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EDITOR’S NOTE

At 104 years young, the ABA Journal is making some important changes to stay on top of a fast-changing legal profession. In response to reader surveys, we are moving toward a model with fewer issues in print and a greater focus on exclusive online content covering practice advice, substantive issues and legal lifestyle news. Beginning with the January/February combined issue, we are expanding our already robust editorial calendar to include a mix of print and online journalism, innovation columns and practical pieces that can help you navigate an industry in transition. We intend to keep providing what you expect from the ABA Journal: insightful coverage of the profession that educates, informs, inspires and entertains.
Letters

President's Message
As we look ahead to 2019, our goals should be to promote civility and protect justice.

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A new practice area is born: reproductive justice.

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As a single mother of five, Ieshia Champs overcame many obstacles to fulfill her dream of becoming a lawyer.

Georgetown University Law Center’s new program takes on police reform.

MY PATH TO LAW
Ed Marquette’s blindness led him to a tech-focused law practice.

HEARSAY
Short takes and fast facts on the law.

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A California police department has produced a true-crime podcast, hoping to enlist help from the public in capturing a fugitive.

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More lawmakers are considering banning gay and trans “panic defenses.”

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Should a wine and spirits retailer be subject to state residency requirements?

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A conversation on writing with Rudolf Flesch.

ETHICS
Is recording others legal, and is it ethical?

WELL-BEING
What you need to know about lawyer suicide.

Business of Law
Some law schools are using virtual reality to augment their curricula, but there are challenges.

LAW SCHOOLS
The University of California at Irvine School of Law will soon mark its 10th anniversary.

TECHNOLOGY
Inspired by Europe’s GDPR, California’s new data privacy law could change how companies in the state do business.

Your ABA
ABA entities partner to offer lawyers and legal employers tools to deal with substance-use disorders.

Check out eight upcoming ABA events, and be sure to mark your calendar.

MEMBERS WHO INSPIRE
When things go wrong, immigrants serving in the military look to Margaret Stock.

An appellate attorney writes the Harper Lee Prize-winning novel.

Cartoon Caption Contest
See the winner from the October and November contests, and submit a caption for this month’s contest.

Precedents
A tale of two silver markets—and two disasters.

L. SONG RICHARDSON:
“How can we be where legal education is going?”

FRANKIE BERGER:
State psychiatric care too often comes down to money.
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ATTACKS ON THE PRESS  
President Bob Carlson’s message, “America: The Resilient Land of the Free,” November, page 8, is an eloquent statement of support for the rule of law, a free press, and free and fair elections. It did, however, make me want to know what defenders of the Trump administration would say in response. Perhaps they have different ideas about the definition of the rule of law, free press and free and fair elections. Or maybe they feel that President Trump and his administration fully support those concepts. Are there not, then, any ABA members who could write a response in defense of the Trump administration? Because I think many of us would really like to know what their reasoning might be!  
Keith Roberts  
New York City

Mr. Carlson states: “Attacks on free speech and a free press also have no place in our society. Criticism of citizens for exercising their right to dissent or be heard and calling the press the ‘enemy of the people’ cannot be tolerated.” Does he not see the inconsistency in these two sentences?  
Constitutionally, criticism must in fact be tolerated unless it contains falsehoods or, as applied to the press, malicious falsehoods.  
B. Paul Hatcher  
Chattanooga, Tennessee

VOTING RIGHTS  
When I was reading “Taking Away the Vote,” October, page 9, I was reminded of a case I had more than 20 years ago. I accepted an appointment by the court to represent a young woman whose parents were seeking a guardianship. The petition listed the right to vote as a right that can be denied to a proposed ward.  
A guardian: They checked every box, including the right to vote.  
I objected to my client losing her right to vote, which apparently no one had done before because the judge was surprised at the objection. He reasoned that she was not able to knowingly obtain facts to understand the issues and intelligently exercise the right to vote. My response was, if the law required everyone who voted to do so knowingly and intelligently, a large percentage of those who now vote would not be able to do so. He smiled and granted my request to not include the right to vote in the appointment of the guardian.  
Fortunately, in New Hampshire, the right to vote is no longer listed on the petition as a right that can be denied to a proposed ward.  
Diana G. Bolander  
Wolfeboro, New Hampshire

ANOTHER ADDICTION  
Jeena Cho’s article “Tales of Addiction,” October, page 26, is great except that she makes the same mistake most lawyer assistance programs make around the country. Because a large portion of the membership had alcohol or other substance abuse problems, they tend to omit the compulsive gambling problem. Considering that addiction has probably caused more economic loss to their clients and to the lawyers’ funds than any other, we tend to disregard the devastating problems because it really is difficult to detect before the devastation occurs.  
Max Hahn  
New York City

Bryan A. Garner’s pronunciation quiz was disheartening, to say the least. As a long-serving attorney and CPA, I only got nine out of 25 correct and thus must assume I have mispronounced these common terms for most of my career, although I worked alongside astute and capable attorneys on Capitol Hill for most of my life. When Garner refers to one “old pronunciation as a lost cause,” I blame another “pronunciation to law professors who accent the last syllable perhaps to help their students spell the word correctly on exams,” and refers to “medieval Latinists respelling one word based on false etymology,” I am embarrassed that I am so out-of-touch and ignorant. Although his test is enlightening, it certainly does humble us old legal dinosaurs who have had successful careers speaking what we thought was proper English.  
Leslie L. Megyeri  
Washington, D.C.

CORRECTION  
On page 38 of the December issue, Jim Block should have been credited for the photo of Frank Wu.  
The Journal regrets the error.

Letters to the Editor  You may submit a letter by email to abajournal@americanbar.org or via mail—Attn: Letters, ABA Journal, 321N. 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.
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President’s Message || By Bob Carlson

Looking Ahead to 2019
Goals for us all: promoting civility and protecting justice

The beginning of a new year has historically been a time for people to take stock of their lives and situations. We make resolutions to try to improve ourselves and better our condition.

As we start a new calendar year, a new Congress is also beginning. In the 116th Congress, there will be more than 100 new faces. We will be looking to new and returning members to resolve to bring a new sense of collegiality and civil discourse—a bedrock of democracy—to the institution in order to move our country forward.

In the coming year, the American Bar Association will renew its efforts to work with policymakers to achieve goals important to the legal profession.

We will advocate for increased funding for the Legal Services Corp. so people who need representation in civil matters but cannot afford it will be helped. Fortunately, Congress has increased the LSC’s funding to $410 million, and we are grateful to Congress for seeing the value of legal aid programs. Unfortunately, existing funding is still not enough to ensure justice for all, and thousands of Americans are turned away from legal aid offices every year.

