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MUCH ADO ABOUT DICTION

In Bryan A. Garner’s “How Do You Say It?” October, page 24, I don’t agree with a lot of the supposedly standard pronunciations. However, this “test” was particularly challenging for a person brought up in four countries who missed several years of grammar school teaching in English as the primary language and whose pronunciation was initially taught by English and Irish teachers in school and Midwestern U.S. parents at home. As a result, I really haven’t a clue. Particularly difficult is deciding which “syLabul” to emphasize.

Paula S. “Susie” Kent
North Stonington, Connecticut

Regarding the pronunciation of “coup de grâce” and “concierge,” the final consonant in each case (“c” and “g,” respectively) is in fact pronounced in French, so those who omit them are mispronouncing the words in two languages. A similar mistake is often made when pronouncing “salade nicoise”—yes, the final “s” is pronounced.

John E. Thompson
Bethesda, Maryland

I’m surprised you don’t remember where the four-syllable pronunciation of the word interesting came from: Rowan & Martin’s Laugh-In! On that seminal ’60s TV show, Arte Johnson’s German soldier character would rise out of the bushes at odd times and comment on the show by saying his catchphrase, “Verrry in-te-res-ting!” (Millennials, Google it. Very funny in its time.)

Rick Goldberg
West Sacramento, California

ON BEING CIVIL

Regarding “Civility Reboot,” October, page 22, in our increasingly tribal culture, incivility is perhaps the norm. Campus speech codes are enforced by a full-blown diversity faculty. They earn their hefty salaries “censoring” incivility. The more incivility the better for these bureaucrats. They promote more incivility by running staged tribunals that deny “due process”—like the hearings of Brett Kavanaugh—to the accused.

Jack Toliver
Saint George, Utah

CLARIFICATION

In “A New Deal,” October, page 59, the list of lawyer types under the dues categories is partial, not comprehensive.

Letters to the Editor

You may submit a letter by email to abajournal@americanbar.org or via mail—Attn: Letters, ABA Journal, 321 N. Clark St. Chicago, IL 60654. Letters must concern articles published in the Journal. They may be edited for clarity or space. Be sure to include your name, city and state, and email address.
The ABA Journal is hosting and facilitating conversations among legal professionals about their profession. We are accepting thoughtful, nonpromotional articles and commentary by unpaid contributors to run in the Your Voice section of our website, ABAJournal.com.
It’s Time to Promote Our Health

ABA mobilizes on multiple fronts to address well-being in the legal profession

The holiday season is upon us, and office parties and family gatherings fill our calendars. For most, these are times of great joy and good cheer. However, for those suffering from substance abuse or mental health issues, the holidays can become a time of dread and depression.

A 2016 study conducted by the American Bar Association Commission on Lawyer Assistance Programs (CoLAP) and the Hazelden Betty Ford Foundation found that 21 percent of licensed attorneys qualify as problem drinkers. That’s 1 in 5 and compares to just 1 in 8 of highly educated workers in other professions.

The study also revealed that 28 percent of lawyers experience depression and 19 percent have anxiety symptoms. The problems are more prevalent among young attorneys in their first 10 years of practice. Evidence shows lawyers also suffer from increased levels of suicide, work addiction and sleep deprivation.

At your next firm party or bar association gathering, look around the room. Odds are that if some people you see are not suffering from these issues, they know someone who is.

This issue should be important to all of us in the profession. To be an ethical, competent lawyer, you first need to be a healthy lawyer.

America’s lawyers need to know that the ABA is working hard to improve lawyer wellness. Through CoLAP, we are working to ensure that every lawyer, judge and law student has access to support when dealing with substance abuse and mental health issues.

Since the 2016 study, the ABA has taken steps to draw attention to lawyers facing distress and to help firms act.

In 2017, the ABA’s National Task Force on Lawyer Well-Being issued a report called “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change.” This report concentrated on the roles we all can play in addressing this problem. It stressed education and emphasized that well-being is an integral part of a lawyer’s duty of competence. The report provides recommendations, with state action plans, for legal profession stakeholders, including regulators, the judiciary, law schools, professional liability carriers and bar associations.

The report highlights the need to eliminate the stigma of seeking help. Creating a safe, confidential path to getting assistance is critical to solving the problem.

My predecessor, Hilarie Bass, formed a Presidential Working Group to Advance Well-Being in the Legal Profession in September 2017. The group assists legal employers—which often want to help but are unsure where to start—develop and support healthy work environments.

The “Well-Being Toolkit for Lawyers and Legal Employers,” released in August, offers tools for legal employers that want to join the lawyer well-being movement by launching organizational initiatives. Also available is the “Well-Being Toolkit Nutshell: 80 Tips for Lawyer Thriving,” summarizing 80 of the toolkit’s key items.

To raise awareness, the ABA launched a campaign in September targeting substance-use disorders and mental health issues among lawyers. After just one month, 25 of the nation’s largest law firms have already signed a pledge to support the initiative and adopt its framework for improved well-being.

At the ABA 2018 Midyear Meeting in Vancouver, the House of Delegates passed Resolution 105, which made it ABA policy to support the goal of reducing mental health and substance use disorders. The resolution also called for all entities dealing with lawyers to consider putting into action the recommendations contained in the “Path to Lawyer Well-Being” report.

To aid our future lawyers, the ABA Law Student Division sponsored Law School Mental Health Day in October, which included podcasts, webinars and a YouTube Live event. They also encouraged law schools to hold programs that break the stigma associated with depression and anxiety.

The legal profession is at a crossroads. Our members, our colleagues, our friends are suffering. It is our duty as lawyers and human beings to help. So please, enjoy the holidays, but keep in mind others who may need help. Get involved, talk to your firm and colleagues, start a well-being program and join the ABA in helping lawyers through these problems.
The Wives of White-Collar Crime
Support group aims to help families and end stigma

IN 2007, Lisa Lawler was blindsided when she learned her husband was being investigated for embezzling money from his employer in Massachusetts to the tune of $2.5 million. He was ultimately convicted and sentenced to two years in jail. And Lawler was left to pick up the pieces of the family’s life.

“There’s a kind of an identity crisis in terms of, ‘What happened? Who are we now?’” says Lawler, whose son was a teenager at the time. “It’s literally as if a bomb went off in our lives.”

After she’d made it through the worst—the divorce from her husband, from whom she’d already been separated; the selling of her home; the move to Texas to start over; the acute shame—in 2013 Lawler decided to create a blog and support group called the White-Collar Wives Club with the hope that other women whose lives were similarly overturned could learn from her experience.

“I began blogging about this because I just felt so disenfranchised at the end of the day,” she says.

Today, the name has changed to the White-Collar Wives Project (thewhitecollarwivesproject.org), and it includes a private online support group with about 80 women from four continents who learned the hard way that they were married to white-collar criminals.

Many lost their partner, their financial stability and their expected future after the crime. “They not only gain support from one another but also learn how to navigate the legal and economic morass,” Lawler says.

In addition to support and education, women in this situation need their own legal representation, says Guinevere Moore, a partner with Johnson Moore in Chicago. “I can’t say it strongly enough—get your own lawyer, and do it right away,” says Moore, a tax litigation attorney.

Moore, who serves as vice-chair of the ABA Section of
Opening Statements

Taxation’s Standards of Tax Practice Committee, says there are critical steps to take to protect an “innocent spouse” from having to pay her husband’s tax liability and to protect the wife’s future income. “Don’t start transferring assets out of your name, out of your husband’s name or between the two of you. There will be a trail, and this will not put you in a good light. Get your own lawyer, and don’t do anything else until you speak with her or him.”

While Lawler divorced her husband immediately upon learning of the crime, protecting her personal assets in the process, she says not everyone is willing to leave. And when wives stay, she says, they face financial ruin.

“I’ve seen it all. Group members report wedding rings being slipped off their fingers; automobiles, homes and everything in them, seized through temporary restraining orders ... and even in one case, an innocent spouse’s fair and legal share of her own 401K after an order of divorce as part of her ex-husband’s restitution. That case was lost again recently on appeal, setting a very dangerous precedent.”

Lawler is quick to agree that all family members of convicted criminals suffer, whatever the crime. “When you have a head of household commit a crime, regardless of what it is, and they go off to prison, you’re also left scrambling. And if you haven’t worked in a number of years or don’t have a career, you’re in the same boat. And the social stigma that goes along with a husband who’s a molester or a rapist or a bank robber—it’s all very similar.”

Research finds that children in particular suffer when a parent is incarcerated. The study Parents Behind Bars: What Happens to Their Children? found that more than 5 million kids have had a parent go to jail or prison, and they are at a higher risk of experiencing other potentially traumatic events later in life, along with more emotional challenges, lower rates of engagement in school and more problems in school.

Lawler’s work has an even broader focus: the oft-overlooked collateral effects on spouses. “These women are treated as chattel with no legal standing to defend and retain their fair share of untainted legal marital property,” she writes on her blog.

For Moore, the key is educating people so they know to find the right attorney to understand and guard their rights and assets. “Protecting yourself doesn’t necessarily put you at odds with your spouse,” she says. “Some women who find themselves in this position think that getting her own lawyer will look like she isn’t standing by her man. That’s not the case at all. Getting your own lawyer can put both you and your spouse in a better position in the end because you are able to protect certain assets that he can’t.”

Lawler’s husband’s crime transformed her life when it happened, and it continues to do so. In addition to launching online platforms to support other women like her, she has penned the e-book The White-Collar Wives Survival Guide: What to Expect When Your Husband Is Prosecuted for a White-Collar Crime, and she is working on a memoir. She also regularly consults with lawyers, corporations, chambers of commerce and other entities about the damage that white-collar crime can cause the entire family. If she can help a spouse in need—or, better, stop the white-collar crime before it happens—she feels as though she’s making a difference.

“The whole premise behind the White-Collar Wives Project is shining a light on this aspect of punishment. These guys really do it to themselves, but they also do it to the family,” she says.

“The question is, did you think of your family and do this anyway? Or did you not think of us at all?” she says. “Either way, it’s a lose-lose proposition.”

—Kate Silver
Arizona Law Determines Fate of Frozen Embryos in Divorce Cases

FOR MORE THAN TWO DECADES, state courts have wrestled with how to settle disputes over frozen embryos when couples divorce or otherwise split. In such cases, one spouse typically wants to keep the embryos to eventually conceive children, while the other doesn’t. Courts have tended to side with the party who doesn’t wish to become a parent on the grounds that no one can be forced to procreate. But at times, rulings have gone the other way—especially in instances where the frozen embryos represent a person’s only chance of having biological children—leaving a split in the courts and uncertainty for litigants.

But a first-of-its-kind law would end that uncertainty in Arizona. The state’s Parental Right to Embryo law, which took effect in July, requires courts in divorce proceedings to award in vitro embryos to the spouse who intends to allow them to “develop to birth.”

Courts have generally viewed embryos as property—if property deserving of special respect—but not as people. Abortion-rights proponents view the law as “backdoor right-to-life” legislation aimed at establishing embryo personhood.

Despite accusations that the law is an attempt to give rights to embryos, architects of the legislation claim the main intent is to benefit future parents. “This new law strikes a balance between the interests of both spouses. One spouse can have the embryos for the purpose of having children, and the other spouse has no obligation as to any resulting child,” says Michael Clark, vice president of policy and general counsel at the Center for Arizona Policy, a nonprofit conservative advocacy group that helped draft the law.

Arizona legislators introduced the bill in response to the case of Ruby Torres and John Terrell, a Phoenix couple who completed in vitro fertilization before Torres underwent cancer treatment so they could later have children. A preconception agreement mandated neither could use the embryos without the other’s consent.

When Terrell filed for divorce in 2016, Torres sought to keep the embryos, arguing it was the only way she could have biological children. Terrell told the court he did not want to have children with Torres. Based on their agreement and other evidence, the court ruled Torres had no right to use the embryos. The judge ordered them to be donated. Torres appealed the decision, and a ruling is pending following oral arguments in June.

Arizona’s Parental Right to Embryo law can’t be applied retroactively and shouldn’t affect the case.

The law hasn’t yet been challenged, but Richard Vaughn, founder of the International Fertility Law Group in Los Angeles, questions its constitutionality. “Based on existing Supreme Court jurisprudence, it would fail because it forces procreation,” he says.

According to Judith Daar, a visiting professor at the University of California at Irvine School of Law and clinical professor at Irvine’s medical school, federal legislation on the issue is unlikely because family law matters have historically been governed by state law.

“Each state has its own public policy. There’s no uniform approach,” says Daar, who also chairs the ethics committee of the American Society for Reproductive Medicine, which opposed the new Arizona law.

To bring clarity to the issue, Vaughn and other members of the ABA Family Law Section’s Assisted Reproductive Technologies Committee (of which Vaughn is immediate-past chair) have formed a subcommittee to explore model legislation addressing the disposition of disputed embryos. When and if completed, states could use the group’s work for guidance. But Vaughn admits that process could take years.

In the meantime, with the number of frozen embryos reaching 1 million in the U.S., Daar predicts that litigation isn’t going away: “What is likely is that these disputes will continue to pile up in courts,” she says.

—Mark F. Walsh
Opening Statements

From Bushido to the Bar

By Shane Blank

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

My parents divorced when I was 11. Six years later, I came home on a Saturday afternoon to find my father dead from a heart attack. Six years after that—just before I took the LSAT—I found my stepfather dead from a self-inflicted gunshot wound. This past summer, my brother-in-law committed suicide in similar fashion. And, to be frank, the reason I ultimately turned to the law was nothing profound: I chose law after being criticized for wanting to be a video game developer—I was told by others to “get a real job.”

I tell you this up front because these circumstances are directly and cumulatively responsible for where I’ve ended up. Today, I am a judicial clerk to a wonderful mentor—the Hon. Stephen N. Limbaugh Jr. of the U.S. District Court for the Eastern District of Missouri. I also serve as a captain in the U.S. Air Force JAG Corps.

I was once doubted by a high school teacher who told me I couldn’t make it at my local community college (and, to be frank, I doubted myself at the time), but I now have a handful of degrees from several universities. I am blessed to be a husband and father of two. I’ve authored a number of articles, argued before myriad courts (including the 8th Circuit just three years into practice) and last year received a statewide Young Lawyer of the Year award.

So, how did I get from challenging roots to where I am today? That is an interesting story.

In the fall of 2005, I found myself alone in an apartment in Tempe, Arizona, battling severe depression. I’d suffered for many months after my father’s death. I was confronted with a choice: give up, believing I was a victim of circumstance, or fight. It was then that happen-

These distinctly Japanese principles, made famous as the unwritten moral code of the Tokugawa-era samurai, became my compass.

—Shane Blank

The Tom Cruise film The Last Samurai was a strange place of comfort for me at the time, and it had been on TV a few nights before. That prompted me to purchase the obscure book Bushido: The Soul of Japan, written by Inazo Nitobe in 1899. I had it with me that day and began to study it.

Rectitude (gi), courage (yu), benevolence (jin), politeness (rei), veracity (makoto), loyalty (chugi), self-control (jisei), and honor (meiyo). These distinctly Japanese principles, made famous as the unwritten moral code of the Tokugawa-era samurai, became my compass. And as I practiced them, I found they were uniquely tailored both to my personal journey and to the profession of law.

I began to share my story rather than hide from it. Bushido speaks of veracity (truthfulness), and in an age of half-truths, omissions and unspeakable taboos, I found it freeing to openly discuss my experiences with others. In that openness, I discovered an appreciation of another of Bushido’s principles: courage.

Courage is “doing what is right,” a simplistic notion in itself, but I took it to mean something else, too. I began to realize doing what is right is only fully achievable because of our adversity. It is simple enough to speak of the hypothetical good we might do, but it is something else still to do good at the actual cost of ourselves.

All of my experiences were directly responsible for building me—both my endurance and my empathy. They were also responsible for developing a certain audacity of belief, a belief that—with God’s grace—I could overcome, and in overcoming, grow. Rather than run from adversity, I chased it; rather than turn from the unknown, I confronted it; rather than hide from fear, I stood with it.

Law, like my discovery of Bushido, was also a fortuitous bit of luck. I chose it because I believed it to be an admired, noble profession.
profession that would quiet doubters. For me, though, it became something more transformational. Law provided repeated, concrete opportunities to identify and do what is right. In this, I began to understand the principle of rectitude.

Rectitude, of course, is both the alpha and omega of the law—it is how we orient ourselves and where we hope to end up. I came to discover, too, that benevolence and politeness play a tremendous role; I quickly divorced myself from the old notion that “advocacy” requires an abandonment of good manners. Courage, veracity and self-control are also paramount. The profession seems, at least to me, to overemphasize winning and profit-generation at the cost of doing what is just—particularly in the teaching of young attorneys. But these three principles temper against such impulses.

And then there is loyalty, which seems today to be a constant struggle between employers and a new age of millennial-minded employees. (I digress for a moment to suggest we millennials are not in fact disloyal as much as we seek a mutual-ity of loyalty—and in that, a feeling of purpose and belonging.)

Finally, there is honor. Honor is the badge either earned or lost in the regular or irregular use of the action-oriented virtues described above. It is the constant reminder of our pursuit of rectitude—a feeling of shame when we knowingly do wrong. As I was still discovering my voice in the legal profession, I admit to feeling some sense of shame; I did not always feel good about doing what I was told to do, and I was afraid of the repercussions if I did not abide. A poor excuse. Honor is frightfully difficult to recapture when it is freely handed away.

My path to law, my story, and these virtues are intertwined. I traveled from near-defeat to a still-blossoming success because of the adversity underlying my story and because of the virtues I clung to in those moments. The practice of law and military service have served as opportunities to project these elements in ways that serve others. And while I wish I had the time to share with you the myriad reasons why Bushido is a wonderful match to the legal profession—the ultimate purpose of this short article is more modest: I hope that, by sharing my own story, you find the encouragement and curiosity to persevere in your own circumstances.

In your life and legal practice, I encourage you: Fight—but do so with humility, respect and open-mindedness. Do the right thing, even at personal cost. Jealously guard your honor. Never lose sight of rectitude. Most of all, do not be shy nor ashamed of your experiences; they are the foundation of your strength.

Shane Blank earned his JD from the University of Missouri School of Law, an LLM in international and constitutional law from Washington University School of Law, and a bachelor’s degree in English and psychology from Missouri State University. He is a captain in the reserve component of the U.S. Air Force JAG Corps currently serving a four-year clerkship with the federal district courts.
Opening Statements

Hearsay

30 TO GO

Washington state has become the 20th in the nation to abolish capital punishment. The state’s supreme court struck down the death penalty, saying that it is imposed arbitrarily and with racial bias. The court also noted the death penalty failed to serve its intended purpose of retribution and deterrence of capital crimes. Gov. Jay Inslee previously issued a moratorium on the death penalty in the state in 2014. According to the American Civil Liberties Union, Washington’s court is the third to strike down the death penalty and cite concerns about racial disparities, along with Massachusetts and Connecticut. Source: npr.com

$22 MILLION

... is the amount of money raised by the Time’s Up Legal Defense Fund. The initiative was started in January by women in the entertainment industry in response to the #MeToo movement. The fund has put together a network of more than 780 lawyers to help financially struggling women litigate their sexual harassment complaints. A variety of employment sectors are represented, from construction and food service to education and the military. More than 3,550 people have asked for help, and about 40 percent of those seeking assistance are women of color; two-thirds are low-income. Approximately 21,000 donors have contributed to the fund, with about $4 million so far spent on more than 50 cases. Source: apnews.com

SURVEY SAYS

More than half of law school admissions officials surveyed by Kaplan Test Prep (56 percent) said they’ve looked at applicants’ social media to get a better sense of who they are. According to the survey, law schools are more interested than business schools in students’ social media. Ninety-one percent said social media is fair game whenulling through applications. In 2011, the first year Kaplan asked the question, just 37 percent of admissions officers said they looked at social media pages. Sixty-six percent of admissions officers who scour social media pages say they’ve found something that hurts a candidate’s chances, including photos of inappropriate activities such as underage drinking, racist posts and criminal activity. Source: law.com

1%

... represents the number of initial Public Service Loan Forgiveness applications approved by the U.S. Department of Education. Congress enacted the program in 2007, allowing college graduates working in certain low-paying public service positions to discharge federal student loans after 10 years. Of the approximately 28,000 borrowers from the first cohort who applied for loan forgiveness in this year, only 289 were approved, and 96 actually had their loans discharged. Experts say the approval rate numbers should increase, and that part of the problem is many people who don’t meet the criteria applied anyway. Others didn’t understand the byzantine rules and qualification process. Source: law.com
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The Working Mother Best Law Firms for Women Application closes February 8, 2019.
Pulling Teeth
Florida ruling on dental photographs takes a bite out of copyright protections
By Stephanie Zimmermann

They beckon from all corners of the internet: eye-catching before-and-after photographs showing how dental work, body sculpting, hair restoration and other services can transform looks and change lives.

