcement from other jurisdictions with great interest, according to members of the panel. Even with that excitement, the chair of the ABA Commission on Hispanic Rights & Responsibilities offered a grain of salt. "To be honest, we don't know where this is going to lead. We don't know the ultimate impact," Pena said. "We can say it has tremendous potential. It's a no-brainer."
Changes to a long-standing U.S. Department of Labor rule that the ABA warned would have seriously undermined attorney-client confidentiality and the fundamental right to effective counsel have been rescinded.

Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 contains a section known as the “persuader rule.” The rule requires employers and their labor consultants to file disclosures with the department when they engage in certain activities or enter into agreements or arrangements to persuade employees on union formation or membership issues. However, the department has long interpreted Section 203(c) of the act to exempt lawyers from the rule’s reporting requirements if they have no direct contact with the employees and merely provide advice or other legal services directly to their employer-clients on these issues.

Changes to the persuader rule intended to take effect in 2016 would have narrowed the department’s interpretation of the “advice” exemption, forcing many management-side labor lawyers and firms to report confidential client information to the government. These reports would have disclosed extensive confidential information, including the existence of the lawyer-client relationship and the identity of the client; the general nature of the legal representation; and a description of the legal tasks performed. The reports also could have compelled disclosure of a great deal of confidential financial information about clients unrelated to the persuader activities the LMRDA is intended to monitor.

The ABA has opposed measures such as the 2016 rule changes since 1959, when it adopted policy urging that any proposed legislation in the labor-management field preserve the confidential attorney-client relationship and not require reporting or disclosure of any confidential client information.

The ABA first challenged the proposed rule changes in 2011, when ABA President Wm. T. (Bill) Robinson III urged the Labor Department to reconsider the proposal because the required disclosures would be “unjustified and inconsistent with a lawyer’s existing ethical duties under Model Rule 1.6 (and related state rules) not to disclose confidential client information absent certain narrow circumstances not present here.”

The association continued its push against the proposed changes in 2016, with ABA President Paulette Brown reiterating its concerns to a key House subcommittee. Brown emphasized that the 2016 changes would “seriously undermine both the confidential lawyer-client relationship and employers’ fundamental right to counsel.” She also urged Congress to keep to the department’s previous interpretation of the advice exception.

In June 2016, a federal district court in Texas granted a nationwide preliminary injunction against the new rule, quoting extensively from the ABA’s previous comments. The injunction was made permanent in November 2016. In June 2017, the department issued its formal proposal to rescind the 2016 changes, based in part on comments filed by the ABA and other stakeholders.

The ABA expressed support for rescinding the changes in an August 2017 letter to the Labor Department, but emphasized that it was not taking sides in a union-versus-management dispute. The ABA explained its sole objective is “defending the confidential client-lawyer relationship by reversing a rule that imposes unjustified and intrusive burdens on lawyers, law firms and their clients.”

The department published its final rule in July, formally rescinding the changes.

The department said it found the ABA comments persuasive and emphasized that the duty to safeguard client confidences has long formed the bedrock of the attorney-client relationship.

It agreed with the ABA’s view, on which the Texas district court relied, that the 2016 rule could very well have discouraged many employers from seeking needed expert legal representation.

This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is editor of ABA Washington Letter, a Governmental Affairs Office publication.
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At the 2019 Midyear Meeting, the Nominating Committee will announce nominations for district and at-large positions on the ABA Board of Governors for three-year terms beginning at the conclusion of the 2019 Annual Meeting. The deadline for filing petitions is Dec. 28. A list of the district and at-large positions conducting elections, and the election rules and procedures, can be found at ambar.org/2019BOGElection.

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At the 2019 Midyear Meeting, the Nominating Committee will announce nominations for district and at-large positions on the ABA Board of Governors for three-year terms beginning at the conclusion of the 2019 Annual Meeting. The deadline for filing petitions is Dec. 28. A list of the district and at-large positions conducting elections, and the election rules and procedures, can be found at ambar.org/2019BOGElection.

Mary L. Smith, ABA Secretary

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

CONGRATULATIONS to Susan Wickes of Richmond, Indiana, for garnering the most online votes for her cartoon caption. Wickes’ caption, below, was among more than 130 entries submitted in the Journal’s monthly cartoon caption-writing contest.