The ABA will also continue its fight to preserve the Public Service Loan Forgiveness program so lawyers who choose public service can get help with their student debt. Though the program’s future seems secure today, we will continue to work with nonprofit partners to oppose future efforts to eliminate the program.

We will continue to advocate for the judiciary, ensuring its independence and making sure it has adequate resources. And we will continue to advocate strongly to protect the independence of the legal profession.

An area where the ABA will continue to advocate nationwide is for civics education. We want people to participate in their communities and our government, and the best way to accomplish that is through education. Broadening understanding of law and its vital role in our society can go a long way toward uniting disparate sides over basic knowledge about our democracy and the rule of law.

This recent election saw a record turnout for a midterm with more than 113 million votes cast, representing 49 percent of eligible voters. It was the first time more than 100 million people voted in a midterm and far surpassed the 2014 turnout of 36.4 percent.

Part of the message voters sent was that they would like to see less partisanship and more action that improves their lives.

In Congress last year, Ohio Reps. Joyce Beatty and Steve Stivers—a Democrat and Republican, respectively—created the Congressional Civility and Respect Caucus. It started with 12 members, and we hope more representatives will get on board. In addition to working through problems in a civil manner, the members go to high schools and civic organizations to talk about ways to solve problems through respectful dialogue.

Civility needs to return to Congress, but it also needs to become part of our normal day-to-day interactions. Lawyers, as role models, have a special obligation to practice civility. In 2011, the ABA House of Delegates affirmed the principle of civility as a foundation for democracy and the rule of law. It urged lawyers to set a high standard for civil discourse as an example for all in resolving differences constructively and without disparagement of others.

We—the public, the legal profession and Congress—need to remember the words of John F. Kennedy in his 1961 inaugural address: “Civility is not a sign of weakness.” Let us resolve to start the new year with a renewed sense of collaboration and common purpose on issues of justice and our democracy.

Follow President Carlson on Twitter @ABAPresident or email abapresident@americanbar.org.

PHOTO BY TOM SALYER PHOTOGRAPHY

LAWYERS, AS ROLE MODELS, HAVE A SPECIAL OBLIGATION TO PRACTICE CIVILITY.”

—BOB CARLSON
WITH WOMEN’S RIGHTS ISSUES sparking a national dialogue, a niche practice area has emerged that is gaining momentum: reproductive justice. The practice area is broad, encompassing issues including forced sterilization and unwanted medical intervention during childbirth.

Because delivery rights are an evolving concept, few lawyers know how to advise clients or effectively litigate these matters. Legal support groups and networks have formed to fill the void, providing education and assistance to lawyers interested in or already practicing in the field.

“There is a grave need for knowledgeable lawyers, coordinated strategy and resources,” says Indra Lusero, founder and president of the Birth Rights Bar Association and a staff attorney with National Advocates for Pregnant Women. “Currently there is no organization with the capacity to address all of these cases. We aim to fill that void by giving our members the skills, support and education they need to litigate these cases.”

Lusero, who practices in Denver, says the problem is compounded by a “broken maternity care system that spends more and accomplishes less,” while maternal mortality is rising, and evidence-based practices (such as the use of midwives and doulas) are underutilized.

The BRBA has members in 20 states and is expanding nationwide. Its members include litigators in a wide range of practice areas. The organization compiles and tracks data, identifies trends and opportunities for strategic action and helps women in need find attorneys. The organization has filed amicus briefs in reproductive justice cases in California, Delaware, New York, Virginia and Washington.

The body of law on childbirth rights is slim, and the legal issues can be complex. Causes of action include constitutional law, business law, regulatory law, torts, lack of informed consent and public health law.

Michael Bast, a medical malpractice attorney in New York City, has spent four years litigating an ongoing case on behalf
Opening Statements

of a woman who had a cesarean section against her wishes and suffered a lacerated bladder.

“The time is now,” Bast says. “Women want to control their body in choosing their manner of delivery.”

Bast has received backing from the BRBA and NAPW in the form of funding, finding experts and raising awareness. He says the support is crucial because most plaintiffs attorneys in reproductive justice cases are solo or small-firm practitioners, while the defense is backed by an army of attorneys, many at large firms with tremendous resources.

Reproductive law is about “changing the balance of power” in delivery rights, says professor Ellen Wright Clayton, an attorney and physician who teaches at Vanderbilt University’s law and medical schools. She sees reproductive law as a “push back against the medicalization of childbirth and the willingness of hospitals to override the wishes of the woman.”

Clayton says disparate treatment of minority and low-income women within the medical system is a significant problem this area of law could address. She points to a history of racism in the health care system that disproportionately affects women of color and non-native English speakers. “If you’re not seen as empowered, you’re not empowered,” she says.

Clayton feels the solution lies in empowering women before they are in active childbirth. “I don’t think you’re going to litigate your way out after the fact,” she says. “The courts have been hostile to these issues.”

Instead, she says, there should be better communication between physicians and patients—and it should take place before you check into the hospital. If you want one mode of delivery and your doctor is opposed, “You’re not going to have that conversation in the middle of delivery.”

Bast recommends that a woman make a birth plan (basically a contract) with her clinician to ensure that her wishes are followed. “Plan ahead. By the time you’re in labor, there is no real weapon,” he says.

—Darlene Ricker

10 QUESTIONS

Defying the Odds

THIS SINGLE MOTHER OF FIVE OVERCAME A LIFETIME OF OBSTACLES TO ACHIEVE HER LIFELONG DREAM OF BECOMING A LAWYER

Society often measures misfortune with statistics, and Ieshia Champs could have been included in any number of depressing data sets. Like the number of Texas children in foster care; the percentage of Houston-area students who drop out of high school; the percentage of those teens who end up homeless and later pregnant. But Champs had something more powerful than her circumstances: a dream. Since she was a young girl, Champs wanted to be a lawyer. Throughout the highs and lows of her life, she held fast to that dream—even when she could no longer see a path to achieve it. But achieve it she did. This past October, with the help of her family, friends and church, Champs became a statistic once again. She was among the 77.87 percent of first-time test takers who passed the July 2018 Texas bar exam. In December, she accepted a position as an assistant county attorney with the Harris County Attorney’s Office, where she’ll be working in the Children’s Protection division.

It’s been a long journey, but you’ve finally reached the destination you’ve dreamed of since elementary school. How did you arrive at the decision to become a lawyer?