Now a legal ruling on photos shot by a Florida dentist of his patient’s teeth—first looking crooked and stained, then straight and gleaming white—could make it harder for such photos to gain copyright protection.

A U.S. district judge in Florida ruled in June that the dentist’s before-and-after photos didn’t contain enough of a “creative spark” to merit protection.

Meeting the standard for creativity is not like pulling teeth,” wrote Judge Mark E. Walker of the Northern District of Florida in his ruling in Pohl v. MH SUB I LLC (d/b/a Offi cete) that was replete with corny puns involving teeth, bites and braces.

Walker tagged the photos as “devoid of creativity or originality” and thus not worthy of copyright protection.

“The case has elicited strong feelings on both sides, with some lawyers thinking the judge got it right and others worrying the decision, which is being appealed, could have detrimental effects on other images used in advertising.”

Some said the copyright ruling ultimately could harm consumers who won’t know whether to trust businesses that display before-and-after photos.

PROMOTIONAL PICTURES
The case began with Mitchell Pohl, a dentist in Boca Raton, Florida, who photographed the teeth of his female patient, Belinda, before and after he fixed them. Pohl used the images on his dental practice website to showcase his work and even registered them with the U.S. Copyright Office—although there was a dispute during the case about whether he had properly dated the photos.

At some point, Pohl found out that his photos had been reposted online without his permission by a company called Offi cete, which used his teeth pictures on websites promoting other dental practices.

Pohl sued for copyright infringement. His attorneys, William H. Hollimon and Martin B. Sipple of Tallahassee, thought it was a simple case of a website marketer grabbing copyrighted photos without permission. But attorney Matthew S. Nelles of Fort Lauderdale, representing the website marketing company, argued the images contained zero artistry—which means they can’t be copyrighted. Walker agreed.
“There is nothing remotely creative about taking close-up photographs of teeth,” the judge wrote in his decision. “The before-and-after shots served the purely utilitarian purpose of displaying examples ... to potential customers.”

In his ruling, the judge referenced several other cases in which photos of pet beds, computer components or motorcycle parts or images of Chinese food choices on a menu were deemed too utilitarian to merit copyright protection.

Pohl says the judge missed the point. “He failed to realize that the creativity didn’t begin right there when I picked up the camera,” the dentist says in an interview. “The creativity began when the patient walked into the office and I saw a blank canvas. It stopped when I pushed the shutter.”

QUESTIONS OF CREATIVITY

If the ruling stands, Hollimon says it will represent “a huge potential expansion” of what can’t be copyrighted. It also will create headaches for photographers who will be left wondering how any particular judge might define creativity.

In a failed motion to reconsider, Pohl’s attorney for the appeal, Joel B. Rothman of Boca Raton, argued that the dentist had made numerous behind-the-scenes creative decisions, including how to pose the patient’s mouth and when precisely to take the pictures. In arguing for Pohl’s photos to merit copyright protection, Rothman pointed to a 2000 ruling by

The work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”

O’Connor said “even a slight amount” of creativity is enough. “The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”

With such a low threshold, surely Pohl’s photos of his patient’s teeth surpass it, says Rothman. “I think it is stunning in its conclusion” that the images are not copyrightable, Rothman says. “The judge looked at the picture, and that was it. And that doesn’t consider the photographer’s art, and it is an art.”

But Nelles, who defended the website marketer against the infringement claim, says the Feist decision helps his argument more than the dentist’s. Simply aiming a point-and-shoot camera at someone’s mouth isn’t artistry, Nelles says. He compared the side-by-side teeth images to hypothetical photos of an old car fixed up for sale. “It’s almost routine,” he says. “Stand in front of the car; take a picture.”

SETTING BOUNDARIES

As for whether the ruling brings too much subjectivity into the realm of photo copyrights, Nelles says this area of the law has always been subjective. With the Florida ruling, there’s now a little more clarity. “The line had to be drawn somewhere,” he says.

Attorney Joshua L. Simmons, a copyright expert and partner at Kirkland & Ellis in New York City, says he wasn’t surprised by the ruling, considering Pohl couldn’t remember some of the details of the photo shoots, such as whether the patient was sitting or standing or what type of camera was used.

Various courts have been trying to figure out how far copyright protection extends. This ruling says that to obtain copyrights, photographers must be able to demonstrate at least some tiny way that their photos are creative, Simmons says.

That can be done by adjusting the camera angle, lighting, exposure or other technical aspects or carefully staging the subject. All that’s needed is “a modicum of creativity” under the Supreme Court’s Feist decision. That’s not much, Simmons says, “but you have to have some.”

But attorney Roberta Jacobs-Meadway, an intellectual property expert at BakerHostetler in Philadelphia, says the judge got the ruling “seriously wrong.”

The ruling seems to confuse the concept of “originality”—meaning a work was created as opposed to copied—with the concept of artistic creativity, Jacobs-Meadway says.

Whether an image is used commercially shouldn’t matter. “A lot of copyrighted work is utilitarian. Fabric patterns are utilitarian,” she says.

To say the photos’ utilitarian use makes them not copyrightable “is a radical interpretation of the copyright law,” Jacobs-Meadway says.

Jonathan S. Masur, a professor at the University of Chicago Law School and an expert in copyright issues, agrees the judge got it right but says he doesn’t expect the ruling will have a huge effect.

Photographers may have to adjust their behaviors a bit, knowing they might have to prove they staged their lighting or planned a pose. But Masur says that isn’t tough to do. “You have to add some very small element of creativity to it,” he says.

As for what the ruling means for consumers who might find out the photos they see in ads have nothing to do with the businesses that post them, the old phrase “caveat emptor” comes to mind.

Masur says the dentist’s case was rightly brought for copyright infringement and not deceptive business practices.

That said, a consumer might have a decent case for fraud if they ended up using a terrible dentist solely because of a copied image, Masur says.

“The consumer always has the option of suing for false or deceptive practices,” he says.

Simmons says consumers should probably think twice when they see before-and-after photos.

“This decision certainly has brought to the forefront that not everything you see online is going to be what you think it is,” Simmons says.
Full Disclosures
In the wake of the Mueller investigation, law firms are making sure they comply with the Foreign Agents Registration Act  
By Mark F. Walsh

Before special counsel Robert Mueller's investigation of Russian interference in the 2016 election, few outside Washington, D.C., had ever heard of the Foreign Agents Registration Act.

Enacted in 1938, the act requires anyone lobbying or doing public relations for a foreign government, company or other entity to register with the Department of Justice and file detailed reports about their work every six months. Intentionally violating the law carries a fine of up to $10,000 or five years in prison, or both.

But even inside the Beltway, decades of lax enforcement meant lobbyists had little to fear from the DOJ for failing to comply with FARA's disclosure requirements.

That changed in late 2017 when Mueller indicted former Trump campaign aides Paul Manafort and Rick Gates on charges that included their failure to register as foreign agents under FARA in connection with their lobbying work for the Ukrainian government.

The special counsel also used FARA to help pressure former National Security Adviser Michael Flynn into a guilty plea for lying about his conversations with a Russian diplomat. In his plea agreement, Flynn admitted to lobbying for the Turkish government without registering as a foreign agent while serving in the Trump campaign.

The high-profile prosecutions didn't go unnoticed in D.C.'s legal and lobbying community. "We started getting calls from clients asking if they had to register or not [under FARA]," says Chris DeLacy, a Washington, D.C.-based partner at Holland & Knight who heads the law firm's political law group.

The firm is a registered foreign agent—lobbying on behalf of clients such as South Korea, Japan and Gibraltar—and an adviser on FARA compliance.

Especially concerning for law firms was Skadden, Arps, Slate, Meagher & Flom getting caught up in the Russia investigation. The megafirm's work for former Ukraine President Viktor F. Yanukovych, coordinated by Manafort, led to a Skadden associate in February pleading guilty to lying about his Ukraine-related work.

More recently, former Skadden partner Gregory Craig—and two Washington lobbying firms hired by Manafort—have come under scrutiny from federal prosecutors, reportedly for failing to register under FARA in connection with representing Ukraine.

Prosecutors also are considering a civil settlement or deferred prosecution agreement with Skadden, according to CNN.

ON NOTICE
With FARA showing its teeth, law firms and lawyers in D.C. are under heightened pressure to determine whether the work they do for foreign clients falls within the law's scope.

And even if they're already registered as agents of "foreign principals," they want to be sure they're meeting FARA's reporting requirements.

"Entities currently registered under FARA are taking this opportunity to ensure their filings are complete and accurate, and that their internal policies and processes contain the best practices necessary to ensure they're complying with the letter and the spirit of the statute," DeLacy says.

That hasn't always been the case. A September 2016 report from the DOJ's inspector general found that most lobbyists were filing initial registrations on time, and half were missing deadlines to submit supplemental reports. Further, FARA registrations, which peaked in the 1980s at 916, currently total more than 400.

That same study called for tougher enforcement of FARA, highlighting the dearth of prosecutions under the law. Between 1966 and 2015, for example, it reported the DOJ brought only seven criminal FARA cases.

The Mueller probe aside, the DOJ has taken a tougher stance on FARA through steps such as audits of FARA registrants and a narrower reading of the law in advisory opinions and informal advice.

That's according to an analysis by Covington & Burling attorneys Robert Keher, Zachary Parks and Alexandra Langton in the summer issue of PLI Current: The Journal of the PLI Press.

An apparent result of the Russia investigation and the IG's report is that new FARA registrations have ramped up, jumping to 101 in 2017 from 69 the prior year. They appear to be on a similar pace this year, at more than 90 through the end of October, according to the DOJ's FARA database.

Major law firms registering since last year—typically reflecting new foreign client engagements—include Baker Botts; Gibson, Dunn & Crutcher; King & Spalding; Manatt, Phelps & Phillips; and McDermott Will & Emery. About 30 firms overall are listed as active FARA registrants.

FINANCIAL INTERESTS
If the designation of "foreign agent" may cause firms some discomfort, the FARA filings highlight the monetary rewards that come with that role. Foreign entities have spent more than $659 million on lobbying and related services since just last year, according to the Center for Responsive Politics' Foreign Lobby Watch.

The online tool that launched in August calculates figures from FARA registrants' semiannual activity reports, which include fees and
The Docket

expenses paid by clients.

Washington, D.C.-based Akin Gump Strauss Hauer & Feld was among the top-earning registrants overall, with total payments since 2017 of $16.5 million from clients including the United Arab Emirates, Japan and Canada. Among other law firms, Squire Patton Boggs received $5.8 million from clients including Croatia, China and Saudi Arabia, while DLA Piper took in $4.7 million from the governments of Timor-Leste and Bahrain, among others.

“It’s an indication of how this [lobbying] industry is booming right now,” says Ben Freeman, director of the Foreign Influence Transparency Initiative at the nonprofit Center for International Policy in Washington, D.C. As such, it’s all the more imperative for lobbyists and law firms to disclose the work they’re doing for foreign clients, he argues.

But lawyers who specialize in lobbying and FARA-related compliance—and even transparency advocates such as Freeman—fault the statute as broadly written and imprecise, raising questions about exactly what activities trigger registration.

“The [FARA] statute is not terribly well-worded, and there are some vague terms that I believe make it hard to enforce criminally, and even civilly, given some of the vague provisions,” says Amy Jeffress, a former DOJ attorney who now specializes in white-collar defense and national security issues as a partner at Arnold & Porter in its Washington, D.C., office.

For example, the law lays out activities requiring registration such as engaging in “political activities” to influence the American government or public or advance the interests of a foreign government or political party. Other types of work warranting disclosure include serving as a public interest agent, collecting or dispensing money, or representing the interests of a foreign entity before a government agency.

“These triggers are extremely broad,” the Covington attorneys stated in their article. “As a result, on the face of the statute, routine business activities of law firms, lobbying and public relations firms, trade associations, think tanks, U.S. subsidiaries of foreign companies, and other commercial enterprises could potentially require registration.”

That said, FARA does have several exemptions. One is for lawyers—provided their representation of a foreign client is limited to judicial or agency proceedings and doesn’t include any attempt to influence the government or public on policy matters.

A commercial exemption permits “private and nonpolitical activities” involving trade or commerce—such as the sale of commodities or property—on behalf of a foreign entity.

The law also extends an exemption to anyone already registered under the Lobbying Disclosure Act, which has less rigorous reporting requirements than FARA, as long as the foreign client is not a foreign government or foreign political party.

MATTERS OF INTERPRETATION

But gray areas emerge even with the exemptions. Parks of Covington & Burling says questions come up most often in relation to the commercial exemption. For example, “If you’re trying to secure a contract for a foreign company, that’s much more likely to be bona fide trade or commerce,” he says. “But if it relates to a broader policy issue, there’s more ambiguity about whether that’s all commercial.”

That question has come up more often lately because of the Trump administration’s relentless focus on trade policy and tariffs.

To provide more guidance on FARA provisions, the DOJ in June for the first time released more than 50 advisory opinions that shed light on its interpretation of the law. The documents represent responses from the FARA unit to requests for opinions on how the law applies to specific situations to determine whether registration is required.

Reaction to the opinions’ release has been mixed. Lawyers interviewed welcomed the step toward greater clarity around FARA but suggest their benefit is limited by being heavily redacted and lacking analysis beyond citing the FARA statute or existing regulatory guidance.

Their value lies chiefly in highlighting fact patterns that might apply in similar situations. “The opinions address a number of scenarios routinely confronted by U.S. lobbying, consulting and law firms in their work on behalf of foreign clients, though they are very fact-dependent and thus should not be viewed as ‘precedent,’” stated a Bloomberg Law article in July by Arnold & Porter’s Jeffress with colleagues Kaitlin Konkel and Craig Schwartz.

Bigger changes are in store for FARA if any of several reform bills pending in Congress are ultimately enacted. The legislative proposals overall aim to strengthen FARA enforcement, in part by giving the DOJ subpoena power to investigate potential cases of nonregistration.

Three of the five FARA bills introduced in the House and Senate also would eliminate loopholes such as the LDA exemption. Other changes would incorporate civil fines into the law and update terms such as “informational materials” distributed by foreign entities to include newer technologies such as social media, according to an August report from the Project on Government Oversight.

A DOJ spokesperson declined to comment on the pending FARA legislation, but many of the bills have adopted recommendations made in the department’s inspector general’s report on FARA compliance.

Despite the planned FARA reforms, lawyers expressed concern that the various bills won’t do much to clear up ambiguous terms in the law. “The legislation isn’t necessarily designed to increase clarity,” Parks says. One thing that does seem clear: FARA enforcement is only likely to get tougher.
When his father died in 2012, Tyson Timbs spent a large chunk of the $73,000 he inherited to buy a Land Rover LR2. “I just always liked them for as long as I can remember,” Timbs says of the high-end SUV brand. A salesman steered him from the used vehicle Timbs intended to buy and toward a brand-new model costing $42,000. “It was going to be dependable,” says Timbs, a 37-year-old Indiana factory worker.

The Land Rover was indeed a dependable ride, but Timbs’ long-standing problems with drug use evolved into drug dealing, which led to his arrest in 2013 and the seizure of his prized set of wheels.

His prosecution has led to an important U.S. Supreme Court case about the Eighth Amendment’s prohibition against the imposition of “excessive fines.” The legal question in *Timbs v. Indiana*, scheduled for argument on Nov. 28 as part of the court’s December sitting, is whether the clause is incorporated against the states by the 14th Amendment.

Incorporations would be “a potentially very important constitutional limitation” on the states, says Beth A. Colgan, an assistant professor of law at University of California at Los Angeles who has written that excessive fines have become the “modern debtors’ prison.”

‘GROSSLY DISPROPORTIONAL’

For 10 years, Timbs had battled a drug addiction—first with opioid painkillers and then heroin. By 2012, he had moved from Ohio to rural Indiana to live with an aunt. For a time, he had gotten clean. But his father’s death sent him into a relapse. After Timbs quickly spent the rest of his inheritance, he was looking for a way to fund his drug habit and began to deal in heroin, court papers say.

Timbs made two sales to undercover police officers in 2013, and he was driving his Land Rover on the way to another sale when the police pulled him over. Despite not finding any illegal drugs in the vehicle that day, the police arrested Timbs and charged him under state law with dealing in a controlled substance based on the two earlier undercover transactions.

While Timbs’ criminal case was pending, a private law firm under the authority of a local prosecutor filed a civil lawsuit seeking forfeiture to the state of the Land Rover, which the police had taken into their custody. Indiana is the only state allowing such private forfeiture actions, in which the private firms get a cut of any proceeds from the forfeited property, according to the petitioner’s brief. However, most states and the federal government routinely seek forfeiture of property used in criminal activity.

Timbs pleaded guilty to one count of dealing and one other criminal count. He was sentenced to six years, with one year to be served in home detention (with his aunt) and five years probation, plus about $1,200 in fines and court costs.

The same judge took up the civil forfeiture claim, finding that Timbs had used the Land Rover to transport heroin but ruling that forfeiture of the vehicle would be “grossly disproportional to the gravity” of the offense.

A panel of the Indiana Court of Appeals affirmed, holding that the excessive fines clause is applicable to the states and agreeing that the forfeiture would be disproportionate even to the maximum $10,000 criminal fine that could have been applied to Timbs for his drug offense.

The Indiana Supreme Court reversed, ruling 5-0 that the excessive fines clause has not been incorporated against the states.

‘WELL-CHRONICLED ABUSES’

Timbs’ appeal to the U.S. Supreme Court reached the justices at a time when there has been renewed attention to the potentially onerous burdens of civil fines and forfeitures.

In 2017, in a statement respecting the denial of certiorari in the case *Leonard v. Texas*, Justice Clarence Thomas expressed concerns about modern civil forfeiture practices.

“This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses,” Thomas wrote, adding that he was skeptical that historical forfeiture practices, which tended to arise in the realms of customs and piracy, could support “the contours of modern practice.”

Timbs has attracted support from a wide range of organizations, including the American Bar Association, the American Civil Liberties Union, the U.S. Chamber of Commerce and the Pacific Legal Foundation.

The ABA in its amicus brief told the justices about its Working Group on Building Public Trust in the American Justice System, which is addressing the
concern that excessive judicial fines and fees “disproportionately harm the millions of Americans who cannot afford to pay them, entrenching poverty, exacerbating racial and ethnic disparities, diminishing trust in our justice system and trapping people in cycles of punishment simply because they are poor.”

A group of legal scholars filed an amicus brief in support of Timbs that says, “State and local governments have been levying greater and greater fines and relying heavily on forfeitures in recent years, often at the expense of people who can least afford to pay. Fines and forfeitures are punishments, but they can also make money for cities and states, which gives governments an incentive to increase these punishments to excessive levels.”

Colgan, who has signed onto the scholars’ brief in support of Timbs, says, “We only have four cases in which the Supreme Court has interpreted the excessive fines clause, so we have a lot of open questions.”

ROLE IN THE CRIME

Indiana argues that there is a problem with the idea that the forfeiture of Timbs’ Land Rover was disproportionate to his fines. “In our view, the excessive fines clause is about punishment for the criminal,” says Indiana Solicitor General Thomas M. Fisher. “When you’re talking about in rem forfeiture, you’re talking about an action against the property. It’s a separate proceeding.”

The state points out that after his arrest, Timbs admitted to the police that he would use his Land Rover to pick up heroin several times per week. At the forfeiture hearing, he said that doing so put “a lot” of miles on the vehicle.