“I’m not sure which way this trial is going to go.” —Susan Wickes of Richmond, Indiana

LEARN MORE at ambar.org/freecle
From the moment his name emerged from the infamous “smoke-filled room” at Chicago’s Blackstone Hotel as a possible 1920 Republican presidential candidate, Warren G. Harding was surrounded by rumors of corruption. His manner was pompous, his oratory prosaic; his qualifications, even as a U.S. senator from Ohio, were the subject of ridicule.

After winning 60 percent of the popular vote, Harding promptly took a vacation. When he finally returned, he salted his cabinet with a few well-known names: Andrew Mellon, Charles Evans Hughes and Herbert Hoover. But there also were cronies, and his secretary of the interior, Senate drinking buddy Albert B. Fall, was one of them.

In 1920, the Senate had authorized the Department of the Navy to manage three vast-producing oil fields, two in California and one in Wyoming. But even before Harding was inaugurated in March 1921, Fall began lobbying Harding to wrest control over the reserves. And in May, Harding issued an executive order (No. 3474) that allowed just that.

Almost immediately, Fall offered the two California reserves in Elk Hills and Buena Vista to Edward Doheny, a West Coast petroleum pioneer and an old friend of Fall’s. Under a no-bid, no-royalties arrangement, Doheny’s company, Pan-American Petroleum and Transport Co., agreed to build an oil storage tank, a refinery and a pipeline in exchange for exclusive control of 30,000 acres of government oil reserves. In November 1921, Doheny’s son, Edward Jr., arrived at Fall’s apartment bearing a black bag containing $100,000 in cash.

Meanwhile, Fall was negotiating with oilman Harry F. Sinclair for the Wyoming reserve known as the Teapot Dome. In April 1922, Sinclair’s Mammoth Oil Co. secretly agreed to build a pipeline and stock the Navy’s East Coast storage tanks in exchange for full control of the Wyoming field—another no-bid, no-royalties deal.

Almost immediately, details of the leases were revealed by the Wall Street Journal. In May, even as a congressional probe was gearing up, Sinclair gave $269,000 in Liberty Bonds and cash to Fall’s son-in-law, M.T. Everhart, who delivered the bundle to Fall.

In hearings before an enraged Congress, oil and gas experts estimated that Fall had given away at least $100 million (about $1.5 billion today) in government-owned oil for little or nothing. Navy officials argued that the arrangements protected the oil from “evaporation.”

Harding died from a heart attack in August 1923, but the whiff of scandal became so pungent that Congress intensified its probe. The first witness, Fall, denied any collusion with the two oil tycoons. But then in January 1924, Doheny’s son admitted to Congress that he had delivered that $100,000 in cash directly to Fall a few years prior.

With Congress poised to authorize an independent counsel to investigate, President Calvin Coolidge jumped in, appointing two lawyers—Republican Owen Roberts, a Philadelphia lawyer; and Ohio Sen. Atlee Pomerene, a Democrat—to share the post.

Between 1924 and 1930, their Office of Special Counsel forged a record of mixed success. In the civil courts, they managed to return the reserves to the Navy, but criminal convictions proved hard to come by. Investigators were dogged by private detectives; prosecutors by inexplicably generous juries.

On Nov. 22, 1926, Doheny Jr. and Sr. began their trial with Fall on charges of conspiracy to defraud the government. After more than three weeks, a jury acquitted all three.

Fall faced similar fraud charges with Sinclair, but their trial ended in a mistrial when Sinclair was discovered using private detectives to monitor the jurors. Sinclair was subsequently convicted of contempt of court and sentenced to serve six months.

With Fall in precarious health, Sinclair was tried alone. Although Everhart testifed about the Liberty Bonds delivered to Fall, the result was the same: Sinclair was acquitted.

But Everhart’s testimony returned to haunt Fall when he was retried. Fall was convicted and sentenced in 1929 to a year in prison with a $100,000 fine. When his case was rejected by the U.S. Supreme Court, Fall spent a little more than nine months in the New Mexico state penitentiary.
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