When I was 5 or 6 years old, I was placed in foster care because my parents were both addicted to drugs. I had been in foster care for about a week when I woke up and found new clothes on the side of my bed. I was really excited because I hadn’t had new clothes in years. I thought, this life is so much better than where I had come from. I remember wondering what I could do to help my friends back home who weren’t as lucky as I was now. That same day was career day at my new school. There was an attorney who spoke to our class, and she went around and asked everyone what they wanted to be when they grew up. I had never thought about it before, and I said, “I don’t know.” She said, “Well, what do you like to do?” I said, “I would like to help people.” She told me about the different types of lawyers and how they helped people, and then she said, “I think you would be an excellent lawyer, and I look forward to seeing you in the courtroom.”

How inspiring! And that dream stayed with you, even when times got tough?

Yes. By the time I was in high school, I had lived in probably six or seven different homes. Sometimes a family would let me stay for months, sometimes a friend would sneak me in to spend the night after her parents went to bed. There was also a time when I was homeless. I would stay in some vacant apartments and sit up all night on the stairs or in the breezeway. Through it all, I was still thinking about being an attorney someday. But with no guidance, I dropped out of high school in my sophomore year. When I dropped out, I realized that my dream was never going to happen. I had more immediate concerns, like, “What am I going to eat?” and “Where am I going to sleep?”

As you got older and started a family, your life began to stabilize. Then 2009 happened. It was both a horrible year and a transformative one. Tell me about it.

Things had really started to turn around for me. I met a man, we had a child together, and I started attending church and getting my relationship with God on track. In January 2009, I received the news that I was expecting my fourth child. I was so excited. But it turned out to be the most traumatic year of my life. Every month, there was a different obstacle. In early February, I found out my kids’ dad—[then] my fiance—had stage 4 cancer. On Feb. 24, while he was doing one of his chemo treatments, I got a call saying my house was on fire. I lost everything I owned that day. My oldest was in school, but my mom was at my home watching my youngest children. They got out just in time. In March, I lost my job. In April, I was told I needed to make funeral arrangements because my fiance wasn’t going to make it. I said, “Oh Lord, I can’t take it.” Then my mother had a slight stroke. In May, we receive a call unexpectedly that my fiance’s dad had passed away from cancer. During all of this turmoil, I was like, “What’s next?” I couldn’t do
anything but expect the worst. Then I received a call from my first lady [pastor] at church. She called me and said, “God told me to call you and tell you to go back to school because you need to be a lawyer, and to do that, you need your GED.” I said, “There’s no way God would tell you I needed to do that, with everything I’ve been through.” I said, “I am 24 years old and about to have four children. I won’t even be a lawyer until I am 33!” She said, “Obedience is easier than sacrifice.”

Your fiancé passed that year, but you still found the strength to earn your GED, making it possible for you to graduate from college and enter law school. How did you decide on Texas Southern University’s Thurgood Marshall School of Law?

When I went to Thurgood Marshall to turn in some papers and tour the campus, I felt at home. Everyone was so welcoming, and the president of PALS—Parents Attending Law School—approached me and told me it would be a great fit. When I told her how many kids I had, she said, “Oh that’s great! I have 10!”

During college, you got married and had a fifth child, but by the time you started law school, you were a single parent again. How did you juggle everything?

It was a handful. When I started law school, David was 12, Davien was 10, Khassidy was 8, Kaleb was 5 and E’mani was 2. I planned everything. I planned the time they would take baths, the time I had to study. Any additional time I would either spend with the kids or plan what I needed to study for the additional days to get ahead. My sister helped me even though she had five kids, and my church helped immensely. My study group helped so much they were like my second family.

Sometimes, when I couldn’t get a babysitter, the kids came to school with me. One of my professor’s exact words were, “If you have to bring your children to class, you are more than welcome, but do not miss my class.”

Did your kids help you study?

Yes, for every subject! I had flash cards—index cards where I’d write the concept and the elements—and they would quiz me on these flash cards. They’d do this daily when I was cooking or doing their hair. I also learn when I am teaching people, so I’d make them sit on the sofa like a little mock jury or a class, and I’d teach them what I had learned that day. They’d be so bored, looking at me like, “We have no idea what you’re talking about!” But they sacrificed their time outside for me. That’s why I wanted to take graduation photos with them holding signs showing they had helped. I didn’t feel like it was just me graduating. They had also sacrificed, so it felt like they were graduating, too.

I am so glad you mentioned those photos! Did you have any idea they would go viral and you’d end up in the news and even flying to California to appear on Steve Harvey?

Not at all. I just posted them on Facebook like I do anything else, never expecting the response I received. I posted them on Saturday, and by the time Monday came around, they were everywhere. A news station came out to interview me at school, and two days later, Yahoo reached out to me and did a story on me. Then the Steve Harvey show emailed and said, “We’d love to have you on the show.” He gave my family a five-night, six-day trip to Jamaica, an all-expenses-paid trip, on-air. In addition to that, he gave me $10,000 on-air. I paid my tithing to the church, and I sent the rest to Sallie Mae to start paying off my loans.

I was going to ask how all this publicity changed your life, but it sounds like it’s been pretty positive—I mean, Jamaican! Did anything else come your way from the photos?

The most amazing things happened. I went bar-study crazy from May until July—I took out a bar study loan so I didn’t have to work, and I never cooked one home-cooked meal all summer. But the picture had gone so viral by then that people started sending me gift cards and money, enough to feed me and my family the entire time.

I know you’ve also received quite a few public speaking gigs from religious organizations and women’s conferences. What’s the message you share?

I tell everyone my testimony and encourage and inspire them. I say, “If God can do it for me, he can do it for anyone, and don’t give up. Whatever circumstances you are going through right now, it doesn’t define your future. You won’t be in this place forever; it’s up to you to step out on faith.”

How did it feel to walk across the stage at graduation and accept your juris doctor degree?

I was speechless because all I could think about was that little girl who lived in the projects. Every hardship I had ever endured flashed in front of my eyes, from seeing my parents do drugs in front of me to being in foster care to being drunk myself. All of it flashed before my eyes, and I realized, this is happening. This is finally happening.

—Jenny B. Davis
IN 2016, professor Rosa Brooks was on a sabbatical from her position at Georgetown University Law Center to finish a book. After it was complete, Brooks began looking for a new project and decided to enroll in the police academy. As she progressed through tactical training to become a volunteer reserve police officer in Washington, D.C., Brooks was surprised by what the Metropolitan Police Department’s curriculum skipped: There was no discussion about community mistrust of police, racial disparities or mass incarceration.