“If you are trying to conceptualize the seizure of the property as proportional to something, you have to compare it to the role the property played in the crime,” he says.

Both sides’ briefs delve heavily into the history of the incorporation of the Bill of Rights against the states and into historical practices of fines and forfeitures. One of the state’s examples is meant to show that in rem forfeitures—legal actions directed against property instead of a person—have sometimes been quite draconian and disproportionate.

In an 1833 case, a federal court upheld the seizure of The Louisa Barbara, a 400-ton passenger vessel, because its 178 passengers exceeded a federal weight limit by one passenger. “When we look at in rem forfeitures, we can see some harsh consequences in history,” Fisher says. “Yet no court has ever suggested there were any constitutional barriers to that.”

Lawyers for Timbs contend that Indiana is ignoring some more recent history. In Austin v. United States, in 1993, the Supreme Court held that forfeitures of property used in certain drug crimes authorized by two federal statutory provisions were “monetary fines” subject to the excessive fines clause.

By arguing that forfeitures aren’t fines, “the state attempts to relitigate Austin,” says Wesley P. Hottot, one of Timbs’ lawyers with the Institute for Justice, an Arlington, Virginia-based public interest legal organization.

The court has incorporated the Eighth Amendment’s other two provisions against the states—those barring excessive bail and cruel and unusual punishment. “The Supreme Court should finish the job and require the states to incorporate the excessive fines clause as a check against the government’s power to punish,” Hottot says.

Timbs has served his house arrest and probation, and he says he is now clean of using drugs. He drives some 35 miles each day to his factory job in Huntington, Indiana, where he is a machinist in a John Deere plant.

He borrows his aunt’s car. It’s a 2012 Dodge Avenger, a modest sedan, since his Land Rover is still in possession.

“I’ve been made aware that if I get it back, it might not be in the best condition,” Timbs says. “I wrote that truck off a long time ago.”

But he hasn’t written off the legal battle he is waging. “I feel like I stand for something,” Timbs says. “I’m coming out of a life of addiction where I didn’t mean a lot to anyone. Now I feel like I’m doing something good with this.”

■
Contract ‘Busts’

Trying to decipher provisions that literally make no sense

By Bryan A. Garner

Transactional drafting is a fascinating field of study—and of practice. There are rigors on the one hand and lunacies on the other. The rigors involve accurately achieving the contracting parties’ desired result, preferably in a form they can comprehend. The lunacies involve using pastiche forms riddled with wildly inconsistent ways of expressing simple duties, absurd archaisms whose purpose few lawyers can explain, and repellent typographic practices that still today make many if not most contracts grotesque to read.

What I’d like to explore in this column is the curiosity of “busts”—the prevalence of contractual provisions, sometimes perpetuated in deal after deal, that make no literal sense at all. That they exist at all is something of a marvel. After all, you’d think that transactional lawyers would adopt a protocol of reading and rereading each contract that goes out the door. Given that critical thinking and close reading are prized habits for lawyers, contradictory or outright nonsensical provisions should be exceedingly rare. Alas, they’re not.

Most experienced lawyers can recall anecdotes of contractual monstrosities. One involves a malpractice claim against a law firm: A mortgage had somehow been prepared in the early 1980s with a crucial line dropped. The sentence made no sense. The firm had prepared dozens if not hundreds of mortgages with the same language missing, resulting in an incomplete sentence that made little sense—and the sense it did seem to make resulted in a disposition that no sane drafter could have wanted. It seems that a typist had simply skipped a line and continued typing. Nobody caught the error—until a problem erupted in the early 2000s.

By that time, the faulty contract had long since become entrenched as the “firm form.” A secretarial error from a generation before had become permanently ensconced in the form.

FLAWED FORMS

That’s one of the pratfalls that forms, or precedents, encourage: a blind reliance on what’s “worked” before. Forms often lull drafters into a false sense of security. If it worked last time, it’s surely reliable. “Don’t touch a word of it,” I’ve heard drafters say. “It’s time-tested, and most of the provisions have probably been litigated.”

This, too, is lunacy. As David Mellinkoff demonstrated in his classic book *The Language of the Law* (1963), litigated forms typically have glaring problems in them. That’s usually why they fomented the litigation in the first place. Yet for most of the 20th century, American legal publishers collected “litigated forms” as if they were prized: The ambiguities within them had been adjudicated and settled. Yet if, say, the Arizona Supreme Court decides a contractual ambiguity one way, the California Supreme Court may decide it differently, and the New York Court of Appeals even differently from the others. All because nobody simply redrafted the ambiguity to fix the problem. After all, if a redrafted form hasn’t been litigated, how could it be recommended over wording that had?

I once attended a lecture by an expert on mechanic’s liens. He cited a recent state supreme court’s decision in which, in a critical provision, the court held that *shall* meant *may*. (Such holdings are common, given the pervasive sloppiness with which legal drafters use the word *shall*.) After noting the decision, he emphatically recommended that all drafters in the state would be well advised to use *shall* in this provision because they know what it means there: It means *may*. When I asked why drafters shouldn’t simply use *may*, he said he had no idea what that might be held to mean. After all, it hadn’t been adjudicated.

This mindset leads to all kinds of perversions in drafting.

WORD SWAPS

But then there are simple lapses in attentive reading. Lawyers often send me “busts” they encounter. Just last week I received an e-mail quoting this provision from a loan
Borrower
banker? them to the lender? Is the borrower being appointed attor-

liberty to obtain the lender’s bank statements in order to give

Loan, Borrower shall furnish and supply Lender each of the
document: “On January 1 of each year during the term of the
Lender’s monthly bank statements for the preceding twelve
(12) months.”

Did you see that? How in the world can the borrower be at
liberty to obtain the lender’s bank statements in order to give
them to the lender? Is the borrower being appointed attorney-in-fact to retrieve those statements from the lender’s bank?

Of course, the second instance of Lender should be
Borrower.

Typos of that kind—actually swapping the parties—are most common in contracts that contain correlative designations ending in -ee and -or: employer/employee, licensor/licensee, mortgagor/mortgagee, etc. Using both in a given legal instrument should be forbidden. It begs for errors of this kind. Yet many intellectual property lawyers prepare licensing agreements with licensor/licensee.

The problems are threefold: (1) whenever such a document is retyped, clerical errors are likely to occur; (2) the sameness of the party designations leads to cognitive difficulties for all readers—including the drafters themselves—because the only visual difference is the two-character suffix at the end; and (3) clients tend to resent such documents not just for their unreadability, but also for their appearing to be forms that the lawyer took little care in adapting.

“I’m paying you this fee for a form you took off your server?” the client is likely to think if not say. A simple search-and-replace maneuver makes the entire document look tailor-made. When you can, you ought to use the parties’ actual names. Bad: Vendor/Vendee. Better: Seller/Buyer. Best: Williams/Johnson. And if you use the parties’ names, you yourself will read the document with greater comprehension and attentiveness. Try it.

Consider an example from an apartment lease. The drafter has adopted the ghastly practice of putting party designations in all-caps:

“LESSEE shall not, without the LESSOR’s written con-
sent, make any alteration in the Leased Premises and LESSEE will not deface or permit the defacing of any part of the Leased Premises. LESSEE shall not do or suffer anything to be done on the Leased Premises which will increase the rate of fire insurance on the building. LESSEE shall not use any shades, awnings, or window guards, except such as shall be approved by Landlord. LESSEE will not keep or harbor any animal in the Leased Premises without first obtaining the written consent of LESSOR. LESSEE will not permit the accumulation of waste or refuse matter. LESSEE will not assign this Lease or underlet the Leased Premises or any part thereof without the LESSEE’s written consent, which consent must not be unreasonably withheld by LESSOR.”

The shouting of names is distracting, to say the least. The all-caps names detract from anyone’s ability to read the paragraph. Then there’s the weird switch from shall in the first three obligations to will for the last three. Then there’s the incorrect use of shall (nonmandatory) in the fourth instance. Then there’s the switch from permit in the first sentence to the archaic suffer in the second. Then there’s the odd phrase refuse matter, in which many ordinary readers would read refuse as a verb: the tenant will not refuse matter. But, of course, the intent is to use refuse in its noun sense, with the redundant word matter. Wouldn’t the plain word trash suffice?

Did you notice the bust in that passage? The final instance of lessee should be lessor. This is a silly error—but one that could cause the landlord many a headache.

A BETTER WAY

Granted, you might use surnames in a contract like this one, but if your client is a landlord with many tenants, positional labels may be best. They must be different in form: Landlord and Tenant would be much preferable to Lessor and Lessee. You’re far less prone to error that way. Here’s how that provision might read:

3.2 Prohibited Activities. Tenant must not:
A) make any alteration in the Leased Premises without first obtaining the Landlord’s written consent;
B) use any shades, awnings or window guards without first obtaining the Landlord’s written consent;
C) keep or harbor any animal in the Leased Premises without first obtaining the Landlord’s written consent;
D) assign this Lease or sublet any part of the Leased Premises without first obtaining the Landlord’s written consent;
E) deface or permit the defacing of any part of the Leased Premises;
F) do or permit anything to be done on the Leased Premises that will increase the cost of fire insurance; or
G) permit the accumulation of waste or trash.

That’s a fairly simple redraft. It adds a helpful heading. It uses vertical listing, which results in tighter wording. It simplifies the language, thereby promoting better compliance by a tenant who now has a better chance of comprehending what’s prohibited. And it groups the items more sensibly. Concededly, other organizational strategies would be possible.

You might have noticed that I completely eliminated the requirement of not unreasonably withholding consent to subletting. If you represent the landlord, you surely don’t want that. Why not just allow your client to have full discretion? You don’t want to impose unnecessary burdens on the client.

In any event, the big point is that we’ve eliminated the bust: the misidentification of a party. When you adopt sounder practices in contractual drafting, you promote critical thinking and prevent error.

Bryan A. Garner (bgarner@lawprose.org), president of LawProse Inc., has taught contractual drafting for more than 25 years at law firms and more than three dozen Fortune 500 companies. He has redrafted contracts for banks, car manufacturers, credit-card companies, insurance companies, oil-and-gas companies, real-estate developers, soft-drink manufacturers, technology companies and telecommunications companies. His forthcoming book is Garner’s Guidelines for Drafting and Editing Contracts.
Picking the Path

Take time to assess and create an intentional, joyful, satisfying life

By Jeena Cho

“I have to sit in the car and give myself a pep talk so I can go into the office every morning. At the end of the day, I often sit in my car and cry.”

This is what one coaching client shared during a recent call. From the outside, no one would guess this was her inner world. She has built a successful boutique family law practice. She has a loving husband, a 5-year-old son and a beautiful home—yet she struggles with longing for something more. I often see lawyers in this position: searching for meaning in their work and struggling with a deep sense of discontentment.

Lawyers are goal-oriented, and we tend to excel at following the rules. Do well in high school, get into a good college, do well on the LSAT, get into a good law school, graduate, pass the bar, get a job at a law firm, put in your dues and make partner. We falsely believe that following the script, checking all the boxes and earning the brass ring will lead to a career filled with a sense of meaning and purpose.

When I graduated from law school, I thought being a trial lawyer was my life’s work. There were certainly aspects of trial work that I loved—the client interactions, the strategy, the legal analysis. However, I loathed the incivility, the endless fights over things that really didn’t matter in the end and living in a world of conflict.

Even though I felt this early on, I told myself to just tough it out and continue doing it. Other lawyers told me: “Just give it time, it will get easier.” Eventually, it did get easier. The last-minute filing the night before Thanksgiving, the efforts of my opposing counsel to bury my client in discovery—all the maddening games lawyers play just became routine.

However, over time, I also noticed an inner yearning not to be a trial lawyer. It just wasn’t right for me. I realized my skills were better suited for finding the middle ground, helping clients find solutions outside of litigation and being a peacemaker.

WHICH ROAD TO TAKE?

When at a crossroads of choosing more of the same or taking the path of uncertainty, it’s helpful to have some framework or strategies for choosing the road less traveled.

As we head into the new year, it’s a wonderful opportunity to pause, take inventory and become more intentional about identifying your values and aligning your life with what is truly important. Mindfulness and meditation, as well as working with a life coach, were incredibly helpful as I figured out how to travel that unexplored path.

I have found that carving out a few minutes each day to sit in contemplation gives me an opportunity to realign myself, my time and my activities to my own values. It makes it easier to notice when I am out of balance, when boundaries have been crossed and when I need to make small course corrections.

It’s a way to acknowledge that your own well-being matters and to dedicate a bit of time to it.

Here are four steps for creating a more intentional, joyful and satisfying life for 2019.

Acknowledgment.

Change isn’t possible until you are willing to acknowledge where you are and how you feel about your current situation. Often, lawyers will resist even admitting that they are unhappy or that their life feels out of control or misaligned because this carries with it uncomfortable emotions. For example, if I admit that I don’t want to be a lawyer, does that mean I have to quit? If I quit, how will I pay my mortgage? How will I pay back my student loans?

Acknowledging involves embracing all of those
fears and emotions. Grab a piece of paper and write down everything you’re feeling about your life right now. When fears or other uncomfortable emotions arise, jot those down, too.

Be curious. Once you’ve identified the parts of your life that perhaps need adjustment or you’re dissatisfied with, become intensely curious about them. For example, if, like my coaching client, you have to give yourself a pep talk before walking into the office, get to know the why. Is it certain aspects of your practice? Is it who you work with? Is it the type of cases? Type of clients? Is there perhaps a misalignment between the work you thought you’d be doing and the work you’re actually doing? What are the pain points?

At this stage, you don’t need to solve the problem or make any changes. You’re simply gathering data or facts. But also look for the silver lining. When in your day do you notice a spark of joy? When you feel at ease? Are there times when you are able to connect with a deeper sense of purpose? It may be helpful to do this exercise daily over several weeks. Buy a journal, and each day jot down the positive experiences as well as the pain points. Write down as much detail about each event as possible.

Change your experience. And change your thoughts. Once you’ve done the previous two steps, it’s time to go out into the world, try new things and see whether they help move you closer or further away from how you’d like to feel and operate in the world. There’s a common phrase used by neurologists: “Neurons that fire together wire together.” By experiencing something different and new, you can help your brain create new neural pathways and shape how you see the world.

These can be small or big. Go to a CLE in a practice area that interests you. Go to a networking event that you wouldn’t usually go to. Invite someone to lunch who has a job that you’re curious about. Take a different route home at the end of the day. Intentionally focus on experiencing your world in a different light.

Sometimes lawyers can fall into the trap of thinking that lawyering shouldn’t involve joy, and that if you experience happiness or contentment from your work, you aren’t doing it right. I believe this myth perpetuates the high rate of stress, anxiety and depression in our profession. It doesn’t need to be this way. By taking these steps I’ve outlined, it’s possible to design a life that gives you a sense of meaning and purpose.

Access the recorded version of this meditation at jeenacho.com/wellbeing.

Adapted from The Anxious Lawyer

“WE FALSELY BELIEVE THAT FOLLOWING THE SCRIPT, CHECKING ALL THE BOXES AND EARNING THE BRASS RING WILL LEAD TO A CAREER FILLED WITH A SENSE OF MEANING AND PURPOSE.”

— JEENA CHO

Tips for Young Lawyers: Round 2

Last month, the ABA Journal published a series of tips for young lawyers from senior lawyers who participated in the ABA’s Briefly Speaking contest. This month, we’re sharing the next round of advice—this time aimed at litigators and business lawyers. The contest winner in the litigators category was Tasha Blakney with Eldridge & Blakney in Knoxville, Tennessee. Jacob McBride of Weinstein Radcliff Pipkin in Dallas won in the business lawyers category.

TOP TIPS FOR BUSINESS LAWYERS
SUBMITTED BY ABA MEMBERS

If you are joining an established firm, determine quickly who your “trusted associate” should be: They’ll be your best asset if you are having a difficult time with an assignment or if you have questions that you are too embarrassed to ask your supervising partner.

Stephanie Thompson
Department of Justice
Salem, Oregon

Know where the bathrooms are. You’re a litigator, which means you will be going to court. CHances are you will have a client with you. Your client will ask you where in the courthouse the bathroom is located. If you don’t know, the client will assume you don’t practice in that court and will never hire you again. However, if you say it’s down the hall and to the right, your client will know that you know your way around. That means more business.

Lee Mendelson
Mendelson Law Firm
Bridgehampton, New York

Never stop learning. The ABA has tons of free webinars for Business Law Section members with great information to keep you up to date in your current practice area, to help you expand your practice or to put new things on your radar. Given the relatively high price of many legal publications, this has been an incredibly cost-effective way of keeping myself educated.

Brent Kampe
Fuller Theological Seminary
Pasadena, California

To gain perspective on potential pitfalls in any transaction, ask a litigator.

Jacob McBride
Weinstein Radcliff Pipkin
Dallas

When you conduct your due diligence on the new client (small business), not only should you research the legal requirements for the engagement but more importantly understand the culture of the client to ensure you provide not only the best product but also one that they will gladly utilize and be comfortable with.

Frank Steiner
Frank Steiner Law
Nashville, Tennessee

Approach generating and maintaining clients like dating:

1) Be confident in yourself first.
2) Mingle where singles congregate.
3) Don’t solely depend on your online presence (your LinkedIn profile).
4) Flatter, but don’t be needy.
5) Mention what you do, but mostly let them talk.
6) Take it slow (building client relationships takes time and patience).
7) Have them meet the parents (if you are part of a larger firm, arrange a meeting with your more experienced bosses to help you get a contract signed).
8) Celebrate your anniversaries and show your appreciation.

Kevin Peek
Sandberg Phoenix & von Gontard
St. Louis

While representing major investment banks and broker-dealers, the first question I always asked my client when I learned of a potential wrongdoing was, “How do you want this to read on the first page of the Wall Street Journal?” Your client needs to fall on the sword and reach out to the appropriate regulatory body or SRO as early in the process as possible.

Kathryn Natale (retired)
Rye Brook, New York

You will be working on multiple deals—use a different pad of paper and file system on your desk to keep track of each deal. List the lawyers you are working with on the front. If one calls, you can quickly get your brain around the relevant deal. This way, you won’t confuse facts of various deals.

Jennifer Coon
Thomson Reuters
New York City

Understand how the business works so that you can understand what needs to be in the documents, and so that you do not waste client time and money with irrelevant clauses, provisions and negotiations. Clients don’t like lawyers who kill their deals but appreciate lawyers who understand their business and help them mitigate real risk.