Brooks pursued law enforcement training in part because of her interest in police reform. At a time when high-profile police shootings were sparking protests, and the Black Lives Matter movement was demanding accountability, Brooks felt more could be done to provide guidance to officers on how profiling, arrests and use of force can impact the community.

“Our strong intuition was that if you want to change police culture, you have to do it from the bottom up, really focusing on young officers who are at the outset of their careers and forming their sense of what it means to be a police officer,” Brooks says.

As co-founder and co-director of Georgetown Law’s Program on Innovative Policing, Brooks and her colleagues decided to create a fellowship to supplement the training of patrol officers. Every month for 18 months, officers visit the law center for a three-hour workshop on topics such as race and criminal justice, mass incarceration, youth development and implicit bias. They learn about the history of African-Americans in their community and sit down with homeless people and teenagers to hear their perspectives on the police. So far, 18 officers have graduated from the Police for Tomorrow Fellowship Program; 26 more started their studies this past September. Some of the curriculum has made its way into the police academy.
Judge Bernice Bouie Donald, who co-chairs the ABA Criminal Justice Section’s Implicit Bias Initiative, says this type of training should exist at every police department. “It does impact what people do: All of us, whether police officers, judges, lawyers—we view things through a lens, and the lenses are sometimes clouded by these biases, [of] which we are unaware,” says Donald, a judge on the 6th U.S. Circuit Court of Appeals in Cincinnati.

Brooks is currently applying for grants to try to fully fund the program, which so far has been a pro bono project for her and her Georgetown program co-founders: Paul Butler, Kris Henning, Christy Lopez and Shon Hopwood. Funding would allow them to amp up research, travel to conferences for presentations and create portable curriculum modules for other police departments.

“If it gets police officers to be more thoughtful about their role, to use their discretion and change department policies in ways that at a minimum do no harm and are more helpful to communities—that would make me very happy,” Brooks says.

—Angela Morris
#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.

If I’m honest, I backed into the law more than anything else. In this I suspect I am not alone, though I think few would admit it.

My journey started on a farm in northeast Missouri. Very early, I knew that farming was not in my future, having developed an allergy to dirt, grease and sweat. My father wanted me to be a doctor. That, of course, ensured that I would become anything but a doctor.

At a small, rural high school, one gets to do everything: baseball, football, track, golf, band, basketball, 4-H, student council, honor society, Young Engineers and Scientists, and even Future Farmers of America. Probably because it was strange and unusual for a farm boy to have a passion for nuclear physics, that is exactly what I had. Although I do not remember now, in high school I could have told you the oscillation properties of a muon neutrino.

All of that, however, slammed to a sudden halt when an accidental blast from a fellow quail hunter’s gun knocked me flat. The spray from the shotgun’s muzzle sent lead pellets through my eyes, rendering me blind.

This all happened during the turmoil of the Vietnam conflict. While recuperating from the accident, I became caught up in the winds of change and the politics of the era. I started making campaign speeches on behalf of then-Missouri Attorney General Thomas Eagleton, a charismatic dovish Democrat, at ice cream socials, county fairs and public gatherings of all kinds. The adrenaline rush one gets from campaigning generally—and specifically from engaging in public debate—is hard to explain, and it is addictive. It seemed that politics was definitely in my future.

“What happened to nuclear physics?” you might ask. Braille, it turns out, is not well-suited to complex mathematics. The Braille symbol for the letter “a” is also used for the number “1”; the symbol for “b” matches the “2” symbol; and the same is true for the other integers. It takes additional symbols to differentiate between letters and numbers. Imagine even a relatively simple algebraic expression written in Braille. A career in physics, therefore, was doomed.

Politics became my passion. I was elected the president of the Young Democrats and chaired a statewide youth committee for the Democratic Party. I was active in the movement to lower the voting age to 18.

The default profession, it seemed, for all politicians was the same: the law. Therefore, I applied to an array of law schools and in that way backed into the law.

It is impossible now to re-create the electric atmosphere of 1973, the year I started at Harvard. The Senate Watergate Committee hearings were being televised daily. The vice president of the United States,Spiro Agnew, resigned, making nolo contendere a highly relevant topic of discussion in our criminal law class. After the Saturday Night Massacre, Elliot Richardson spoke on campus about why he resigned rather than fire special prosecutor Archibald Cox at the behest of the embattled President Richard Nixon. Then, of course, the president of the United States resigned, and his hand-picked successor pardoned him.

Perhaps it was overload. Whatever it was, I was burned out on politics. But ironically, I had not burned out on the law.

Looking back, I was extremely fortunate but too oblivious to realize it. When interviewing for associate positions, I was usually asked, “How can you practice law being blind?” I think most who asked that question didn’t have a clue. At the time, however, I thought they were just asking for my strategy. One interviewer, however, did not ask. So, I asked him why he didn’t ask. He said, “If you can make the kind of grades that you have made at the Harvard Law School, then you can figure out how to practice law in our law firm.” I accepted the job offer from that firm, and that is how I ended up in Kansas City.

Just as I backed into the law through pursuit of politics, I backed into intellectual property and technology through my blindness. Using voice synthesis, I taught myself computer programming, and I even wrote a couple of commercially distributed educational computer programs. Then, the early, primitive screen-reading programs required a deep knowledge of computer

PHOTO COURTESY OF ED MARQUETTE

PHOTOS BY CHRISTIN McQUEEN FOR THE HARRIS COUNTY DEMOCRATIC PARTY; SHUTTERSTOCK
technology. That immersion in technology positioned me well for the technology explosion that came with the microprocessor and all that followed. My practice now is involved heavily in technology and related intellectual property rights.

It was not until well after my own practice began to flourish that I realized how astoundingly lucky I was. The unemployment rate for blind people generally is about 70 percent. Many blind and physically handicapped people who are pumped through law school struggle to find any kind of law-related job. What a terrible tragedy—not just for the lawyers with disabilities but also for the organizations that miss out on the creativity, inventiveness, and out-of-the-box thinking that almost inevitably comes with people with disabilities.

When an individual has to devise alternative solutions to accomplish even the most mundane tasks, that person is, of necessity, adept at finding alternative solutions—solutions that often escape others. That is the message the disabled community needs to broadcast, and seeing that it happens is the main reason I am so involved in issues of diversity and inclusiveness, even though they do not directly relate to my legal practice.