Rochelle Friedman Walk
Aegis Law
Tampa, Florida

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Kathryn Natale (retired)
Rye Brook, New York
TOP TIPS FOR LITIGATORS
SUBMITTED BY ABA MEMBERS

In legal writing: Less is always better. Remember your audience is a very busy judge who wants to get to the point quickly. Strive to put your most important arguments first, and state them as succinctly as possible. Revise and revise again, until you have pared away all excess words, phrases and arguments.
Karen Kahle
Steptoe & Johnson
Bridgeport, West Virginia

Never allow your client to be the client and the attorney. They can only play the role of client. If they begin doing their own research and directing you on the law, you have lost control of the matter and should withdraw to preserve your sanity.
Deborah Pino
The Law Offices of Deborah Pino
Oakland Park, Florida

Always break down the legalese to something the client can relate to in another context. Empower the client to make hard choices so he/she can move through the litigation and get to life on the other side.
Gail Roth
Gail P. Roth, LLC
King of Prussia, Pennsylvania

Look at your uniform jury instructions on the cause of action(s) and use them to help you draft not only the complaint but also for deposition preparation and discovery requests.
Michael Schwarz
Law Offices of Michael Schwarz
Santa Fe, New Mexico

Make it your goal to be the most prepared attorney in the courtroom at all times. Do this and you will always have an advantage over your adversary. Many times over, my laborious preparation for even the smallest and most insignificant of court appearances has provided me with the tools to be more effective than my adversary, which is the key to success in the courtroom.
Shannon Miller
Maurice Wutscher
Wayne, Pennsylvania

Get out of the office. Always visit or inspect the site or the tangible objects that are the subject of the dispute. You will gain infinitely more knowledge by such inspections than you can possibly get from video, photos or documents. It also gives you the upper hand with witnesses who try to lie. It opens leads for evidence that you did not even think of. Also, take a few hours to visit your local courthouse and the clerk’s office. Meet people there, and make connections with the staff.
Robert Guinness
Guinness & Buehler
St. Charles, Missouri

Hard work by a new litigator gets further than an underprepared, more experienced litigator. Roll up your sleeves and get to work. They will likely underestimate you to your advantage.
Jen Lipinski
Gordon & Partners
Palm Beach Gardens, Florida

Be courteous to every single person you encounter in the courthouse, from the security officer who greets you at the door, to the bailiff who assists in the courthouse, to the clerks and the court reporters and everyone in between. When you need assistance—and you will—it is these very people who can make the difference for you between being an effective advocate and a clearly exposed newbie. If you are courteous and respectful to all, you will have advocates of your own when you need help.
Tasha Blakney
Eldridge & Blakney
Knoxville, Tennessee

Be extra nice to the judge’s clerks and judicial assistants. A smile and a friendly “good morning” go a long way. Not only do judges appreciate and expect you to be respectful toward court staff but not doing so could adversely affect your ability to best serve your clients. Ever wonder what the judge and clerk talk about in chambers? If you’ve been rude or nasty, that conversation might well be about you!
Neal Zaslavsky
Law Office of Neal S. Zaslavsky
West Hollywood, California

With clients and juries, don’t forget you are not talking to lawyers. So leave the legal jargon and logic at home and concentrate on what they want to know. Tell stories. Use examples. Be a person.
David Benson
Benson Law Firm
Cleveland
Lawyers have a variety of ethical obligations to consider after disasters, according to the recently released ABA Formal Opinion 482. Large-scale disasters that have devastated cities across the country reinforced the need for the ABA to address the myriad rules that lawyers must consider. “In light of recent disasters such as Katrina and Florence, there is certainly a need for a formal ethics opinion to address how lawyers should plan or prepare for natural disasters to protect their clients’ interests,” says ethics expert John P. Sahl, a professor at the University of Akron School of Law.

Perhaps most fundamentally, lawyers must follow the duty of communication required by Rule 1.4 of the ABA Model Rules of Professional Conduct, which requires lawyers to communicate regularly with clients and keep them apprised of their cases. After a disaster, a lawyer must evaluate available methods to maintain communication with clients. The opinion relates that lawyers should keep electronic lists of current clients in a manner that is “easily accessible.”

In these early communications, clients need to know whether their lawyers will be able to continue their representation. The opinion also says a fee agreement or engagement letter could explain how to contact a lawyer in the event of an emergency or disaster.

“The opinion is a very helpful roadmap with a lot of practical tips for all lawyers,” Sahl says. “Although the opinion focuses primarily on the obligations of managers and supervisors, all lawyers need to review this opinion to ensure that they are taking the necessary steps to protect the interests of clients and others when a natural disaster occurs.”

Lawyers should also remember that Rule 1.1, the duty of competency, includes a technology clause that requires lawyers to consider the benefits and risks of relevant technology. Because a disaster can destroy lawyers’ paper files, lawyers “must evaluate in advance storing files electronically” so they can access those files after a disaster.

Storing client files through cloud technology requires lawyers to consider confidentiality obligations. Lawyers should make sure to “(i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.”

If a disaster causes the loss of client files, lawyers must also consider their ethical obligations under Rule 1.15, which requires lawyers to safeguard client property. For current clients, lawyers can attempt first to reconstruct files by obtaining documents from other sources. If they cannot, lawyers must notify the clients of the loss of files or property. To prevent such losses, “lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly.” Lawyers can store files in the cloud if they can meet ethical obligations regarding confidentiality and access to information.

In addition to client information, a disaster could impact financial institutions and therefore client funds. Thus, lawyers “must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust.” Other steps lawyers should consider include “providing for another trusted signatory on trust accounts” and “designating a successor lawyer to wind up the lawyer’s practice.”

Furthermore, a disaster may cause an attorney to have to withdraw from a client’s case under Rule 1.16. “In determining whether withdrawal is required, lawyers must assess whether the client needs immediate legal services that the lawyer will be unable to timely provide,” the opinion says.

“I HAVE SEEN SITUATIONS WHERE LAWYERS WERE NOT PREPARED. THERE CAN BE OBVIOUS ISSUES WITH PAPER FILES AND AN INABILITY TO COMPLY WITH FILING DEADLINES.”

-WENDY ELLARD
“Lawyers who are unable to continue client representation in litigation matters must seek the court’s permission to withdraw as required by law and court rules.”

The opinion highlights an important point for lawyers—“diligent preparation,” says Wendy Huff Ellard, a partner at Baker Donelson in Jackson, Mississippi, whose clients are public or private nonprofit entities, contractors and industry associations impacted by disasters.

“I have seen situations where lawyers were not prepared,” Ellard recounts. “There can be obvious issues with paper files and inability to comply with filing deadlines during a large event. But I’ve also seen issues with electronic file access following an event—many lawyers do not have backup systems in place to account for system crashes and inaccessibility.” Ellard says the opinion is a timely reminder of attorneys’ ethical obligation to remain vigilant even during times of disaster and provides actionable tips to remain in compliance.

**LAWYER DISPLACEMENT AND VOLUNTEERING**

The opinion also provides guidance to lawyers who are displaced from their jurisdictions and seek to practice law in another jurisdiction. Such displaced lawyers may be able to practice temporarily in another jurisdiction, as ABA Model Rule 5.5(c) indicates. However, displaced lawyers need to obtain approval from the new jurisdiction. The formal ethics opinion cites a key provision of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. That rule provides in part that a lawyer displaced by a disaster “may provide legal services in this jurisdiction on a temporary basis if permitted by order of the highest court of the other jurisdiction.”

The opinion also explains that lawyers practicing in jurisdictions not impacted by a disaster may wish to volunteer their services to those who are impacted. “Out-of-state lawyers may provide representation to disaster victims in the affected jurisdiction only when permitted by that jurisdiction’s laws or rules, or by order of the jurisdiction’s highest court.”

The ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster requires that “the supreme court of the affected jurisdiction must declare a major disaster and issue an order that allows lawyers in good standing from another jurisdiction to temporarily provide pro bono legal services in the affected jurisdiction through a non-profit bar association, pro bono program, legal services program or other organization designated by the courts.”

Ellard says “Opinion 482 provides helpful points on how impacted lawyers can continue their practice elsewhere and how those who aren’t impacted can potentially assist in other jurisdictions. I hope all of my colleagues heed the call and consider volunteering their time through the ABA or some other reputable pro bono legal services provider.”

The opinion bluntly warns against “the possibility of improper solicitation in the wake of a disaster.” ABA Model Rule 7.3(b) generally prohibits direct solicitation of potential clients: “A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer or law firm’s pecuniary gain.”

Given some egregious behavior by some lawyers after disasters, the caveat from the opinion is understandable. “This part of the opinion reflects a concern about lawyers possibly overreaching clients in the direct face-to-face solicitation context,” S. Gillers, chair of the ABA Standing Committee on Ethics and Professional Responsibility has issued a formal opinion that reaffirms that duty.

In Formal Opinion 483, issued in October, the standing committee also provided new guidance to help attorneys take reasonable steps to meet this obligation.

“Lawyers today face daunting challenges from the risk of data breaches and cyberattacks that can lead to disclosure of client confidences,” says Barbara S. Gillers, chair of the ABA Standing Committee on Ethics and Professional Responsibility. “Formal Opinion 483 offers helpful guidance on how the ABA Model Rules of Professional Conduct should inform lawyers’ approaches to these risks in order to comply with the duty to protect client information.”

This opinion bookends the standing committee’s May 2017 Formal Opinion 477R, which set forth a lawyer’s ethical obligation to secure protected client information when communicating digitally, says Lucian Pera, a partner at Adams and Reese in Memphis, Tennessee, and co-author of an article in the second edition of the ABA Cybersecurity Handbook.

The new formal opinion only discusses breaches of client data, not other data breaches that may also require action on the part of an attorney or firm.

“When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to
stop the breach and mitigate damage resulting from the breach,” Formal Opinion 483 says.

The ethics opinion implicates Model Rule 1.1 (competence), Model Rule 1.4 (communications), Model Rule 1.6 (confidentiality of information), Model Rule 1.9 (duties to former clients), Model Rule 1.15 (safekeeping property), Model Rule 5.1 (responsibilities of a partner or supervisory lawyer) and Model Rule 5.3 (responsibilities regarding nonlawyer assistance).

Like many legal ethics opinions regarding technology, this opinion does not endorse particular hardware or software but rather presents “reasonable” steps a lawyer could take.

“As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach,” the opinion states. “The decision whether to adopt a plan, the content of any plan and actions taken to train and prepare for implementation of the plan should be made before a lawyer is swept up in an actual breach.”

While amorphous to some seeking concrete recommendations, others see this as the indicia of a changing obligation.

“The opinion identifies an emerging legal standard for ‘reasonable’ security that requires instituting a fact-based process for assessing risk, identifying and implementing security measures, verifying effectiveness, and ensuring security measures are continually updated,” says James Walker, partner at the New York City office of Richards Kibbe & Orbe.

The opinion offers flexibility for lawyers to tailor the recommendations to a particular need or potential threats.

The opinion states that these efforts may include restoring or implementing technology systems where it is practical but also declining a technology solution if a task does not require it, taking into account that internet-enabled services could increase a firm’s vulnerabilities.

As the new opinion tries to shed light on a complex topic, some issues are not covered. Experts noted that obligations are if they aren’t sure that confidential client information was affected during a hack.

“In my opinion, when lawyers cannot determine whether a breach compromised material confidential client information, they must notify the client accordingly because the lawyers’ inability to determine what happened is material to the client,” says Eli Wald, a law professor at the University of Denver Sturm College of Law.

Calling the opinion “the best summary of our learning on this subject at this point,” Pera in Tennessee sees areas where the committee could have gone further.

The opinion declines to extend the same breach notification protections to former clients as current clients because Model Rule 1.9(c) doesn’t have “a black letter provision requiring such notice.”

But the opinion does suggest attorneys come to an agreement with each client about how to handle the client’s information after representation ends. A client may also give informed waiver of these obligations under Model Rule 1.9.

“I’m not sure I agree with them that the ethics rules don’t require the notification to a former client,” says Pera, adding that his former clients would be upset if their information was caught up in a breach but weren’t informed.

As a precaution, he says that even if the committee is right on this point, lawyers should consider what client information they keep after representation ends.

In a footnote, the opinion recommends that firms should have data retention policies that limit their possession of personally identifiable information.

The document ends with a somber reminder that even if attorneys follow the model rules and make “reasonable efforts” to prevent disclosure and access to client information, they may still experience a data breach.

“When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients ‘reasonably informed’ and with an explanation ‘to the extent necessary to permit the client to make informed decisions regarding the representation,’” the opinion says.
What does emerging technology like AI and blockchain—as well as regulations like GDPR—mean for cybersecurity?

By Jason Tashea

It’s possible that someone may be watching your screen—by listening to it.

A recent study from cybersecurity analysts at the universities of Michigan, Pennsylvania and Tel Aviv found that LCD screens “leak” a frequency that can be processed by artificial intelligence to provide a hacker insight into what’s on a screen.

“Displays are built to show visuals, not emit sound,” says Roei Schuster, a PhD candidate at Tel Aviv University and a co-author of the study with doctoral candidates Daniel Genkin, Eran Tromer and Mihir Pattani. Yet the team’s study shows that’s not the case.

The researchers were able to collect the noise through either a built-in or nearby microphone or remotely over Google Hangouts, for example. Then they ran the audio through a neural network—a type of AI—to determine on-screen keystrokes or uncover which Alexa top 10 website the user was visiting.

The researchers were also able to accurately determine a majority of a list of 100 English words, albeit in an ideal research setting where letters were all caps and black on a white background. Seventy-two of the words “appeared in
the list of top-five most probable words,” the researchers found.

“Advances in machine learning today can be extremely useful,” says Schuster—even for malicious attackers. This novel approach illustrates just another vulnerability that affects just about anyone with a monitor.

While unaware of this exploit being used by nefarious actors, he recommends that those working on sensitive material should keep microphones away from their screens—an increasingly tough request, as many devices come with the technology.

“Beyond designing new screen models to adopt mitigations,” he says, “there is little manufacturers could do at this point.”

In January, when we started this series, major themes were put forth. Chief among them was that cyberthreats are ever-evolving, as shown by Schuster's team's research.

With that in mind, we close this series by looking around the bend to understand how major emerging technologies will affect cybersecurity in the coming years. While experts disagree when technologies such as artificial intelligence and blockchain will play a larger role in cybersecurity and data protection, there is broad agreement that their roles will be pivotal. This could, in turn, create new solutions, risks and regulatory headaches.

Today, it is standard to protect a centralized database through a combination of software, hardware and human intervention. Still, significant data breaches occur, including those at Equifax, the U.S. Office of Personnel Management and Yahoo. In the last two years, the city of Atlanta, DLA Piper and shipping company Maersk were all temporarily crippled by attacks on their networks.

While artificial intelligence and blockchain are not silver bullets, each has the potential to provide another layer of protection or intervention. Novel defenses are needed as state and private actors are teaming up to create more potent, self-propagating attacks, according to a 2018 report from CrowdStrike, a cybersecurity company.

Regardless of a threat’s source, recovering from an attack is expensive. A recent global report by IBM Security and the Ponemon Institute found that a single data breach cost a corporate victim an average of $3.9 million.

At the same time, there are fewer people to fill cybersecurity jobs. By 2022, the cybersecurity workforce gap will be 1.8 million people, according to a 2017 Frost & Sullivan survey. Already, one-third of new cybersecurity hires in North America don’t have a technical or cybersecurity background.

Without an influx of new trained hires on the horizon, filling this gap requires mechanization.

“Automation can be configured to detect anomalies better and faster than humans, supplant operators in monitoring tasks, and decrease false positives to free up analyst time,” argued a Booz Allen Hamilton report on the role of AI in cybersecurity. By collecting data about an attack, AI programs can also learn attackers’ habits, which can improve threat detection and assess a network’s risk, according to the report.

A STEP AHEAD

However, the cutting edge is quickly moving beyond these tasks.

In 2016, the Defense Advanced Research Projects Agency held the Cyber Grand Challenge, the world’s first machine-only hacking tournament. Contestants built software to be tested by various automated attacks. To win, computers protected themselves, scanned for vulnerabilities and made patches in real-time without human support.

This novel event showed that in a competition environment, AI could not onlyrepair itself but do so in seconds.

A year later, the Defense Department’s Defense Innovation Unit awarded a contract to the winner of the competition, ForAllSecure, to automate analysis and remediation of weapons systems. The technology provides “a 1,000-fold improvement in time and cost performance ... over manual methods,” according to the website.

While setting a new bar, in reality AI applications only augment rather than replace human abilities.

“We’re not at a point where artificial intelligence can make causation decisions, to think like a human mind thinks, to figure out why it actually happens,” says Lt. Col. Natalie Vanatta, deputy chief of research at the Army Cyber Institute.

Whether operable today or down the road, AI in cybersecurity, like any AI application, is limited by the quantity and quality of the data needed to “train” an algorithm. Currently, research in the cybersecurity space is being handicapped “because the data is not available,” Vanatta says.

Of what data there is, quality is also at issue.

For example, a firm may want to develop an in-house threat detection tool based on its network’s data. But if the company doesn’t know its network well enough to say it is adversary-free, then it’s nearly impossible to trust the data or an algorithm trained on it. The aforementioned CrowdStrike report found that adversaries will dwell in a network for an average of 86 days before they are discovered.
Beyond the challenges faced when building AI tools for defense, Vanatta adds that AI could create new vulnerabilities, effectively weaponizing data.

“If every decision they are making is based on these data streams, then to attack an artificial intelligence system I no longer need to be an insider threat,” Vanatta says. “All I have to do is poison the data and play that long game.”

For example, she says that if someone sent a box from the same place on the same day, every month to the same government address, it would get flagged, tagged and opened—at first. However, if the package had a deck of cards in it, it would be marked as safe. If this pattern continued for a few years, the algorithms that originally flagged the potential threat will “learn” packages following that pattern are not dangerous and don’t need to be flagged in the future.

Put on the black market, this knowledge could be bought by someone out to harm that government agency. “Then, death and destruction rains down instead,” she says.

Blockchain has “no single point of failure,” says Philippa Ryan, lecturer at the University of Technology Sydney and 2018 ABA Journal Legal Rebel. This means that the most common types of data loss, either through human error or malicious attack, occur less often.

Like data collection confounding AI’s role in cybersecurity, however, blockchain has its technical hurdles. It is still clunky and slow, which emphasizes the perennial trade-off between security and efficiency. Ryan says that when quantum computing—a type of computing with the potential to outperform today’s supercomputers—becomes viable, speeds won’t be a problem. (Theoretically, the math behind quantum computing is ready; the hardware, on the other hand, is not.) Regardless of computing speed, regulators may slow down blockchain’s adoption and use.

Europe’s GDPR is a regulatory behemoth that includes rights to erasure and portability of personal data. Some see direct conflict between these rights and the fixed nature of data on a blockchain.

In 2012, when the GDPR was first drafted, parliamentarians were considering “old-school data management,” which assumed databases were centralized, says Guggenberger, who was a policy analyst at the European Parliament from 2014 to 2016. “At that time, no one at the European level was talking about blockchain,” he says.

As for a legislative fix to the GDPR, he believes it’s unlikely. “That’s like opening Pandora’s box,” he warns.

On the design side, however, there are two potential solutions, according to Laura Jehl, partner at BakerHostetler in Washington, D.C.

“You have to be proactively thinking about the architecture of your system, what information they collect and store ‘on chain,’ how they store information ‘off chain,’” and whether data stored “on chain” is sufficiently anonymized, she says.

Ensuring that protected, personal identifying information as defined by the GDPR is kept off a blockchain network could circumvent erasure and portability requirements, for example. Further, if a company decides to host personal data “on chain,” then they would need a robust anonymization process to obscure a user’s identity.

While less extensive than the GDPR, Jehl adds that California’s new data privacy law has a right to deletion. She says, for similar reasons, this creates “open questions” for anyone doing business in California.

Back in Europe, however, local authorities tasked with enforcing the GDPR have a different view.

“At first glance, it seems that there is a conflict with the GDPR [and blockchain applications], especially with the rights of the data subject,” says Kristin Benedikt, head of department for online companies, tele-media, apps and mercantile directories at the Bayern Office for Data Protection Oversight, which enforces the GDPR. “However, this is not correct.”

She notes that both the rights to erasure and portability apply in narrow circumstances, so some of the concern is overblown. However, there is still need for further guidance.

“With regard to the future, we believe that it is important to have a European opinion and not only a Bavarian [opinion],” she says.
Proving Consent

Tech companies are creating apps to combat sexual assault, ranging from tools memorializing consent to programs that help victims file reports with the authorities  

By Jason Tashea

When having sex in Sweden, “no” means “no” and “yes” must be explicit.

In May, the country’s Parliament passed a law stating that sex without consent is rape, making it the 10th European Union country to do so. Past laws required Swedish prosecutors to show that violence, or the threat of it, had occurred. That isn’t the case anymore.

“This law change is hugely significant,” says Esther Major, senior research adviser at Amnesty International’s Europe office. “The burden is no longer on the victim to prove she fought back but on the perpetrator not to rape in the first place. It shifts the focus from the victim’s behavior to that of the accused.”

As laws change, software developers believe they can leverage technology to bolster and prove consent.

Launched in March, uConsent is an app designed to enshrine consent between two people.

“The app is like a digital handshake,” says Cody Swann, CEO of Las Vegas-based Gunner Technology, which produced the software.

The app requires two people to type in what they consent to. If both enter the same information—confirmed by each person scanning a unique QR code on the other’s phone—then a timestamp and location tag is added, and the agreement is uploaded to uConsent’s servers.

The evening then proceeds as consented, Swann says.

The #MeToo movement has brought consent and sexual assault to the fore. While technologists hope to impact how consent and sexual assault reporting occur, advocates, lawyers and researchers are often skeptical of technology’s role in this sensitive space.