Ed Marquette is a partner at Kutak Rock. A diversity and inclusion advocate, Marquette serves as the chair of the Diversity Action Group for the Intellectual Property Law Section of the ABA and as the section’s liaison to the Commission on Disability Rights.
Serial Sleuths
Amid legal concerns, California police release true-crime podcast in hopes the public can help find a fugitive

By Jason Tashea

California millionaire Peter Chadwick—free on $1.5 million bail while awaiting trial for the murder of his wife—failed to show up for a court hearing in January 2015.

Police learned his phone had been turned off. They discovered Chadwick withdrew millions from his bank accounts and maxed out cash advances on his credit cards. Inside his $2.5 million home, Newport Beach police found books about how to change identities and live off the grid. Chadwick's whereabouts remain unknown.

With no new leads in the case in years, the Newport Beach Police Department tried something new—producing a podcast in hopes of engaging the public in its search for one of the country’s most-wanted fugitives.

Over two weeks in September 2018, the department posted Countdown to Capture, a podcast in six 15-minute episodes. The novel approach details the murder allegations against Chadwick.

In announcing the podcast’s release, Newport Beach Police Chief Jon Lewis said that Chadwick had the financial means to flee from authorities and hide. He wanted Chadwick’s photo spread around the globe.

“We want everyone to be looking for Peter Chadwick,” he said at the time.

While riding the popularity of other true-crime podcasts such as *Serial*, which covered the murder conviction of Adnan Syed and led to a post-conviction appeal in Maryland, it’s a novel medium for a police department. Because it’s unchartered territory, some experts believe the approach could create legal issues for
the prosecution, including violations of the Fourth Amendment’s protection against unreasonable search and seizure.

With more than 165,000 listeners in the first month, Jennifer Manzella, spokeswoman for the Newport Beach police and host of the podcast, says its audience is primarily in the U.S. (mostly in California), Canada and the United Kingdom. The department created a website to promote the podcast and released it on Apple Podcasts and Stitcher.

“At one point, we reached No. 24 on the U.S. podcast charts, which is far beyond any reach that we would have anticipated when we first launched the project,” Manzella says. “Tips continue to come in from both domestic and international locations.”

Done entirely in-house, Manzella says there was a steep learning curve, but those involved from the police department enjoyed the challenge. With a team of six, the project got underway last July. Manzella handled most of the production.

SCENES FROM A MURDER

The podcast tells the story of the Oct. 10, 2012, strangulation of Quee Choo Lim Chadwick—known affectionately as Q.C.—and the subsequent investigation. The Chadwicks had been married for 21 years and had three sons.

The story is told through a slow and methodical presentation of the characters and circumstances that surrounded Quee Choo’s life and death. The episodes include insights from officers who worked the case and speculative retellings of Chadwick’s shifting alibi.

In a 911 call, Chadwick claimed that a handyman named Juan—who he said was hired to paint a banister in the family’s home—strangled Quee Choo and forced Chadwick to help dispose of her body in Mexico. Police began to doubt that story, however.

Having found evidence of a struggle in the home—including broken glass and a faint splattering of blood on the wall—police arrested Chadwick, and he was charged with murder soon after. Photos from the time of the arrest show Chadwick with yellow bruises and scratch marks on his arms, face and torso.

Eight days after her death, Quee Choo’s body was found by police in a dumpster on a remote road about 4 miles from the Mexican border. Her body, wrapped in a comforter from her bed, was found with money and passports that Chadwick claimed Juan had stolen. The podcast presents evidence hinting at infidelity by Chadwick and a potential divorce.

CITIZEN DETECTIVES?

Today, Chadwick is one of the U.S. Marshals Service’s 15 Most Wanted fugitives. He may be using aliases such as Gregory or Pete, according to a U.S. Marshals press release.

With $25,000 from the U.S. Marshals and $75,000 from the Newport Beach police and private donors, a reward of up to $100,000 is being offered to anyone providing information leading to Chadwick’s arrest. The Newport Beach Police Department asks for tips through either a hotline at 800-550-6273 or email to tips@nbpd.org.

With the stated goal of crowdsourcing the public to help find a fugitive criminal suspect, some experts are concerned a private individual could be inspired to take on the mantle of a sleuth, running afool of search and seizure laws familiar to trained law enforcement officers.

Collin Miller, a professor at the University of South Carolina School of Law, says that California law holds that a private person looking for evidence could constitute a government search if the government knew of and acquiesced to the private search, and if the private individual intended to assist law enforcement.

“So, if the police encourage searches by private citizens who uncover evidence that they otherwise wouldn’t have sought out, could that lead to a Fourth Amendment challenge to the evidence?” he says.

The podcast ends each episode with a physical description of Chadwick and an announcement of its tip line phone number, but there is no warning to listeners regarding how involved they should be in the investigation.

A LONG TRADITION

Maria Haberfeld, a professor of police science at John Jay College of Criminal Justice in New York City who is not a lawyer, says she doesn’t see any ethical or legal issues with the podcast, describing it as a “more sophisticated ‘wanted’ notice” that reaches a larger audience. She reasons that because Chadwick didn’t appear in court after having been granted bail, “the police department has the right to ask the public to assist in locating the fugitive.”

Framed this way, the podcast is an extension of a modern American tradition. America’s Most Wanted, for example, solicited public help on television between 1988 and 2012. Local stations have broadcast variations of Crime Stoppers programs that enlisted the public’s help in cracking unsolved cases. In recent years, amateur sleuths have taken to the internet to collect and share information surrounding cold cases on sites such as Project: Cold Case and Defrosting Cold Cases.

Manzella says she has no legal concerns about the Newport Beach police podcast, though she hastens to add that she is not an attorney.

Regardless of potential pitfalls, Haberfeld believes that the attention gained by the podcast will inspire other departments to produce their own, adding a new dimension to how police work with the public to solve crimes. With many police departments understaffed and under-resourced, “any constructive help from the public, especially when looking for a dangerous fugitive, is much needed,” she says.
The Docket

Stop the Panic
More lawmakers are considering banning gay and trans 'panic defenses'
By Lorelei Laird

The bad blood between Brandon McInerney and Larry King was well known among their classmates at E.O. Green Junior High in Oxnard, California. It got so bad that McInerney told another student he planned to kill King.

King, 15, was openly gay. He occasionally wore makeup and heels and flirted with other boys, even though they gave him a hard time for it. He especially liked to flirt with McInerney, despite the anger and embarrassment it caused McInerney. One day, King loudly called out, “What’s up, baby?” to McInerney in a crowded hallway.

The next morning, during first period, McInerney, then 14, pulled out a gun and shot King to death.

In California, the evidence of premeditation could have been enough to earn McInerney a conviction for first-degree murder. But at the 2011 trial, McInerney’s defense lawyers argued that he should instead be convicted of voluntary manslaughter because King’s flirtatious comments had pushed McInerney to an “emotional breaking point.” Enough jurors agreed. Later on, one juror wrote a letter to the Ventura County District Attorney’s office, calling McInerney’s prosecution a “propaganda-filled witch hunt.”

“You all know the victim had a long history of deviant behavior,” the juror wrote. “After weeks of testimony, it is my firm belief that this young man reacted to being bullied and being the target of Larry King’s sexual harassment.”

The juror was responding to what’s known as a “gay panic defense,” in which defendants say victims provoked the crime by revealing their sexuality or making a nonviolent sexual pass. Like its close cousin, the trans panic defense, it’s a way to diminish the defendant’s responsibility for the crime—in McInerney’s case, to initially argue for voluntary manslaughter rather than first-degree murder. It’s also offensive to many in the LGBT community who say it blames the victim and tells the world that gay and trans lives are less valuable than other people’s.

That’s part of why the ABA House of Delegates voted in 2013 to urge jurisdictions to ban gay and trans panic defenses. Now, a slew of states are taking action. Illinois and Rhode Island bans on the defenses went into effect last year, and bills were introduced in at least six other legislatures, including Congress.

“It does serve an important purpose [in] that it gives the judges the power to really reject these types of defenses when they come up,” says Jordan Blair Woods, a professor who teaches criminal law and law and sexuality at the University of Arkansas School of Law. “And it’s a firm statement in the criminal law that these types of inequalities are not a reason to justify violence.”

DEFENSE THEORIES
Gay panic defenses have been around since at least the 1960s, according to a 2016 report Woods co-authored at the UCLA School of Law’s Williams Institute, a think tank on LGBT issues. “Homosexual panic disorder” was recognized as a diagnosis in the first edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, which helped legitimize the defense. Both gay panic and homosexuality have been removed from the DSM, but the Williams Institute report found that almost half the states had considered appellate cases involving some form of the defense.

Indeed, the report notes that there are several ways in which gay or trans panic can be used to defend against a criminal charge. The one McInerney used is common: The victim provoked the defendant with a same-sex pass or a revelation about the victim’s gender or sexuality, reducing the defendant’s responsibility for the crime. Another common argument says a victim’s actions, sexuality or gender identity caused the defendant to fly into a panic or rage that caused a temporary mental breakdown, creating diminished capacity or temporary insanity. Less commonly, a defendant might argue self-defense against an unwanted sexual advance.

These aren’t stand-alone defenses, Woods notes, but theories underlying conventional defenses. “There’s really not one type of gay or trans panic defense,” Woods says.

But all versions of it are harmful, says D’Arcy Kemnitz, executive director of the National LGBT Bar Association.

“It tells LGBTQ+ individuals their lives are worth less than those of their heterosexual friends and neighbors, it excuses violence committed against the LGBTQ+ community, it further implies that there is something unnatural and dangerous about same-sex intimacy,” Kemnitz says, using a plus sign to include a larger number of people who are not straight or cisgender.

In 2013, when the ABA passed Resolution 113A, which urged jurisdictions to ban gay and trans panic defenses, there were no such laws. That started changing in 2014, when California passed a law saying killings are unreasonable if they stem from discovery or knowledge of “the victim’s actual or perceived gender, gender identity, gender expression or sexual orientation.”

Illinois followed in 2017 with a law providing that “discovery, knowledge or disclosure of the victim’s sexual orientation” cannot mitigate first-degree murder or constitute provocation. That took effect in early 2018,
“It tells LGBTQ+ individuals their lives are worth less than those of their heterosexual friends and neighbors, it excuses violence committed against the LGBTQ+ community, it further implies that there is something unnatural and dangerous about same-sex intimacy.”

— D’Arcy Kemnitz

the same year that Rhode Island forbade the use of gay and trans panic to support provocation, self-defense or diminished mental capacity arguments.

They may be on the forefront of a legislative trend. In 2018, legislation to ban the defenses was considered in Congress, as well as in Georgia, Minnesota, New Jersey, New York, Pennsylvania and Washington, D.C. Some of those bills had stalled by early fall, but Monisha Harrell of Seattle-based Equal Rights Washington says her organization is working with a legislator in that state to introduce a comprehensive bill in 2019.

Anthony Michael Kreis, a visiting assistant law professor at the Chicago-Kent College of Law, has consulted with legislators in some of those states and helped write the Illinois statute that became law in 2018. He says the bans may have currency right now because major LGBTQ civil rights struggles—marriage and employment discrimination—are being won in some jurisdictions.

“I think of this as ... the next generation of LGBTQ rights issues,” says Kreis, who studies the law’s treatment of LGBT people and other vulnerable groups.

HIGH-PROFILE INCIDENTS

Woods says not all of these bills will, or should, necessarily look alike. Because there are different ways to use gay or trans panic as a defense, he recommends that jurisdictions adopt language that addresses the way they’ve been used locally.

Kreis says he didn’t have to do too much of that kind of tailoring on the Illinois statute. Initially, he says, he was working on a refined version of the California law’s language. One goal was to make it clear that the law would not take away access to self-defense in general, or other defenses.

To do that, backers of the bill had to address some misconceptions about what a gay panic defense is. Kreis says the media sometimes confuse the issue by reporting that a defendant used a gay panic defense when that person was really arguing self-defense in a situation that happened to involve a same-sex relationship or encounter.

In the spring of 2018, for example, headlines screamed that a gay panic defense permitted James Miller of Austin, Texas, to receive a sentence of 10 years of probation and six months in jail for stabbing Daniel Spencer to death. Miller’s attorney argued that Spencer did make a pass at Miller, but Miller stabbed Spencer only after Spencer attacked him physically—a claim of self-defense that doesn’t rely on panic, rage or disgust created by a same-sex pass.

To address that kind of confusion, Kreis says, backers of the bill had to talk it through with legislators, assuring them that the bill wouldn’t ban self-defense claims. In this, they were helped by the fact that there was no similar high-profile case in Illinois at the time. “These things are so often very charged that it’s hard to have the conversations in the moment,” he says. “We weren’t reacting to any immediate incident. So I think that was helpful for the legislative process.”

It worked—the Illinois legislature not only passed the bill but passed it unanimously, which Kreis says was a first for any LGBT civil rights legislation.