In the U.S., one in five women and one in 71 men will be raped during their lifetime, according to the National Sexual Violence Resource Center.

Eight out of 10 victims will know their assailant.

For Michael Lissack, executive director of Empowering Victims, a nonprofit in Massachusetts, consent apps aim to get people beyond nonverbal gestures and fumbling statements that may or may not indicate clear boundaries.

To that end, his organization created We-Consent, a consent app, and it is developing an assault reporting tool.

“We invented an app that was not designed to be used,” says Lissack of We-Consent. By merely knowing the app was available, his hope was that it would instigate a conversation between two people that might otherwise not have happened.

However, that’s a best-case scenario, says Mary Anne Franks, a professor at the University of Miami School of Law. “If you can coerce someone into having sex with you, there is nothing to stop you from being able to coerce somebody into using an application that makes it seem that you consented,” she says.

Compounding concerns, the apps don’t reflect the fluid nature of consent.

“It assumes that all sexual experiences that start out great end great,” says Erica Olsen, director of the Safety Net Project at the National Network to End Domestic Violence, “and that’s just not the case.”

Acknowledging this problem, Swann says he is talking with Amazon to create a version for Alexa that would let someone retract consent through the voice-activated assistant.

If sexual assault does occur, Callisto, a nonprofit web service from San Francisco, helps victims memorialize the event, makes a reporting choice and detects serial offenders, CEO Jess Ladd explains.

The tool allows users to upload evidence and use it when they’re ready. According to Callisto’s 2017 report, campuses with the web app see students report an assault in an average of four months, while those without the tool see reporting occur 11 months after the incident.

No one interviewed for this article knew whether data from a consent or reporting app had been used in a court proceeding. Research from 2012 indicates that for every 100 forcible rapes that occur, less than 6 percent will be prosecuted.

Susan Sorenson, director of the Ortner Center on Violence & Abuse in Relationships and a professor at the University of Pennsylvania, thinks that, unlike consent apps, Callisto may have staying power because universities struggle with campus assault.

“The systemic issue is how universities have varying degrees of integrity in investigating sexual assault on their campuses,” she says. “If all of them were doing a good job, students wouldn’t see a need for this.”

Operating outside of the university, Callisto gets around these failures, she says.

Franks at Miami believes technology like Callisto is a good thing.

“The more we can encourage victims of crime, generally, to record what has happened as soon as they can, in as much detail as they can, the better it is for the process all together and for everyone,” she says. ■
SURVIVOR MENTALITY

As the number of workplace and mass shootings continues to rise, law firms are seeking out professionals to hold active shooter drills  

By Angela Morris

Last year, a Houston lawyer went to Las Vegas to attend a country music festival but came home a survivor of a tragic type of mass violence that has become all too common in modern America.

When a gunman opened fire with a semi-automatic rifle at the Route 91 Harvest festival, killing 58 concertgoers and wounding 546, this attorney survived using the survival mindset she had learned when her law firm hosted an active shooter defense course at the office.

“I’ve had four people come forward and tell me the training I’ve provided saved their lives when an active shooter showed up,” says Stephen Daniel, the Houston Police Department instructor and senior community liaison who trained the survivor at her law firm. Daniel says she and her firm wished to remain anonymous because the shooting was so traumatic.

In a country where mass shootings happen with increasing frequency, it’s becoming more common for law firms to bring active shooter defense instructors on-site to teach their lawyers and staff about how to survive a shooting situation. Daniel says he’s taught attorneys at 30 Houston-area law firms about the “run, hide, fight” method of surviving an active shooter. Daniel was one of the active shooter instructors to present sessions at successive annual conferences of the Association of Legal Administrators, where some law firm administrators first got the idea to bring the active shooter training to their firms.

“Safety of our employees is paramount,” says John Meredith, chief operating officer of Chamberlain, Hrdlicka, White, Williams & Aughtry in Houston, who first heard an active shooter trainer speak at a meeting of the Houston chapter of the ALA. “We take it seriously.”

Meredith says he brings the courses into all his firm’s offices annually because he wants to keep up with best practices. Firms can usually call their local police departments for free training, and the FBI also offers it, he notes.

TRAINING IS KEY

Blank Rome teams up with law enforcement for active shooter courses in all the cities where it keeps offices, and the firm has created a management training program to teach about indicators of workplace violence, according to Robert Weaver, the Philadelphia-based chief risk and security officer.

“This is a salient issue for law firms, particularly given the recent attacks targeting lawyers and judges. Whether in the offices of the firm or in court, attorneys need to know how to react to this type of event,” Weaver said in an email.

Ken Sweet, president of the Greater Los Angeles chapter of the Association of Legal Administrators, knows of a few law firms in the city that have offered the training.

The Los Angeles County Bar Association offered a course in January. Sweet, office manager at Clark Hill in Los Angeles, notes that his firm’s Las Vegas office took part in an active shooter course in September offered by the building’s management company. Active shooter training ought to be part of any law firm’s safety repertoire, just like fire drills or earthquake preparedness, he says.

“It’s become a more common problem. You hear about it on the news more and more, and I think if people don’t know how to act or react to something like this, then they are very vulnerable,” he says.

A widely accepted definition from the federal government is that a mass shooting is an event where three or more people die, not counting the gunman. Mother Jones magazine, which uses that definition to track mass shootings, recorded 11 mass shootings in 2017, with 117 killed and 587 wounded. The Las Vegas shooting accounted for most of those. Mother Jones recorded 10 mass shootings this year at press time, with 65 dead and 45 injured.

The legal industry has not been immune to workplace shootings. In June, two paralegals were shot to death when a shooter tied to an old divorce case entered the Scottsdale, Arizona, office of family law firm Burt Feldman Grenier. Atlanta divorce attorney Antonio Mari was shot to death in June by his client’s husband, police say.

In December 2017, at an office holiday party, an ex-partner of the Law Offices of Perona, Langer, Beck, Serbin and Harrison in Long Beach, California, shot two other name partners—one was killed, the other injured—and then the gunman shot himself.

Daniel, the Houston-based instructor, tells the lawyers he trains that the best option in an active shooter situation is to escape by running away, and the second is to hide in a room and lock the door. If those options won’t work, fighting is the last choice.

He encourages people from carrying guns, noting that the idea of being a “good guy with a gun” and stopping an active shooter comes with serious dangers. Officers responding to a shooting are looking for any person with a gun and could mistake the “good guy” for the criminal shooter. Daniel adds that he wouldn’t want to see an amateur marksman in a shootout amid a crowd of people.

Instead, he asks his students to visualize a gunman anywhere they commonly go—work, court, church, stores, movie theaters or concerts—and imagine a plan for running, hiding or fighting.

“I’m teaching people a survival mindset,” he says. “I’m teaching them how to think, so if they ever get in one of these situations, they can make intelligent choices.”
How so, exactly? For the first time, the ABA Journal’s extensive favorites list has added a web tools category that includes apps, subscription services and other digital solutions to help lawyers with their daily grind—or help provide greater access to justice.

The 2018 Web 100 comprises our 20 favorite web tools, joined with 35 timely and thoughtful blogs, 20 entertaining and informative podcasts, and 25 fun and useful Twitter accounts.

How do we choose the Web 100? ABA Journal staff solicits readers’ thoughts about the best of the legal web (and considers our staffers’ own picks). We’ve also asked panels of judges outside our staff to weigh in and make suggestions.

Newcomers to our best-of-the-web roundup are featured here in print. Go to ABAJournal.com/web100 to see the rest and read more about our judges. Now it’s time to look at our picks, open your browser and learn how to be a better lawyer.

Get informed, be entertained—and maybe even transform your practice with tech

By Sarah Mui and Stephen Rynkiewicz
Great legal blogs go deeper into practice niches than the mainstream legal press and share well-written personal insights. Here we’re highlighting 10 blogs that are new to our Web 100 list, and the five that are joining the Blawg 100 Hall of Fame.

NEW TO THE WEB 100

AD LAW ACCESS
For attorneys looking to stay abreast of trends in consumer protection, Ad Law Access provides analysis of issues from the labeling of gummy vitamins to whether leaving empty space in packages of chips and candy is misleading. “A nice source—from Kelley Drye & Warren—for developments in advertising law, including cases decided by the advertising industry self-regulatory body,” says Harvard Law School professor and blogger Rebecca Tushnet.

THE APPEAL
This blog launched in 2017 as In Justice Today, and it was rebranded this year. The Appeal and its two companion podcasts produce original reporting that examines cases of prosecutorial misconduct, overcharging and abuses of power in the criminal justice system. A particular focus is the toll mass incarceration is taking on the nation.

APPELLATE ADVOCACY
University of Arizona legal writing professor Tessa Dysart and a band of academic contributors blog about how to tackle drafting appellate briefs; the latest and greatest reference resources; and things as fundamental as the paragraph as a unit of persuasion. The blog has “good summaries of appellate advocacy issues,” says Mark Walsh, a freelance journalist who covers the U.S. Supreme Court for the ABA Journal and other publications.

BUSINESS BLOG
The Federal Trade Commission “doesn’t hide the ball when it comes to business guidance,” Tushnet says. “This blog provides updates on FTC cases against various abuses and points to relevant guidance.”

FAUGHNAN ON ETHICS
Tennessee lawyer Brian Faughnan goes beyond recounting examples of lawyers behaving badly. His chatty, well-written posts unfold like short stories and explore the ethics issues that emerge in discipline cases.

HOWE ON THE COURT
Full-time blogger Amy Howe—who has served as counsel in dozens of U.S. Supreme Court cases—covers news from the nine as it happens and advances important upcoming cases. She even reviewed tens of thousands of emails from Brett Kavanaugh’s time in the White House to blog in the run-up to his confirmation hearing.

PROSKAUER ON ADVERTISING LAW
This blog, edited by New York-based lawyers in Proskauer’s False Advertising & Trademark Group, covers advertising
law cases at the appellate level, analyzes their significance and provides the lawyers’ takes on whether the courts reached the correct decisions.

TAKE CARE
At Take Care, law scholars provide legal analysis of President Donald Trump’s administration. “Sometime in the future, perhaps sooner than we imagine, we will look back on this moment in history and marvel that we made it through,” says Frank Wu, a professor at the University of California’s Hastings College of the Law in San Francisco. “This blog is for those who are trying to ensure that we emerge on the other side with democracy still functioning.”

WHO IS MY EMPLOYEE?
BakerHostetler partner Todd Lebowitz’s blog on independent contractor misclassification disputes and joint employment issues “gives good illustrations as to some of the incongruities and absurdities of labor law enforcement,” says Anthony Kaylin, vice president at the American Society of Employers in Livonia, Michigan. “I have been following for a long time and really enjoy the analogies and learn much to keep me up to date as to the interpretation of law.”

ZEN AND THE ART OF LEGAL NETWORKING
Posts by law firm network executive Lindsay Griffiths offer lawyers detailed approaches on how to nurture the professional relationships that can bring in business and how to identify and confront their interpersonal barriers to success. “This blog is outstanding, thoughtful and useful,” says Ivy Grey, director of business strategy for WordRake.

BLAWG 100 HALL OF FAME CLASS OF 2018

BEST PRACTICES FOR LEGAL EDUCATION
At this blog, law professors discuss what skills and qualities—beyond knowing the law—the future lawyers in their classrooms really need and the nitty-gritty of how to teach them. Recent posts discuss suggestions for bar exam reform, approaches to take with Generation Z law students who were raised on the internet, and what law students remember about professors decades later.

CANNALAW BLOG
Canna Law Blog helped the Canna Law Group of Harris Bricken make a name for itself in this emerging practice area. “People might have laughed about the idea of cannabis law as a field, but there is no doubt it has become, in every sense, legitimate,” Wu says. “Here is a great resource for the curious as well as those interested in actually entering the specialty.”

CONSTITUTION DAILY
This National Constitution Center blog covers the U.S. Supreme Court, legal history and other constitutional news and debate. In the weekly We the People podcast, NCC President and CEO Jeffrey Rosen talks to leading experts on timely or historical constitutional topics. At the blog you can also find the NCC’s Interactive Constitution, where a pair of scholars—one selected by the Federalist Society, the other by the American Constitution Society—write a joint statement about each provision of the constitution.

IN CUSTODIA LEGIS
At this blog, Law Library of Congress staff write about the things that come up in their work at the world’s largest law library. “I love how this blog humanizes the legal side of government,” says Lisa Flowers, a public relations executive based in Springfield, Virginia. “Their staff interviews are always interesting. I also like how they highlight exhibits, summarizing key points that make me realize why I should go see the exhibit or share information about it.”

JOTWELL
Jotwell stands for Journal of Things We Like (Lots). It’s sponsored by the University of Miami School of Law, and its mission is to highlight the best legal scholarship from the vast sea of what’s available. “Jotwell is a great place to get reviews of new legally relevant works—articles or books by experts,” Tushnet says. “The reviews are critical in the sense of exploring and sometimes contesting the arguments, but the aim is to identify works that are worthy of more readers.”

Go online to read about the 20 other Web 100 blogs and the rest of the Blawg 100 Hall of Fame.

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Admit it: You listen to podcasts for fun. We won’t judge. But with so many lawyers trying their hand at the medium, it’s time to tune in and stay informed about the profession. And to have fun.

AG LAW IN THE FIELD
Attorneys who are practicing in rural areas praise this podcast from Texas A&M AgriLife Extension Service blogger Tiffany Lashmet. “I like how practical and down-to-earth the host is,” adds Houston family lawyer Erin Callahan, president of the professional development organization Ms. JD.

BRIBE, SWINDLE OR STEAL
Compliance consultant Alexandra Wrage probes corruption, fraud, money laundering, sanctions and other aspects of white-collar crime. “I am captivated,” Callahan says. “This kind of podcast makes me want to hit the subscribe button 10 times.”

CLIENTING
Marketers Gyi Tsakalakis and Kelly Street chat about client development. Their lawyer interviews navigate the technical and ethical issues of digital marketing. “Good food for thought and fun listening,” says Keith Lee, the Alabama law blogger who founded LawyerSmack.

CORPORATE HOMIE PODCAST
Thompson & Knight partner Demetra Liggins teams with her twin sister, banker Bemetra Simmons, to share thoughts on career advancement, networking and getting things done. “It provides real advice for the things people don’t want to talk about,” says Stevens & Lee shareholder Linda R. Evers.

IN THE DARK
True crime podcast Serial was the gateway drug for many lawyers’ listening habits, and In the Dark follows its deep-dive format. Episodes probe a 27-year abduction investigation and the six murder trials of Curtis Flowers. Says Callahan, “I couldn’t stop listening! Captivating!” In November, the U.S. Supreme Court agreed to hear Flowers’ case.

LAW360 PRO SAY PODCAST
Law360 reporters conduct a weekly review of high-profile cases and BigLaw news. Lee’s LawyerSmack network finds it a quick way to keep up with legal events.

MAKE NO LAW
In recounting (and sometimes re-creating) pivotal First Amendment debates, Callahan says criminal defense lawyer and Popehat blogger Ken White is “knowledgeable and a great storyteller.”

MASTERMIND PODCAST
The lead-generator trappings may put off some listeners, but Indiana lawyer Burton Padove says the small-practice podcast helped him restructure billing so more people can afford legal services.

MORE PERFECT
This U.S. Supreme Court omnibus from the Radiolab production team excels at giving the legal backstories of current events. “Well-produced and worth your time,” Lee says.

THE PARALEGAL VOICE
Litigation paralegal Carl
Morrison continues this long-running review of issues and skills for paralegals and legal assistants. “A must-listen-to for any paralegal or anyone interested in becoming a paralegal,” Callahan says.

**REBOOT YOUR LAW PRACTICE**
Scott J. Limmer and Oscar Michelen show solos how to stay organized. “I have benefited greatly by keeping in mind one of their mantras,” Padove says. "If you get so caught up in tasks that you stop being a good lawyer attending to clients, then you will not achieve success in your practice.”

**SMALL LAW PODCAST**
Texas lawyer Donivan Flowers provides an introspective view of small-firm issues, from underserved clients to attorneys’ health problems. “He shares his concerns as if the listener is a lifelong friend,” Padove says. “I have not heard a similar heartfelt, soul-searching legal podcast.”

**STAY TUNED WITH PREET**
Preet Bharara, co-chair of a Brennan Center for Justice rule of law task force, does not shy from issues of public corruption. As a former U.S. attorney for the Southern District of New York, he’s revelatory on criminal justice—notably in interviewing Jason Goldfarb, a former lawyer who his office successfully prosecuted—but also draws in political humorists and media figures.

**TECHNICALLY LEGAL**
Chad Main, founder of alternative legal services firm Percipient, interviews legal innovators. “A former litigation partner, Chad understands the market and the current trends,” says PacerPro CEO Gavin McGrane. “He invites interesting guests and asks insightful questions.”

Read about the Web 100’s five other podcasts online.

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If Twitter is the tool to tweak the world’s conversation, the top tweeters in the Web 100 are strong talkers of few words. These 15 newcomers run the gamut from nonprofits to profs to legal tech entrepreneurs.

**ABA CENTER FOR INNOVATION (@ABAInnovation)**
The center encourages, supports and drives innovation in the legal profession and justice system.

**ALMA ASAY (@AlmaAsay)**
This 2017 *ABA Journal* Legal Rebel founded legal tech startup Allegory Law. She’s now chief innovation officer, legal solutions at Integreon, which acquired Allegory last year.

**KRISTEN CLARKE (@KristenClarkeJD)**
She’s president and executive director of the National Lawyers’ Committee for Civil Rights Under Law.

**A CRIME A DAY (@CrimeADay)**
“In 1982, the [Department of Justice] attempted to count the total number of federal crimes,” @CrimeADay says on its Twitter home page. “The [Wall Street Journal] said ‘Since then, no one has tried anything nearly as extensive.’” This feed has tweeted one federal crime every day since July 2014.

**D. CASEY FLAHERTY (@DCaseyF)**
He is a legal operations consultant, creator of the Service Delivery Review and Legal Tech Assessment, a principal at Procertas and a 2013 Legal Rebel.

**JOHN E. GRANT (@JEGrant3)**
He’s a legal operations consultant and founder of the Agile Attorney Network.

**ERIN LEVINE (@hellodivorce)**
She’s founder and CEO of Hello Divorce, a website that aims to manage the California divorce process and take “the drama” out of it.

**CAT MOON (@inspiredcat)**
She is director of innovation design at the Program on Law & Innovation and an adjunct professor at Vanderbilt Law School.

**DERA J. NEVIN (@dera_nevin)**
She’s a Baker McKenzie associate, adjunct professor at the University of Toronto Faculty of Law, legal tech specialist and legal process engineer.

**MELBA PEARSON (@ResLegalDiva)**
She’s deputy director of the American Civil Liberties Union of Florida.
This was a breakout year for legal technology on the web, from subscription services to access-to-justice helpers. Our judges and readers all had their own favorites. Let us know about yours.

**RAICES (@RAICESTEXAS)**
The Refugee and Immigrant Center for Education and Legal Services is the largest immigration legal services nonprofit in Texas, focusing on immigrant children, families and refugees.

**DANIEL B. RODRIGUEZ (@DBRodriguez5)**
The former dean at Northwestern University Pritzker School of Law and the University of San Diego School of Law is now chair of the ABA Center for Innovation.

**BILLIE TARASCIO (@mymodernlaw)**
This 2018 Legal Rebel heads up Modern Law, a divorce law practice, and Access Legal, a legal technology company.

**JAE UM (@jaesunum)**
She's the founder of Six Parsecs, a legal market insights company and a 2018 Legal Rebel. Jae's tweets are a great entry into her brilliant long-form posts about data, design and strategy in the legal marketplace,” says Vanessa Butnick Davis, vice president of research and product development at LegalZoom.com.

**MIKE WHELAN JR. (@mikewhelanjr)**
This Rockport, Texas, solo practitioner, is founder of the Lawyer Forward Conference, which helps you “become a more complete attorney.”

**MIGUEL WILLIS**
A2J AUTHOR
Legal aid agencies, courts and law schools use this Chicago–Kent College of Law product to guide client interviews and fulfill the needs of low-income and working-poor clients. Miguel Willis, a Law School Admission Council fellow and 2018 Legal Rebel, says the website “has been instrumental in advancing innovation at legal aid organizations throughout America.”

**CALLISTO**
A secure website records sexual assault instances confidentially, lets victims decide whether or how to report them and flags potential repeat offenders. On college campuses, use of the site brought more incident reports and requests for medical or other services. In 2018, plans were announced to develop a version to document workplace harassment.

**COURTLISTENER**
The Free Law Project’s circuit court monitor now picks up most state appellate decisions, as well as oral argument recordings for the U.S. Supreme Court and federal appeals courts. The “new notification feature makes this really powerful for lawyers and reporters,” says Sam Harden, project manager at the Florida Justice Technology Center.

**DOCASSEMBLE**
Live chat and e-signatures are features of this free server software for client intake. “This is becoming the definitive open-source tool for guided interviews,” Harden says.

**DONOTPAY**
Joshua Browder’s “robot lawyer” iOS app is drawing the same criticisms on technical, legal and ethical fronts as his former small-claims website did. But it may yet fill a niche for pro se consumer complaints. “If you're looking to fight a parking ticket or obtain a flight refund, this will provide you with the necessary information and walk you through the process,” says MyCase legal technology specialist and 2009 Legal Rebel Nicole Black.

**HELP4TN**
Librarians are trained to assist patrons with the legal and social-service checkup website of the Tennessee Alliance for Legal Services.
JUSTFIX.NYC
Some 2,300 New York City households have used the JustFix.nyc website to build a case for landlord repairs, housing court or tenant group action, or to stop an “informal eviction,” says co-founder Dan Kass. “They have a strong track record of impact on their accomplishments thus far,” Willis notes.

LAW GUIDES
Community Lawyer’s flat-fee service builds chatbots, client intake and document assembly programs for lawyer websites. A Chicago Bar Association committee is working with the service for a legal health checkup, says Jessica Bednarz of the Chicago Bar Foundation.

LAWDROID
Chatbots for law firm and legal aid websites answer questions, speed client intake and identify legal issues. Willis says the automation tool is “extremely user-friendly.”

LAWMATIC
MyCase co-founder Matt Spiegel built this customer relationship manager for law firms. Features includes email marketing, client intake and e-signature features.

LAWPAY
AffiniPay’s credit card processor for lawyers separates account and trust fees to comply with ethics guidelines on commingling of funds.

LEXICATA
A lead conversion and intake tool integrates with Clio, MailChimp, Ruby and other task managers to nudge prospects in a lawyer’s pipeline. Clio acquired Lexicata in October.

PACERDASH
A free PACER dashboard tracks dockets, accesses past purchases and shares files with colleagues and clients. “If you use PACER often, it’s definitely worth looking into,” Black says.

PALADIN
Dentons is working with this subscription service, which tracks law firms’ pro bono hours, on a client-matching framework. “Founders [and 2017 Legal Rebels] Felicity Conrad and Kristen Sonday are passionate about addressing the access-to-justice problem in America and the lack of diversity in legal tech,” Willis notes.

PRACTICE PANTHER
This billing platform features a mobile dashboard to share calendars, maintain client accounts and view your files. Integrations with QuickBooks, LawPay and file-sharing apps extend its use.

RADVOCATE
A consumer complaint website escalates issues to an arbitrator or lawyer on a contingent-fee basis. “This tool is in the very early stages, but I think it has great potential,” Bednarz says.

RECAP
A browser extension accesses and archives PACER purchases in the free CourtListener database. “Making it seamless to add PACER documents is absolute genius,” Harden says.

SHAPE
This online case manager tracks time and expenses, monitors payments and documents and stores client conversations. Shape also integrates with Clio and Needles.

TALI
Alexa and other voice assistants integrate with this time tracker, as well as case managers Clio, RocketMatter and Practice Panther. “Putting in time is a pain,” Harden says. “A lot of user testing went into the product, and it shows.”

UPSOLVE
Legal aid groups use this document creator to walk clients through Chapter 7 filings with help from a bankruptcy attorney. A project started by Rohan Pavuluri and Jonathan Petts drew support from Harvard, Yale and hedge-fund manager Paul Tudor Jones’ Robin Hood Foundation.
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LEARN MORE AT AMBAR.ORG/2019GOODS
Some of the most contentious political issues are, at their root, e-discovery disputes.
Donald Trump’s 2016 presidential campaign stump speeches were predictable in that they were completely unpredictable. The freewheeling real estate tycoon-turned-reality-television-star loved speaking off the cuff. When he took the stage on July 27, 2016, in Doral, Florida, he was no different. Trump fired off his thoughts about a variety of topics, including what to do about ISIS, whether the U.S. should honor its commitment to NATO, his refusal to release his tax returns, his relationship with Russia and its president, Vladimir Putin, and many other things.

Most of his time on stage, however, was dedicated to addressing his main opponent in the upcoming general election, Democratic nominee Hillary Clinton. The former first lady and U.S. senator from New York had become embroiled in scandal ever since it was revealed that as secretary of state, she used a private email server rather than relying on an official State Department email address. Clinton’s conduct raised ethical and legal questions—primarily relating to compliance with the Freedom of Information Act and preservation of records pursuant to the National Archives and Records Administration’s regulations, to say nothing of potential civil or criminal liability for possibly mishandling classified information. Clinton had deleted just over 30,000 emails that she claimed to be of a personal nature—an act Trump and others seized upon as the presidential race intensified.

“Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing. I think you will probably be rewarded mightily by our press,” Trump said from the Doral dais. He was apparently referencing allegations that Russian hackers had attacked the Democratic National Committee’s servers and breached Clinton campaign chairman John Podesta’s private email account and leaked a treasure trove of emails to WikiLeaks. In fact, this summer the Justice Department announced indictments against 12 Russian nationals as part of special counsel Robert Mueller’s probe into Russian interference in the 2016 election.

In this one apparently off-the-cuff statement, Trump illustrated the ways politics have hijacked otherwise opaque and technical e-discovery disputes. That Clinton’s legal team deleted thousands of emails during the course of an investigation is normally an obscure matter for courts to hash out. In some cases, parties have been sanctioned or suffered an adverse inference when electronic evidence goes missing.

But because the subject of this investigation was running for president of the United States, a dispute over email retention policies is now of geopolitical importance.

Indeed, a larger debate over preserving electronic evidence continues to hang over national politics. Donald Trump Jr.’s meetings with Russians, Michael Cohen’s plea bargain, Brett Kavanaugh’s contentious confirmation to the U.S. Supreme Court, Paul Manafort’s fraud convictions and an attempt at impeaching Deputy Attorney General Rod Rosenstein all involve, at their core, electronic evidence. The near-daily headlines relating to what had once been a fairly obscure set of federal laws has helped breathe new life into the field of e-discovery.

The fact that electronic evidence drives investigation and inflames the news cycle...
is not new. In 1986, Oliver North and John Poindexter thought they deleted thousands of emails from their computers at the National Security Council relating to what would become known as the Iran-Contra affair. Instead, the emails were recovered and became part of the criminal case against the men, both of whom were convicted but saw their verdicts reversed on appeal.

NOTHING REALLY DISAPPEARS
In the years since Iran-Contra, the technology has become more sophisticated while producing exponentially more data. Conversely, the naivete displayed by North and Poindexter in relation to how technology and data work seems to remain. The fact is that nothing ever really disappears. If electronic evidence is involved, chances are the information in those communications will surface, regardless of whether it is deleted or hidden.

Unlike paper records, deleting or destroying electronic evidence is not a practical way to cover up a crime. In fact, FBI specialists managed to recover about 15,000 deleted emails from Clinton’s supposedly scrubbed server. Of those, about 5,600 were deemed work-related, though many were duplicates of emails Clinton had already turned over.

More recently, investigators seized two BlackBerrys and recovered several hundred megabytes of data in the Cohen prosecution. The government was even able to recover approximately 731 pages of encrypted information from apps like WhatsApp and Signal.

E-discovery provides irrefutable evidence in many matters. But even with this capability to uncover data from the digital scrapheap, the practice can be messy, uncertain and prone to failure. In the 2010 high-profile e-discovery matter Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York ruled that attorneys need to take reasonable steps to preserve evidence, but that courts cannot expect a standard of perfection.

“The standard remains,” says Scheindlin, now retired from the bench. “For Clinton’s team, the question is whether she made an effort to preserve those emails once it became obvious it could be relevant for litigation or a congressional inquiry.”

Email and electronic records must not be destroyed if litigation is imminent. A technician with Platte River Networks deleted an archive of Clinton’s emails in March 2015 using a program called BleachBit. Weeks earlier, a House committee had ordered that all emails be preserved. The technician told the FBI that he had been instructed to delete the emails in December 2014 and had forgotten to do so before having what he called an “oh shit” moment.

The technician, Paul Combetta, however, later admitted to the FBI that he had been aware of the order and used BleachBit anyway. However, in May, then-FBI Director James Comey gave him immunity in exchange for his testimony. Two months later, Comey cleared Clinton of criminal wrongdoing, saying that while he could not “find a case that would support bringing criminal charges on these facts,” he nonetheless concluded that Clinton had been “extremely careless.”

E-discovery specialists point out that the law takes a much more nuanced view of when a failure to preserve electronic evidence is a punishable offense. In 2015, the Federal Rules of Civil Procedure were amended to offer defendants an opportunity to produce evidence from alternate sources if electronic evidence is deleted or destroyed.

Specifically, under the amended Federal Rule of Civil Procedure 37(e), if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court can only impose sanctions if it finds the party acted in bad faith. And even if Clinton’s actions did lead to evidence disappearing forever, a crime was still not likely committed.

“First of all, you have to apply the proper standards, regardless of political agenda,” says Craig Ball, a Texas-based attorney who has served as a court-appointed special master in e-discovery disputes. “If you are considering the issue for a civil matter, then discovery must be proportional to the matter; if it is criminal, then a higher level of proof is required.”

FILLING THE GAPS
Preservation is just one part of the overall electronically stored information puzzle. Human sloppiness or
error, lack of standardized processes and technology outpacing the law are additional factors driving today’s high-profile political e-discovery disputes.

Using a private email system from a government or personal computer to communicate about official matters is not a crime. However, when officials fail to copy or transfer records of public business from a device or webmail account, they are violating the current federal records law. A 2014 amendment to the Federal Records Act recognizes that officials use personal email and other forms of electronic messaging apps for official communications and states that these individuals have an obligation to copy or forward anything they send from Gmail or another service related to official business to a “.gov” account so it can be properly archived.

In a May 2015 statement to the Senate Judiciary Committee investigating government transparency, Jason Baron, of counsel at Drinker Biddle & Reath and co-chair of the Information Governance Initiative, was critical of Clinton’s email recordkeeping practices in several respects, including not acting to ensure in a timely manner that all of her federal email records were returned to the custody of the State Department prior to her leaving office. However, he acknowledges Clinton was not alone in her actions. “It’s become clear in the time since 2014 that a lot of officials continue to be doing similar things,” he says. “Secretary Clinton was not the first and will certainly not be the last.”

Experts say the larger problem of the Clinton matter is the role of “shadow IT” in the modern business world. Google’s Gmail now has more than 1 billion active users, most of which are personal email accounts. In addition, modern workers can use thousands of free or cloud-based applications to do their work and will often use them without the knowledge of their IT departments.

“The fact is that this is a worldwide phenomenon. If it helps get the job done, people will always manage to find a way to go around IT restrictions,” Baron says. “Unfortunately, that often means IT has no idea what relevant electronic evidence may exist outside company servers when a legal matter arises.”

After Clinton left her role as secretary of state, the federal government updated its retention rules to better account for email in particular. As set out in a Managing Government Records Directive issued by the Office of Management and Budget and the Archivist of the United States, all agencies must “manage both permanent and temporary email records in an accessible electronic format” by Dec. 31, 2016. Hundreds of agencies have informed NARA that they are complying with that deadline through voluntary adoption of what is known as a capstone email policy requiring designated senior officials’ emails be preserved as permanent government records.

However, nothing in the rules explicitly addresses records in the form of encrypted apps like WhatsApp, Signal or self-destructing apps like Confide. Guidance by agencies is needed in this area to direct that employees take reasonable steps to ensure that any electronic messages they send on commercial services that constitute federal records are copied or forwarded to a government account prior to the self-destruct deadline.

“If the electronic message otherwise meets the definition of a federal record, you do have to take reasonable steps to copy or forward the message to a government system,” Baron says. “There needs to be automated, tech-friendly, rules-based compliance, or people may just ignore their recordkeeping duty.”

Even with Clinton’s extremely high-profile and damaging case in the news, e-discovery attorneys say most attorneys tend to ignore issues of preservation before a matter arises.

“Litigators in California and other states have a duty of competence that says they need to understand electronic evidence,” says Bobby Malhotra, e-discovery counsel with Munger, Tolles & Olson in Los Angeles. “Unfortunately, most litigators only deal with e-discovery every few months or years, so there is very little incentive to understand the issues that their clients might be facing in litigation—until it’s to get ahead of the problem.”

These issues are getting more, not less troublesome. The Democratic National Committee filed a wide-ranging lawsuit in April against the Russian government, WikiLeaks, the Trump campaign and several others alleging an international conspiracy to interfere in the 2016 election. The nature of the suit will almost surely involve international discovery requests across several social media platforms and involve numerous parties. Fortunately, Rule 26(b)(1) of the Federal Rules of Civil Procedure can help limit the scope of discovery: It says information is discoverable if it is both “relevant” to the claims or defenses of a party and also “proportional to the needs” of the case. “The judge’s job under Rule 26 is to make sure that discovery remains proportional to the needs of the case,” says Scheindlin.
“Requesting parties can demand all the information they want, but their requests still have to meet that standard.”

Even though the Federal Rules of Civil Procedure have been amended to limit the scope of discovery, most litigators remain reactive and may fail to use the rules to effectively limit the cost and extent of discovery. “Litigators like to know we have these rules in our back pocket if we are faced with an overbroad discovery request,” says Malhotra. “But the problem is that too many lawyers think of these rules on proportionality as defensive and narrow, and not as a proactive, constructive issue that we should pursue before a matter blows up into an ugly discovery dispute.”

PRIVILEGE IS STILL A PRIVILEGE

As the Clinton controversy drones on, the new administration has found its own electronic evidence in dispute.

Before Cohen’s guilty plea in August to eight counts of tax, financial and campaign fraud, one of the main disputes between the parties involved document review and which documents should be protected by attorney-client privilege. Cohen’s lawyers were given a deadline to finish reviewing hundreds of thousands of documents seized from his premises by federal agents to determine which should be covered by attorney-client privilege. When the sides were unable to agree on how to review for privilege, a special master was appointed in April to manage the process.

“By e-discovery standards, this is a walk in the park. Basically, the special master must segregate evidence based on privilege,” Ball said before the Cohen plea. “The focus of the Cohen matter is a small number of attorney-client privilege records as it relates to a very small number of clients and a sub-matter related to Stormy Daniels.”

Once again, even this seemingly simple matter has become contentious and drawn out. However, for e-discovery attorneys, the controversy stems not from prurient interests surrounding President Trump, but over how to identify potentially relevant materials in complicated, politically sensitive matter. In particular, the process of creating privilege logs has been derided as an archaic, broken process in need of a technology-assisted update.

“I don’t know if privilege logs survive,” says John Facciola, a former U.S. magistrate judge for the U.S. District Court for the District of Columbia. “There’s no reason privilege review should be as long, complicated and expensive as it is. This is one of the reasons litigation is so expensive.”

Ball says that privilege logs can be an effective tool when used as the Federal Rules of Civil Procedure intend. He believes privilege can be broadly construed, and that judges often fail to define what the attorney-client privilege really protects so that parties tailor their assertions of the privilege to just the information that truly qualifies as privileged. “Privilege should be rethought. It’s probably the single most expensive component of discovery,” says Ball. “It has become a hiding place for damaging evidence and a kitchen junk drawer of lazy lawyer assessment.”

Former U.S. Magistrate Judge Frank Maas of the Southern District of New York had been on the shortlist of names under consideration for the role of special master in the Cohen matter. In a five-page letter to presiding Judge Kimba Wood, Deputy U.S. Attorney Robert S. Khuzami—citing a letter from Maas—suggested that technology-assisted review could help “identify potentially privileged material for review in an efficient manner.”

However, Ball disagrees, arguing that based on what he understood about the Cohen matter at the time, the document collection was not large enough to use TAR effectively. “This is just too small a matter for that kind of review,” he says. “The more salient issue is getting parties to stop playing games with privilege.”

Maura Grossman, research professor in the David R. Cheriton School of Computer Science at the University of Waterloo and principal of Maura Grossman Law, believes the review could have been done more effectively and cheaply using TAR. She believes that a team of two or three reviewers including herself, Judge Maas and one or two others could have completed the Cohen review within two weeks. Ultimately, the monthslong process found 7,150 items to be privileged out of more than 3.2 million that were handed over to federal prosecutors using manual review.

She acknowledges there are some issues machines can struggle to identify, particularly the subtle indications that a document may be considered privileged. “Work product is tricky because something prepared in advance of litigation, like a spreadsheet for a lawsuit, will look very much like any spreadsheet produced in the course of normal business,” Grossman says. “Fortunately, the number of players involved in producing work product is limited, which can help narrow your focus. Once you train the system, it will quickly learn to spot work product and privileged materials.”

E-DISCOVERY AS A WEAPON

E-discovery has also intensified already-controversial matters. Kavanaugh’s confirmation to the Supreme
Court became an emotional and dramatic TV spectacle, but it began as a discovery dispute. Just hours before hearings on Kavanaugh’s nomination, the federal judge and former George W. Bush White House counsel turned over more than 42,000 pages of documents from Kavanaugh’s time in the Bush White House to the Senate Judiciary Committee. Minority Leader Chuck Schumer, D-N.Y., responded angrily to the document dump, tweeting: “Not a single senator will be able to review these records before tomorrow.”

The document dump is certainly not a new strategy—when paper was still the most commonly used medium for business communications, legal teams would deliver boxes and boxes of documents to opponents in the hopes of overwhelming their ability to review them all. But with the volumes of digital records now available for review, digital document dumps can be even more challenging for human reviewers.

E-discovery experts argue that congressional staffers could have found relevant documents in this collection within hours using artificial intelligence tools. “It’s outrageous for 40,000 documents to be produced so late in the process, but the fact is that computers could help perform a thorough search in hours,” Scheindlin says. “If you have all the time in the world and an unlimited budget, sure, human reviewers are great. But computers can rank the most relevant documents in hours, and I think judges need to be more willing to rely on technology.”

Even though the documents were produced as large PDF files, and many of the words had been garbled by optical character recognition software, Grossman was able to upload the pages into an online repository that was searchable using her proprietary technology-assisted review software, known as Continuous Active Learning or CAL. She says that the tool was apparently used by congressional staffers, but she has no indication whether they identified any documents for the Kavanaugh hearings. “Anyone would need help trying to review 42,000 documents by tomorrow,” Grossman says. “The only other option congressional staffers had was to hit control-F and search for a particular word or name. With TAR, they could find substantially all documents related to a particular topic in a matter of hours.”

E-DISCOVERY EVERYWHERE

Baron recognizes that people will increasingly use whatever technology is available; some will use it for efficiency or competence, while some may use it to avoid public disclosure. It is up to lawyers to find ways to highlight this shadow IT issue and to recommend ways of dealing with it as part of an information governance framework in order to ensure that organizations comply with all manner of legal and regulatory requirements. “Some information should be deleted,” Facciola says. “For example, in many types of intellectual property litigation, personally identifiable information and medical records, you have to be darn sure stuff is deleted. Deleting things is not pernicious and is often necessary to the needs of any ongoing operation.”

Electronic evidence has arguably confused and obscured the national political debate. Reporters began sifting through these recovered data collections that include everything from confidential state secrets to Clinton campaign chair Podesta’s risotto recipe. “I think it’s time to recognize that parties should produce less, not more,” says Facciola. “There’s no reason why Podesta’s risotto recipe needs to be preserved for posterity.”