In California, McInerney’s mistrial helped add impetus to that state’s law banning gay and trans panic defenses that was passed in 2014. By then, however, it was too late to apply it to McInerney: He’d pleaded guilty to second-degree murder before he could be retried. He is scheduled to be released from prison when he’s 38.

Meanwhile, the Ventura County Star reported in June that King and McInerney’s former school hasn’t forgotten the experience. E.O. Green’s current principal said school administrators responded by bringing back school clubs in an attempt to give every student a place to belong. Since 2017, that has included Prism, a gay-straight alliance club.

In 2018, the 10-year anniversary of the shooting, Prism won a national award for Gay-Straight Alliance of the Year.
The Docket

Liquor Store War

Should a giant wine and spirits retailer be subject to state residency requirements? By Mark Walsh

In June, a new wine and liquor superstore called Total Wine Spirits Beer & More opened in the upscale Turkey Creek shopping area in Knoxville, Tennessee, offering some 8,000 wines, 3,000 spirits and more than 2,500 beers, as well as a wine-tasting bar, a classroom and a walk-in cigar humidor.

“I think we’re unlike any other retail liquor store in Tennessee,” Edward Cooper, the vice president of public affairs and community relations for the retailer, told the Knoxville News Sentinel when the nationwide chain of more than 190 stores opened its first outlet in the state. “I think that customers will be happy with our interest and desire in giving them what they desire, and that’s price, service, selection and a great customer experience.”

Whatever else might be said about a proud corporate executive’s boast, Cooper was right about one thing: Total Wine is unlike any other retail liquor store in Tennessee in that it was the first superstore operated by an out-of-state corporation to receive a liquor license despite the state’s longtime law requiring that licensees satisfy a two-year residency requirement.

Total Wine received its license after a federal district court in 2017 struck down Tennessee’s residency requirements for liquor wholesalers and retailers as a violation of the dormant commerce clause, the principle that the states may not enact laws discriminating against interstate commerce. A panel of the 6th U.S. Circuit Court of Appeals in Cincinnati affirmed the district court in a 2-1 decision last February; and a few months later, the Total Wine store in Knoxville opened its doors.

But the U.S. Supreme Court has agreed to hear an appeal by the Tennessee Wine and Spirits Retailers Association, which is defending the state’s residency requirement. If the court rules for the association and revives the residency requirement, the Total Wine superstore in Knoxville may become just one giant purveyor of cigars, soft drinks and snacks—but no liquor, assuming it could stay open at all.

THE ‘THREE-TIER SYSTEM’

The state retailers’ association argues that the 21st Amendment, ratified in 1933 to end prohibition, gives the states “broad latitude to regulate the retail sale of alcohol free from the constraints of the dormant commerce clause.”

“Tennessee’s durational-residency requirement is not subject to the dormant commerce clause because it is authorized by the [21st Amendment’s] core Section 2 power ‘directly to regulate the sale ... of liquor within’ the state,” the retailers association argues in a brief.

Because of ambivalence by the state, the Nashville-based association, which represents more than 500 liquor store owners across Tennessee, is carrying the ball in Tennessee Wine and Spirits Retailers Association v. Blair, which is scheduled for argument Jan. 16. The Tennessee Attorney General’s Office had issued two opinions in recent years concluding that the state’s residency requirements for liquor licenses likely violated the commerce clause. However, the office filed a letter with the Supreme Court in the case stating that the Tennessee Alcoholic Beverage Commission believes its residency requirements do not violate the commerce clause, but that the commission would not file its own merits brief.

The main requirement says that applicants must have resided in Tennessee for two years before applying. In addition, the state imposes a 10-year residency requirement to renew a license (which is good for just one year). For corporations, state law requires all of a company’s stock to be held by individuals who meet the residency requirements.

When Total Wine and another out-of-state applicant, the new owners of a longtime Memphis liquor store called Kimbrough Fine Wine & Spirits, sought licenses in 2016, the state retailers association informed the Alcoholic Beverage Commission that if the agency granted the licenses, the association “would immediately file suit ... asking a court to make a Tennessee agency follow current Tennessee law passed by the Tennessee legislature elected by Tennessee citizens.”

The commission’s then-director filed his own suit, seeking a declaration regarding the legality of Tennessee’s requirements. After the state association removed the suit to federal court, the district court struck down the durational-residency requirements.

The 6th Circuit panel agreed 2-1 that Tennessee’s two-year residency requirement violated the dormant commerce clause. The court considered the requirement in light of the Supreme Court’s 2005 decision in Granholm v. Heald, which struck down Michigan and New York laws that barred out-of-state wineries from making direct sales to consumers.

The high court had said that because those states’ laws involved “straightforward attempts to discriminate in favor of local producers ... the discrimination [was] contrary to the commerce clause and [was] not saved by the 21st Amendment.” But the justices also reasserted that the “three-tier system” of alcohol regulation by the states, in which there is separate licensure for producers, wholesalers and retailers, is “unquestionably legitimate.”

The 6th Circuit said Tennessee
could achieve its goals of oversight, management and control of licensed alcohol retailers by using nondiscriminatory means, such as requiring an out-of-state-based retailer to have a general manager who is a resident, and by requiring both in-state and out-of-state retailers to post a substantial bond.

Judge Jeffrey S. Sutton, dissenting over the two-year residency requirement, wrote that “state regulations of in-state distribution, even if facially discriminatory, are constitutional unless a challenger can show that they serve no purpose besides ‘economic protectionism.’”

All three members of the panel agreed that the 10-year residency requirement for license renewals and the corporate ownership provision did not pass muster, and the Tennessee retailers’ association did not appeal that part of the ruling.

‘FAMILY-OWNED BUSINESSES’

Just as the Granholm case was driven by changes in the economy that led to wineries seeking to sell directly to consumers, the Tennessee case reflects the rise in recent years of large chains of liquor superstores.

“This is really one of the last industries still dominated by family-owned businesses,” says Michael D. Madigan, a Minneapolis lawyer who has practiced alcohol-related law for more than 30 years. He acknowledges that chains such as Total Wine and consumers would not “enjoy the unprecedented choice and variety offered by the current regulatory system.”

Scott A. Keller, a Washington, D.C., lawyer who filed an amicus brief for American Beverage Licensees, a national association of package liquor stores, bars and taverns that also backs Tennessee’s residency rules, argues that in-state residency requirements allow states to better enforce all their liquor regulations.

“Can a state say that you must be an in-state wholesaler and retailer?” Keller asks. “If the court were to say otherwise, that would eviscerate the three-tier system we’ve had in place for decades.”