Unfortunately, the problem looks like it will only get worse. The Bill Clinton White House left 32 million emails for the public record, surpassed by the George W. Bush White House’s 200 million-plus emails and more than 300 million emails received from the Barack Obama White House. And after 2019, billions of emails and all forms of electronic records from hundreds of executive branch agencies will be subsumed into the National Archives.

Despite these high-profile cases involving e-discovery, why is the practice area still relegated to the fringes of litigation practice? “If recent high-profile cases have breathed new life into e-discovery since 2016, that surge has escaped my notice,” Ball says. “So, either it’s not a real surge, or it’s slipped by me.”

For Malhotra, the progress has been more incremental. “Understanding technology, where data is stored, and the kinds of issues that are very important in the e-discovery world are slowly becoming important to attorneys outside of our practice area,” Malhotra says. “More judges seem to understand e-discovery and take it seriously, and e-discovery is being taught as part of the curriculum in law schools. I’m not saying we are where we need to be, but things are slowly turning around.”

On one hand, e-discovery promises hard, irrefutable, smoking-gun evidence. On the other hand, that tantalizing promise, so rarely fulfilled, drives others insane. But e-discovery attorneys think that the high-profile attention on their otherwise obscure practice area might be the best thing that’s happened.

“I’m encouraged, and I have to say that I think there is no better time to be a trial attorney,” Ball says. “If anything, I feel that Hillary’s email and Cohen’s investigation have gone a long way to educating the public and the profession to the esoteric questions like what a special master is, how email servers work, and what digital bleaching does. What a great, teachable moment.”

Jason Krause is a freelance writer based in Madison, Wisconsin.
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OTHER PEOPLE'S MOLL
Quarterly earnings calls can be stressful—especially if a business has bad or underwhelming news to disclose. Between upset shareholders and skeptical reporters firing off questions and scrutinizing numbers, CEOs would be forgiven if they conducted this four-times-per-year ritual with a full bottle of scotch next to their speakerphone.

Burford Capital, however, has had no need for such feelings of dread. Its earnings calls, as of late, seem to contain nothing but good news. Founded in 2009 by Christopher Bogart, a former litigation associate at Cravath, Swaine & Moore and former general counsel at Time Warner Inc.; and Jonathan Molot, a former lawyer at Cleary Gottlieb Steen & Hamilton and a senior adviser in the Department of Treasury at the start of the Obama administration, the litigation financing company has become the largest such firm in the world.

Burford, which has been traded on the London Stock Exchange since its inception, currently has $3.3 billion in its coffers to invest in legal matters. In the first half of 2018, the company reported that income was at $205.2 million, a 17 percent increase compared to the first half of 2017. Meanwhile, the company has expanded, buying up Gerchen Keller, a Chicago-based litigation finance firm, for $160 million in 2016.

Gerchen Keller founders Adam Gerchen, Ashley Keller and Travis Lenker, who have since founded a plaintiffs-side litigation firm, declined to be interviewed.

In an October Burford study, the company surveyed 495 lawyers, general counsel and partners in the United States, the U.K. and Australia and found that more than three-quarters of them believe that litigation finance is a growing and important part of the business of law. The study also found that 70 percent of those who had not used it before are likely to in the next two years, while 42 percent of law firms surveyed see litigation finance as a way of remaining competitive in the marketplace.

“We have a suite of ways that we help law firms and the corporate clients of law firms,” says David Perla, managing
director at Burford who joined in May after eight years of being in charge of legal outsourcing providers Pangea3 and two years as president of Bloomberg BNA’s Legal Division/Bloomberg Law. “For firms, it’s a business development tool. They’ll ask us to educate their clients about the benefits of applying for capital to monetize their existing legal assets.”

At its essence, litigation financing is third-party funding of legal cases. Legal financing companies provide a nonrecourse cash advance to litigants—usually plaintiffs—in exchange for a percentage of the judgment or settlement. It is not considered a loan but rather a form of asset purchase or venture capital. If, for example, the financier invests $200,000 and the case settles for 10 times that, the finance firm gets back its initial $200,000, as well as a percentage—anywhere between 10 and 30 percent—of the settlement money. If a plaintiff loses, the financing firm does not get paid.

Proponents of litigation funding say it levels the litigation playing field, benefits companies and firms by allowing them to free up capital for core business purposes, and reduces the risks for firms and their clients to settle for less than what their cases are worth.

Critics, on the other hand, contend that litigation funding disrupts the legal process by bringing in an outside party that can potentially exert control, encourages the filing of frivolous suits, and gives plaintiffs attorneys an unfair advantage in settlement talks. “There’s been an increasing demand for litigation funding by both firms and clients in the last couple of years,” says Eric Robinson, a shareholder at Stevens & Lee in its New York City office and co-chair of the firm’s litigation finance and alternative funding group. “Some firms don’t want to risk the contingency fee model, but that may change if a client is willing to consider a litigation funder.”

KEEP THE CASH FLOWING

Litigation funding started in Australia and the United Kingdom in the mid-1990s and entered the U.S. commercial market in the mid-2000s. It is now a multibillion-dollar global industry with a dozen commercial litigation funding companies in the U.S. market.

Financing is conducted on a single-case basis or on a portfolio of suits. Portfolio financing provides law firms with a large chunk of money in exchange for returns tied to a pool of cases.

Litigation financing is used for a variety of purposes. For individual plaintiffs, particularly those involved in personal injury lawsuits, the money can come in the form of cash advances to pay for medical expenses or attorney fees. Advances tend to run between $2,500 and $7,500.

Meanwhile, for law firms and companies, it can be used for litigation or arbitration costs such as attorney fees, expert witness and court fees, or as working capital to cover such costs as salaries, rents and other business expenses. For individuals and companies, the money also can be used to provide cash flow during the period after a judgment has been issued and before the settlement or verdict money has come in.

That cash flow can be a lifeline—especially for law firms, allowing them greater flexibility with their caseloads. “A good piece of strong litigation is an asset; it can pay for itself or other costs,” says Allison Chock, the Los Angeles-based chief investment officer at Bentham IMF, which provides litigation finance to plaintiffs and law firms in the United States and for international arbitration.

Chock says litigation finance can allow clients to hire counselors who don’t normally take cases on a contingency basis. And it also enables firms
to take on more contingency or hybrid fee cases than they ordinarily would because the firm is not carrying 100 percent of the risk throughout the case. “At a high-end contingency firm, you can only do a certain number at a time; otherwise the expense could bankrupt your firm,” she says.

Founded in 2001 in Australia, Bentham is the second-largest litigation funding company in the world, with $200 million dedicated to funding U.S. matters and another $106 million for legal funding in other jurisdictions around the world. The company entered the U.S. market in 2011 and currently has U.S. offices in New York, Los Angeles, San Francisco and Houston.

“Our company is made up of almost exclusively lawyers, including even some of our marketing personnel. Our CMO is a former litigator, as is our marketing manager in LA,” says Chock, a former litigation associate at Latham & Watkins and partner at litigation-only boutique firm Hennigan, Bennett & Dorman, which later merged with McKool Smith. “When a case comes in, we will do our due diligence—collection risks, how solid is the case, etc., and then based on our evaluation, we will decide what terms will be offered.”

Chock says Bentham does mostly single-case financing. “We’ve worked hand in hand with contingency lawyers and more traditional hourly firms that want to do more of these types of cases,” she says.

In the majority of instances, however, firms are coming to them on behalf of their clients. “There’s been an uptick in interest from big law firms in the last two years,” she says. “They wouldn’t have done this five years ago, but clients are now demanding this. They want law firms to take on some of the risk.” She says Bentham’s largest, single-case investment so far is a $40 million advance on a trade secrets and breach of contract judgment that’s currently on appeal.

Perla of Burford, meanwhile, compares his company to a financial institution. “Burford is a public balance sheet, much like an investment bank,” Perla says. “Everything we do is non-recourse, and we only make money if the client is successful.”

According to him, the firm applies a forensic level of due diligence on a case-by-case basis to vet the legal validity of each case and the likelihood that the suit will be successful. Perla says of the 1,500 inbound requests for capital in 2017, the firm only funded 60 requests.

WHO’S THE BOSS?

 Critics, however, have argued that litigation funding is rife with ethical conflicts and potentially illegal behavior. One of the oft-cited concerns about litigation funding is that it will create a deluge of frivolous lawsuits.

The U.S. Chamber of Commerce has been particularly vocal on this front, fearing that businesses will be awash in specious lawsuits and/or forced to settle frivolous suits to avoid having to pay to litigate them. On its Institute for Legal Reform website, the chamber argues that “more litigation funding means more litigation,” and that funding “can undercut a plaintiff’s control of litigation.”

“Those people who rail against us, the ones that say we are gambling or drumming up business, overlook the fact that we only take on cases we can win,” Perla says. “Because of the way that we carefully vet cases on either a single-case or portfolio basis, we are actually creating efficiency in the [legal] system.”

Robinson, who advises Stevens & Lee’s clients about the benefits and potential pitfalls of litigation financing, concurs. “The big funders are sophisticated and vet claims carefully. As a result, they weed out the weak claims that shouldn’t be brought. In that sense, they’re having a positive effect on the market,” he says.

Meanwhile, in February 2017, the Consumer Financial Protection Bureau and the New York attorney general sued RD Legal, one of the largest consumer litigation financing firms, over allegations that it scams 9/11 first responders and NFL concussion victims out of millions of dollars by luring them into costly settlement payouts while disguising the terms of the advance agreements.

In its court papers, RD Legal has claimed that the structure of the CFPB is unconstitutional while maintaining that it has done nothing wrong. “Far from engaging in the ‘deceptive and abusive’ practices alleged
in this lawsuit, the RD entities provide customers the information necessary to make informed decisions about whether to sell their settlement proceeds,” RD Legal said in its motion to dismiss. “The RD entities even encourage customers—in bold type in every contract, above the signature line—to consult with an attorney and other professionals who can assist in determining if the transaction fulfills the customers’ financial needs.”

In June, the U.S. District Court for the Southern District of New York agreed with RD Legal as to the unconstitutionality of the CFPB and dismissed the claims brought by that bureau. However, it upheld the claims brought by the New York attorney general and allowed those to proceed.

Meanwhile, in March, the New York Times reported that federal prosecutors are looking into consumer litigation financing firms for, among other things, high interest rates. According to the Times, prosecutors are looking into whether the financial arrangements between cash-advance firms and lawyers constituted illegal kickbacks.

John Beisner, the Washington, D.C.-based leader of Skadden, Arps, Slate, Meagher & Flom’s mass torts, general and allowed those to proceed. If you’re a plaintiffs lawyer, why not ask the clients to sign the settlement offer? That’s how it works in the real world. But in some cases, the settlement offer will be rejected by one party and accepted by the other. In those cases, the parties may need to negotiate a settlement that is acceptable to both parties. If the settlement offer is rejected, the parties may need to go to court to resolve the dispute.

Burford also accused Donziger and others of fraudulent inducement and kickbacks. Donziger, the lawyer for the villagers, claimed that the oil giant polluted their land.

In a civil RICO case against Steven Donziger, the lawyer for the villagers, court documents revealed that Burford, in a confidential presentation to the plaintiffs, was concerned about an “unnaturally low” settlement and asked them not to settle for less than $900 million without Burford’s consent. And if plaintiffs settled for less than that, Burford wanted to be compensated for $900 million anyway.

That presentation, however, predated the actual agreement signed by the plaintiffs attorneys including Patton Boggs (now Squire Patton Boggs) and Donziger, who stipulated that if they settled for less than $1 billion, Burford would be compensated as if the settlement was $1 billion. Additionally, if Burford invested $15 million, it would receive 5.5 percent of any recovery.

Burford ultimately invested just $4 million and later sold its stake. In February 2011, the plaintiffs were awarded $18.2 billion from Ecuador courts. However, the company refused to pay, accusing plaintiffs and their lawyers of engaging in fraud. Burford also accused Donziger and others of fraudulent inducement and terminated its relationship with the plaintiffs in September 2011.

Burford released a joint statement with Chevron in April 2013 renouncing any claims to the litigation. U.S. courts have ruled for Chevron, rejecting attempts by the Ecuadorian plaintiffs to collect the judgment. Donziger, meanwhile, has been suspended from the practice of law in Washington, D.C., and New York.

“Then the problem [with litigation funding]—the settlement isn’t dictated by the strength or weakness of the case, but by the investors,” Beisner says.

“When we invest, we have no control over strategy or settlement,” says Perla of Burford. “The only influence we have, in terms of settlement, is when we decide to invest and the

Continues on page 60
Since 2009, when major litigation funding company Burford Capital started investing in cases, less than 10 percent of funding requests came for matters led by female lawyers.

That’s something Burford wants to change.

Aspiring to close the gender gap in the legal profession, Burford set aside $50 million in capital to fund matters led by women and female-owned law firms.

The Equity Project aims to enable female litigators to become leaders in significant matters, claim origination more easily, and nab new business by offering clients alternative fees.

“From a financial perspective, we think it’s good business to make investments with teams that are diverse because they get better results,” says Aviva Will, senior managing director of Burford’s investment team.

Will says she works alongside a senior management team that’s 50 percent women, which is different than earlier in her career, when she was often the only woman in the room as a BigLaw attorney and in-house counsel.

The gender gap in the law is well documented. The National Association of Women Lawyers found in a 2017 survey that women make up 46 percent of associates yet only 19 percent of equity partners. Female attorneys earn 90 to 94 percent of what men do in the same positions, and 97 percent of firms in the NAWL survey said their highest-paid partner was male.

“We can actually do something concrete and real to change those numbers,” Will says.

Burford’s Equity Project funding is available when a female lawyer is first-chair, is plaintiffs lead counsel or on a plaintiffs steering committee, earns origination credit, becomes the client relationship manager, or when a female-owned law firm represents the client.

Sharon Rowen, director of the documentary Balancing the Scales, which is about discrimination against women in the law, says Burford’s initiative could impact a small subset of female lawyers who work in BigLaw.

“It’s definitely an initiative that will help women become equity partners and raise that percentage, or get women who are already partners more equal pay,” says Rowen, a partner at Rowen & Klonoski in Atlanta. “It’s certainly a win situation for Burford because they are opening more avenues for more business.”

To spread the word about the project, Burford reached out to successful women from BigLaw firms such as Quinn Emanuel Urquhart & Sullivan; Latham & Watkins; and King & Spalding.

One of its Equity Project champions is Bobbi Liebenberg, co-chair of the ABA’s Presidential Initiative on Achieving Long-Term Careers for Women in Law.

Liebenberg, a senior partner at Fine, Kaplan and Black in Philadelphia, says a class action lead counsel must have the financial resources to finance a case that spans many years, so Burford’s capital could be critical for women to land those appointments. In other matters, the funding could help a female attorney convince her firm to take a client on contingency.

“It has real potential for closing the gender pay gap and for increasing the opportunities for women to serve as first-chairs at trial and first-chairs in class actions,” she says.

—Angela Morris
Continued from page 58

return we have on it.”

Chock of Bentham also says claims about undue influence on the part of funders are completely unfounded. “In the U.S., that’s not the case. The client and firm are in control, and no reputable funder would try to influence strategy,” she says.

In regard to settlement matters, Chock says in single cases, funders have the right to be informed of any settlement discussion, but “the client is ultimately in control.” In fact, she says if they had been allowed to offer legal advice, in some instances, the plaintiffs would have won larger settlements. “We’ve had situations that if they had followed our advice, they would have done much better,” she says.

Lisa Miller, principal at the Lex Law Corp. and a civil litigator in California and New York who consults on ethics and third-party funder issues, says when it comes to issues of funding and control, lawyers have to set clear guidelines from the get-go about independence of thought and action.

“Attorneys are going to be wading into a Wild West,” she says. “And they need to make sure the ethics wall is firmly in place.”

MATTER OF DISCLOSURE

One of the hotly debated topics around litigation funding is the question of disclosure: Should plaintiffs be compelled to reveal that their work is being underwritten, in part, by a third party?

Those in favor of disclosure point out that under the Federal Rules of Civil Procedure, defendants are required to disclose information about their insurance coverage at the outset of their case.

“Defendants are saying, ‘Look, federal judges require that all insurance contacts should be revealed—how much money there is, how much money they can spend on litigation, etc. This is totally one-sided. Why shouldn’t outside funding be revealed, as well?’” Beisner says.

Not surprisingly, funders oppose forced disclosure. “Opponents want to analogize it to liability insurance, but this is not the same thing,” Chock says. She says disclosure of litigation funding prejudices claimants and will result in costly “discovery sideshows” that unnecessarily burden claimants and courts in a way that rarely arises in insurance coverage disclosures.

To Chock, the whole thing smacks of a fishing expedition. “Disclosure is the first step,” Chock says. “What defendants are truly after is a dis-covery sideshow, targeting the financial wherewithal of the claimant, and worse, trying to learn of weaknesses in the claims that may have been identified by the funding professionals. I used to be a defense lawyer, so I’d want to know that stuff, too. But why is that fair?”

Regardless, forced disclosure about litigation financing may be around the corner. In April, Wisconsin passed a bill requiring disclosure for all litigation funding arrangements—consumer and commercial. It was the first state to pass such a law.

And in May, three Republican U.S. senators introduced the Litigation Funding Transparency Act of 2018. The bill seeks to mandate disclosure of the existence of litigation funding agreements and details of the agreements in any federal class action or multidistrict litigation case.

Critics such as Beisner say the unique structures of class actions and MDLs mandate disclosure. “When litigation funding started, we all thought class action funding would never happen. The attorneys can’t agree to give you money—the class members would have to agree,” he says.

The way funders get around this, he says, is the attorney in a class action agrees to give up a part of their contingency fee to litigate that matter.

“The whole idea of the arrangement is a concern because of the ethics rule that says that an attorney can’t share their fees with a nonattorney,” he says.

While Chock says she is “vehemently opposed” to mandated disclosure, she says it might make sense for certain class actions and MDLs, depending on how they’re handled. She points to the way Judge Dan Polster of the U.S. District Court for the Northern District of Ohio handled litigation funding disclosure in the multidistrict opioid litigation.

Polster ordered the litigants to reveal their litigation financing agreements to the court—not to opposing parties. He also required that counsel and the funder sign statements that funding wouldn’t give the lender any influence over litigation strategy or settlement decisions, or undermine counsel’s independence.

THE ROAD AHEAD

While certain aspects of litigation funding might continue to be debated and contested, funders think their future is bright.

“I think we’ve just scratched the surface,” Perla says. According to him, Burford is moving into providing business solutions for law firms, as well as exploring the private equity model to provide firms alternative solutions to the cash partnership problem.

For example, a law firm might spin off its administrative back office and other nonlawyer-related tasks as a
separate business structure owned by the partners. Then the law firm would pay the operations entity for its work on behalf of the firm. The spin-off service would be a source of permanent equity for the partners.

Stevens & Lee shareholder Robinson says he’s seeing increased demand in the intellectual property space. “A patent owner might have a meritorious claim—they can prove patent infringement—but might not have the resources to explore a suit. Bringing in a funder can help in these kinds of cases,” Robinson says.

He also predicts the litigation funding model will empower clients in fee negotiations. “I think it has the potential to be transformative,” Robinson says. “It could, particularly for sophisticated business litigants, offer another route to negotiate price with their lawyers.”

Clients could conceivably negotiate a percentage of a fee upfront and risk the difference based on the result, he says. Adding litigation financing as an alternative to billable hours could “eventually let a client that’s frustrated with the risks it takes in an hourly engagement have a solid idea about acceptable price on the front side, along with the risk that its lawyer might share with it,” he adds.

Robinson and others predict that demand for litigation financing—particularly on the part of clients—will continue to grow. “It’s exciting for them because it keeps capital in their pockets,” he says. “It also can allow a litigant to engage a lawyer that might be priced beyond its usual budget and give the lawyer more freedom to prove the client’s claims.”

The rise of artificial intelligence has led to additional opportunities for litigation financing firms. LexShares, a litigation funding firm founded in 2014 with offices in Boston and New York City, has developed a proprietary platform that scours federal and some state court filings for potential investment leads.

Called “Diamond Mine,” the technology searches dockets for keywords such as “breach of contract.” It downloads cases, converts them into raw text and then applies a 17-point scoring system to determine a baseline of investment opportunity.

If a case looks promising, the company reaches out to litigants to gauge their interest in financing. If they’re interested, LexShares attorneys assess the claim’s validity and determine whether it’s a good candidate for financing. The majority of LexShares’ investments are about $1 million.

According to the company, in the first half of 2018, Diamond Mine identified 436 cases that led to litigants seeking financing of more than $540 million, but the firm only invested in 20 of the 436.

San Francisco-based Legalist is another litigation financing company using technology to find potential clients. It was founded in 2016 by two Harvard University dropouts who developed an analytics tool that constantly monitored courts and livestreamed the data. “It made the data readable to lawyers, so we thought they would pay us for the data to help better assess their own cases,” says co-founder Eva Shang.

While the technology didn’t take hold with lawyers, it earned Shang and her co-founder, Christian Haigh, a spot in the vaunted incubator startup Y Combinator, where the duo first learned about litigation financing.

Today, the duo’s algorithm uses court documents to make underwriting decisions by looking at data points, such as the time it takes similar cases to be resolved and how many cases in a specific jurisdiction settle. Once a case has been identified and a litigant has agreed to pursue financing, the sole Legalist attorney vets the case. As of press time, Legalist says it’s vetting additional lawyers to join the firm.

“We’re a technology company that wants to fight the injustices of the legal system,” Shang says. “We fund commercial cases in the lower range—the real David vs. Goliath cases, not the Goliath vs. Goliath ones.”

Ultimately, Miller of the Lex Law Corp. urges clients and law firms to educate themselves about the benefits and potential problems with legal financing. “I don’t think [litigation funding] is a bad thing; it’s just not well understood,” she says. “In litigation, the last thing you want is more trouble. It’s already expensive and exhausting.”
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When a Louisiana prosecutor’s family visited South Africa for the 2010 World Cup, tragedy struck. A drunken driver hit and killed one of the lawyer’s sisters and left her brother with a critical head injury.

U.S. District Judge Jay C. Zainey in Louisiana’s Eastern District heard the devastating news and was told the family needed help paying for a medical jet to bring the family home, with the cost expected to exceed $300,000.

Zainey did what he is well-known for: He jumped into action. As a judge, Zainey is not allowed to raise money, but he did the next best thing. Zainey emailed members of the SOLACE program in his state to see whether any of them had contacts in the medical evacuation industry who could help the prosecutor’s family.

HELPING HANDS

SOLACE, which Zainey co-founded more than 15 years ago, stands for Support of Lawyers/Legal Personnel—All Concern Encouraged, and it features a broad network of legal professionals who try to help fellow members of the legal community and their families in times of significant need.

Less than 20 minutes after Zainey sent the email about the tragic events in South Africa, a local law professor wrote back indicating her brother was an intensive care doctor in New Orleans who regularly uses medical transport and would do his best to help. By the next day, Ochsner Medical Center in Jefferson, Louisiana, agreed to send a critical care team to South Africa to pick up the injured man. In addition to donating the doctors, the hospital said it would help fund the flight.

Zainey says the story is just one of many showcasing the profound generosity of legal professionals involved in the SOLACE program, as well as that of their contacts in other industries. SOLACE members also have donated an SUV after flooding in Louisiana; provided an apartment in the Boston area for a family to stay while children received treatment; and cared for the dog of a person who was receiving cancer treatment.

“I am always overwhelmed and inspired by the great concern and compassion that members of our legal community have for each other,” says Zainey, who is based in New Orleans. “It makes me proud to be a member of our honorable profession.”

Zainey, a 1975 graduate of the Louisiana State University Paul M. Hebert Law Center, says he sees working in the law as a great way to give back to others. He started his legal career teamed up with a respected criminal defense attorney before going into solo practice in 1984. In that role, Zainey handled a variety of cases, including personal injury, family law and criminal defense matters.

In the mid-1990s, Zainey became the first solo practitioner elected president of the Louisiana State Bar Association. During his presidency in 1995-1996, he started developing a reputation as a leader in the legal
community who created ways for lawyers to help others needing assistance.

Zainey created a bar Community Action Committee that undertook different projects—such as putting on Easter egg hunts and visiting nursing homes—to serve those in the inner city.

He also established the Committee to Provide Legal Services for the

Zainey’s friend Mark Surprenant, suffered a ruptured brain aneurysm and was in the hospital for weeks.

Mark Surprenant, a partner at Adams and Reese in New Orleans, says many members of the local legal community stepped up to help, such as bringing flowers to the hospital and delivering meals to the family’s home.

As Surprenant was walking back to his office from church one day around this time, he started thinking there could be a better-organized way to coordinate the assistance his family received.

Surprenant says it was divine intervention that caused him to bump into Zainey during his walk and share his thoughts on how others who faced their own tragedies could best be supported.

Zainey was immediately enthusiastic about the idea of better coordinating aid and started working his contacts to turn the idea into reality.

“Of all the people to run into, Jay was the best person I could have ever come in contact with at that point in time. He really took the ball and ran with it.”

- Mark Surprenant

Disabled, which was designed to provide training and offer opportunities for lawyers to work in that domain.

Zainey says his family has extra compassion for those with disabilities because his son, Andrew, has special needs.

“Andrew is our inspiration to be better people and do more for people,” says Zainey, who has three children with his wife, Joy.

He also credits his parents and his Jesuit education for instilling in him a drive to serve others. That desire played a key role in him wanting to transition to the bench.

“As a lawyer, I certainly hoped to have a positive impact on people’s lives,” Zainey says. “I thought as a judge I would have a greater opportunity to have an impact on more people’s lives.”

Zainey was nominated to a federal judgeship by President George W. Bush and took the bench in February 2002.

TIME OF NEED

A tragedy in Louisiana several months later sparked the creation of SOLACE. New Orleans attorney Monica Surprenant, the wife of

a SOLACE initiative as a member benefit.

In the speeches he gives to try grow SOLACE’s reach, Zainey says he emphasizes the common bond lawyers share.

“We were in law school together, we sweat out the law school exams together, we sweat out the bar exam together and then we made it; so we should try to help each other in our time of need,” he says.

A talk Zainey gave at a national meeting of bar leaders prompted then-Nebraska State Bar Association President Michael Kinney to start a SOLACE program in his state.

“What piqued my interest was how simple it is,” Kinney says. “It doesn’t cost any money.”

Zainey praised Nebraska for being the first state to require members of the bar to opt-out if they did not want to receive email notifications from SOLACE, as opposed to an opt-in approach. Louisiana soon followed suit, and the judge now recommends the opt-out method for building a strong SOLACE network.

“I ask people not to opt out because when they receive these notices, even if they delete them right away, it will at least be a constant reminder to them that the SOLACE program exists and it exists for them,” Zainey says.

The judge constantly highlights that the program would not be a success without those who help. And he notes that the program aims not only to assist lawyers and their families but other members of the legal community, including paralegals, court personnel and legal secretaries.

Zainey and Surprenant say Judy Perry Martinez, president-elect of the ABA, has been a longtime supporter of their efforts. Martinez, of counsel at Simon, Peragine, Smith & Redfearn in New Orleans, says she appreciates how SOLACE allows members of the legal community to help colleagues or their family members in ways big and small.

“Some of the most extraordinary efforts I have seen are those following natural disasters where individuals simply say no to the notion that
they will leave it to someone else to step up and pitch in," Martinez says. "Within minutes of a request going out from SOLACE via email, the offers of help start rolling in, and the feeling that you are part of a community of caring individuals overwhelms."

Zainey says he is hopeful for stronger ties between SOLACE and the ABA moving forward. He credits the ABA with being instrumental in aiding the expansion of another program he started, Project H.E.L.P.—Homeless Experience Legal Protection, which launched in New Orleans in 2004.

Through Project H.E.L.P., which is now in dozens of cities across the country, attorneys volunteer to provide regularly scheduled pro bono legal clinics for the homeless.

Surprenant says Zainey’s work with Project H.E.L.P. and SOLACE highlight the judge’s consistent willingness to give his time and energy to help others in need.

Zainey’s charitable efforts have earned him numerous honors, including the St. John Paul II Award from the Catholic Foundation of the Archdiocese of New Orleans.

“I think it’s just in his DNA to be a loving, caring person,” Surprenant says.

If you are interested in starting a SOLACE program in your area, contact U.S. District Judge Jay C. Zainey at jayzainey@lasolace.org or contact Mark Surprenant at mark.surprenant@arlaw.com. For more information about Project H.E.L.P., visit homelesslegalprotection.org.

Wheels of Justice
Kentucky pro bono organization meets clients on the road  By Stephanie Francis Ward

A fancy outfitted rig can get you a lot of attention, even in legal services.

Kentucky’s Legal Aid of the Bluegrass recently learned this first-hand after equipping a 2017 Mercedes-Benz Sprinter van with a mobile law office, including bench seating for six, as well as a desk, multiple computers, videoconferencing equipment, a printer and Wi-Fi. A sky-blue autowrap with the words Justice Bus in white runs along its sides. You don’t have to have a special license to operate the vehicle, so staff and volunteer lawyers do the driving.

The van was purchased with a $50,000 opportunity grant from the American Bar Endowment awarded in 2017. The Justice Bus hit the road over the summer, and its trips include 10 rural northern Kentucky counties, says Joshua Crabtree, the Legal Aid of the Bluegrass’ executive director.

According to Crabtree, those 10 counties together have 102,541 residents, and 24 percent of them are eligible for legal aid services.

He says the area only has 88 active attorneys.

The service area includes Campbell County, which is near the agency’s Covington office. During one test run at the Campbell County courthouse, they met a woman in the parking lot headed to a domestic violence hearing without an attorney. “She said: ‘What is this, what do you do?’” Crabtree says. A summer intern explained that they represent people who can’t afford lawyers.

“You could kind of see a light bulb go off in her head, like ‘That’s my situation,’ ” Crabtree says.

They then did an intake screening aboard the bus and took her on as a client. During the screening, they determined she had custody issues that had to be addressed.

“She was able to go directly into court that day and get a continuance on her hearing,” he says. “Even with all the connections we have with domestic violence shelters and centers, she wouldn’t have found us had we not been there.”

FINDING OPPORTUNITIES
The Justice Bus was one of the first 15 groups to get an ABE opportunity grant. The Opportunity Grant Program, established in 2017, provides seed money for new projects that address the needs of unrepresented or underrepresented communities.

“Usually you have to have an established program, then you go into the funding world to find money. We’re trying to provide seed money for innovative ideas,” says Joanne Martin, the ABE’s executive director. “It’s a way of giving synergy to new ideas that combine the needs of the community with the supply of pro bono lawyers and the knowledge of legal services needed.”

The ABE, a nonprofit corporate public charity, sponsors insurance plans for ABA members. Approximately 83 percent of lawyers with those plans agree to donate available generated dividends to the ABE, and those are used to fund the organization’s annual grants.

The two major recipients of those grants are the American Bar Foundation, a research institute for the empirical and interdisciplinary study of law, and the ABA Fund for Justice and Education, which supports the organization’s public service and educational programs.

According to Martin, of those groups, each will receive more than $3.5 million this fiscal year. But the Opportunity Grant Program is a newer, separate set of grants. This year, another 12 programs
were selected for grants, totaling $296,654, according to Martin.

CLOSING THE GAP
At the Legal Aid of the Bluegrass, clients’ most common legal issues involve family law, interpersonal violence matters and housing, Crabtree says. In addition to courthouses, the bus travels to senior centers and libraries, and staff and volunteers work with a local church.

“Having more brick-and-mortar offices could have been an easy answer. But it wouldn’t have created the opportunity the van does, and it’s more efficient and cheaper,” Crabtree says.

Staff and volunteer attorneys usually visit between one and two counties per week, with regularly scheduled client visits and outreach hours. But the Justice Bus goes wherever there’s a need.

Some clients don’t have regular access to cellphones and computers, Crabtree says, and if their attorney is not on the bus, they can speak with them through videoconference equipment. And if there’s a communication or technology issue, an in-person legal aid representative is there to help.

When asked whether some were leery about boarding a bus and sharing personal information with strangers, Crabtree says they try to build trust by providing services people need. For example, the public can get ID cards laminated and scanned, so the information can be backed up on the cloud.

“By providing some simple service, it makes potential clients more likely to engage with us in conversation, where we can determine if there is a legal need that we can help with,” he says.

ABA Notices

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

2019 BOARD OF GOVERNORS ELECTION
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

NOTICE BY THE SECRETARY: NOMINATING COMMITTEE MEETING AT 2019 MIDYEAR MEETING
The Nominating Committee will meet in conjunction with the 2019 Midyear Meeting in Las Vegas, Nevada, on Sunday, Jan. 27, 2019, beginning with the business session at 9 a.m. Immediately following the business session, the Nominating Committee will hear from candidates seeking nomination at the 2020 Midyear Meeting. This portion of the meeting is open to Association members.

AMENDMENTS TO THE ABA CONSTITUTION AND BYLAWS
The Constitution and Bylaws may be amended only at the ABA Annual Meeting upon action of the House of Delegates. The next meeting is Aug. 12-13, 2019, in San Francisco, California. The deadline for any ABA member to submit proposals is March 8. Proposals will be published in the July/August 2019 ABA Journal. For details, go to ambar.org/AmendmentsNotice.

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DECEMBER 2018 ABA JOURNAL || 69
Power Play
New act aims to build an army of pro bono lawyers
By Rhonda McMillion

The ABA is applauding the enactment this past fall of legislation to help survivors of domestic violence gain access to pro bono legal services.

The Pro bono Work to Empower and Represent Act of 2018 moved through Congress with strong bipartisan support. The new law requires the chief judge from each judicial district to host at least one public event annually for the next four years to promote free legal services to empower survivors of domestic violence, dating violence, sexual assault and stalking. Every two years during the next four years, the chief judges must host events in areas with high populations of Native Americans and Alaska Natives.

The new law also requires each chief judge to submit a report on each event to the director of the Administrative Office of the U.S. Courts, who will provide an annual compilation and summary of the reports to Congress.

The idea for the POWER Act grew out of pro bono summits established in Alaska in 2010 by Sen. Dan Sullivan, R-Alaska, when he was the state’s attorney general. Sullivan introduced the legislation with Sen. Heidi Heitkamp, D-N.D., also a former state attorney general. Reps. Joe Kennedy, D-Mass., and Don Young, R-Alaska, sponsored a companion bill in the House. While the original version of the legislation called on the U.S. attorney in each judicial district to host the pro bono events, the final version included an amendment shifting that role to the chief judge.

Citing “horrific” statistics, Sullivan emphasized that “we must get serious about reducing the rate of sexual assault and domestic violence in Alaska and across the country.” He said Department of Justice research shows that about 25 percent of American women will be victims of domestic assault in their lifetimes, and three women on average are killed by a current or former partner each day in the United States.

He also explained that research has shown that “when abused victims are represented by an attorney, their ability to break out of the cycle of violence increases dramatically.” One study funded by the National Institute of Justice found that 83 percent of victims represented by an attorney were able to obtain a protective order, compared to just 32 percent of victims without an attorney.

The POWER Act cites the comment on Model Rule 6.1 of the ABA Model Rules of Professional Conduct, stating “every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”

In a statement commending the enactment of the POWER Act, ABA President Bob Carlson said: “An underlying goal of this law is to let victims know that legal assistance is available to them and empower them to move forward with their lives.”

Carlson emphasized the ABA “has long promoted access to justice for victims of domestic and sexual violence and urges every lawyer to provide legal services to those who have a limited ability to pay.” Policies adopted by the ABA’s House of Delegates in 2006 urge all lawyers to engage in community service activities—including delivering pro bono legal services—and support the development of programs by the courts in collaboration with bar associations to encourage, facilitate and recognize pro bono representation of indigent parties in civil cases.

Carlson issued a call to action for the legal profession and state and local bar associations to work with the chief judges in their districts to implement the new law.

Encouraged by the success of pro bono assistance efforts in Alaska and other states, the sponsors hope that the POWER Act, as a tool at the federal level, will create “an army of lawyers to defend victims and survivors of abuse.”

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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CONGRATULATIONS to Harold M. Goldner of Blue Bell, Pennsylvania, for garnering the most online votes for his cartoon caption. Goldner’s caption, below, was among more than 170 entries submitted in the Journal’s monthly cartoon caption-writing contest.

“Last thing I heard him say was something about sailing through the confirmation process.”  
—Harold M. Goldner of Blue Bell, Pennsylvania

JOIN THE FUN Send us your best caption for the legal-themed cartoon below to captions@abajournal.com by 11:59 p.m. CT on Sunday, Dec. 16, with “December Caption Contest” in the subject line.

For complete rules, links to past contests and more details, visit ABAJournal.com/contests.
In November 1892, Fall River, Massachusetts, was an unremarkable New England mill town with a very remarkable problem: What to do with Lizzie Borden?

Late in the morning of Aug. 4, the body of Andrew Jackson Borden, a prominent local banker and mill manager, was found hacked to death in the parlor of his house at 92 Second St. Perhaps a half-hour later, the body of Abby Borden, his second wife and Lizzie’s stepmother, was found in a very similar condition in an upstairs guest room.

At first, police suspected a Portuguese laborer turned away earlier by Andrew Borden unpaid for some work at the house. But the more they spoke with the 32-year-old Lizzie, the more the police came to suspect an answer closer to the Borden household. It had been Lizzie who had discovered her father’s body and sounded the alarm to housekeeper Bridget Sullivan, who had been washing windows that morning. It was Sullivan, along with a neighbor, who found Abby’s bloodied body upstairs.

Although the murders had evidently occurred over a span of 90 minutes, neither woman claimed to have seen or heard anything unusual. The problem was that there was scant physical evidence linking anyone to the spectacularly bloody murders, and police suspicions hinged on a string of circumstances gleaned from Lizzie’s sometimes-varying accounts.

Even worse, Lizzie’s accounts seemed suspiciously detached, as when she corrected an investigator who inquired about her relationship with her mother: “She is not my mother,” Lizzie interrupted. “She is my stepmother.”

At the coroner's inquest, actual evidence continued to be elusive, but so was Lizzie’s testimony: Her answers were short and often argumentative. She hadn’t realized her father had returned from an errand. When he did, she must have been in the barn searching for fishing sinkers. After finding his body, it never occurred to her that her stepmother might be in danger. Abby had left, Lizzie thought, summoned by a mysterious note.

But there was no note. Abby was still at home with 19 hatchet-like wounds in the back of her head. And on Aug. 11, one week after the murders, Lizzie Borden was arrested.

But the lack of physical evidence (or even an obvious motive) plagued prosecutors, and by the time a Bristol County grand jury was empaneled Nov. 7, the case seemed in limbo. Shortly before the grand jury was scheduled to deliver its report, neighbor Alice Russell shared a story she hadn’t previously told investigators.

Two days before their murders, Abby and Andrew Borden suffered severe stomach cramps, and Abby suspected poison. The night before the murders, Lizzie had acknowledged that possibility, telling Russell she feared another, more violent attack from some of her father’s business associates. More damning, Russell testified she had encountered Lizzie in the Borden kitchen three days after the murders burning pieces of a blue corduroy skirt she claimed had been ruined by paint. The grand jury had heard enough, and on Dec. 2, 1892, Lizzie was indicted for murdering her father with “10 mortal wounds” to his head.

But at her trial in New Bedford for the killings the following June, the lack of physical evidence continued to haunt the prosecution. Lizzie’s lawyer, George Robinson, was an experienced trial attorney and a former governor of Massachusetts. Robinson’s methodical cross-examinations undermined the circumstantial case against her. Her detachment was attributed to morphine sedation by the family doctor. The skirt-burning was dismissed by its obviousness and boldness. And on June 20, 1893—a absent motive, serious blood evidence or even a weapon—the all-male jury acquitted her. Though it seemed no one else could have done it, many considered the outcome a remarkable exercise in the rule of law.

After her trial, Lizzie Borden continued her life in Fall River without controversy until her death at age 67. She was buried in the family plot, adjacent to her father, mother and, of course, her stepmother.
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