FINDING THE PROPER BOUNDARY

Carter G. Phillips, a veteran Supreme Court litigator with Sidley Austin who represents Total Wine in the case, says: “The core principle of the dormant commerce clause is that you shouldn’t balkanize the states. You should allow the free flow of commerce.”

He characterized the scope of the question before the court as modest.

“The consequences would be more severe if the court were to offer a holding that casts doubt on the three-tier system,” Phillips says. “But we’re not challenging the three-tier system.”

The Institute for Justice, an Arlington, Virginia-based public interest legal group that for years has been fighting certain state liquor regulations it views as economic protectionism, is representing the mom-and-pop Kimbrough liquor store, which a Utah couple, Douglas and Mary Ketchum, acquired. They originally sought to be licensed as out-of-state owners.

“The 21st Amendment does not trump the commerce clause,” says Michael Bindas, a senior attorney with the institute. The Ketchums moved to Tennessee two years ago, but Bindas says there are enough questions about how Tennessee’s residency requirements will shake out to leave uncertainty about the couple’s right to a retailer’s license over the long term.

“The more the court recognizes the nondiscrimination principle of the commerce clause, and the more it protects the rights of newly arrived residents of a state—like the Ketchums—to operate a business, the better it will be because consumers will have more choices.”

One thing seems clear: Some 85 years after the 21st Amendment was ratified, lower courts are still eager to get further guidance from the Supreme Court.

This past November, the Chicago-based 7th U.S. Circuit Court of Appeals revived a lawsuit over Illinois restrictions on shipping alcohol to consumers in that state from out-of-state retailers.

The court acknowledged that the type of alcohol regulation at issue in Lebamoff Enterprises Inc. v. Rauner was different than the residency requirements in the Tennessee case, but it said the Supreme Court’s decision in the latter may provide some relevant guidance.

“In recent years, there has been considerable litigation over the proper boundary between lawful exercise of 21st Amendment powers and unlawful economic protectionism,” the 7th Circuit said, adding that the lines the Supreme Court has drawn thus far “are sometimes difficult to follow.”
Da Vinci’s Code

Lawyers can draw valuable lessons from the master in Walter Isaacson’s *Leonardo da Vinci*

By Philip N. Meyer

With winter’s chill now in full force, I recall sitting in a beach chair in late August on a spit of sand on the rocky Maine coast reading Walter Isaacson’s marvelous book *Leonardo da Vinci*. I have been completely absorbed by the book, and it seems as if I have not lifted my head from the pages since midday. When I finally look up, the sun is setting beneath the clouds behind me. I listen to the song of the late-summer cicadas set against the lap of the waves. Shadows spread out over the ocean, and the sunlight ducks below the layer of clouds and cuts in perpendicularly, skimming across the surface of the ocean. As I read *Leonardo* and view the reproductions of his masterpieces, I seem to have a heightened visual sensitivity, almost as if nature is attempting to convey some unspecified meaning in its own shifting images.

Everything changes as it moves, and—as if adhering to Leonardo’s sfumato technique—borders between sky, surface and shadow shade gradually into each other. Leonardo was certainly right that there are no clear lines of separation in either nature or in art. Unfortunately, however, I am a lawyer, not an artist. My professional identity is built upon understanding and adhering to rules and boundaries. And the emotional meaning of the unfolding scene before me is elusive; it needs the hand of an artist, purposely shaping the imagery into an apparent narrative meaning.

I write out notes and observations in longhand on a legal pad as I read through the book.

PICTURES THAT TELL STORIES

I have loved Isaacson’s previous books on Steve Jobs, Einstein and Ben Franklin. These books provide compelling biographical stories. They are also intellectual biographies that reveal the genius of their subjects in ways that general readers—including lawyers—can comprehend and appreciate.

But the new book is something more. It is a gorgeous volume replete with reproductions of Leonardo’s masterpieces—a stunning and visually compelling book. The pictures are abetted by Leonardo’s own words and illustrations drawn from more than 7,200 remaining pages of his codex (notebooks), supplemented with Isaacson’s clear-headed and jargon-free explanations of Leonardo’s art and his scientific, anatomical and naturalistic revelations.

The book is a visual primer of sorts and suggests how Leonardo seemingly discovered wholecloth modernity in visual representation, articulating incorporating foundational “principles” of narrative composition into his story paintings.

WHY THE ARTIST MATTERS TO LAWYERS TODAY

We are, I believe, now rapidly traveling “back to the future.” We are entering what communication theorist Walter Ong predicted in the mid-20th century would be a return to “post-literacy.” In Leonardo’s own time of the early Italian Renaissance, the birth of the printing press and a new print-based technology was transformative in science, art and the humanities. The new technologies of print soon gave birth to transformative forms of storytelling, including the novel, our predominant narrative form for complex storytelling well into the second half of the 20th century.

In our own time, however, the proliferation of new visual and auditory technologies have shifted us away from print, away from printed stories anyway, especially the complex narratives of the novel. In so many ways and for so many of us, we have returned to a more unmediated visuality and orality—the images and sounds dominant in movies and television and media-based technologies. Soon, there will be sense-based simulations, too.

Lawyers, whose practice is in large measure a storytelling practice, need to better understand the importance of visual literacy—how to read and construct complex images, supplementing analytical and critical reading skills.

To become more effective practitioners of visual storytelling, we can draw upon lessons from other master-practitioners of visual narrative crafts. And who better than Leonardo to teach us? Leonardo, who married his artistic genius with an equally meticulous and endlessly recursive exploration of visual storytelling, reflecting analytically upon how his art was informed by nature, theater, science and anatomy. Leonardo, who perpetually tested his art against “experimental” data obtained firsthand.
LOOKING AT ‘LADY WITH AN ERMINE’

As I surf through the reproductions in the book, I stumble onto one of Leonardo’s earlier Milan portraits—“Lady with an Ermine.” This portrait of Cecilia Gallerani, mistress of the de facto Duke of Milan, is not as famous as the “Mona Lisa,” although Cecilia shares the Mona Lisa’s inscrutable smile. She is a remarkable lady, nevertheless. To me, Leonardo’s portrait of this young woman conveys and predicts the mystery, allure and beauty characteristic of modern iconic movie stars (e.g., Audrey Hepburn). Leonardo’s composition also purposely suggests the motion of Cecilia’s thoughts; animating a complex narrative in which the viewer becomes complicit and an active participant. It is, for me, a theatrical or cinematic storyline: I follow Cecilia’s dramatic attention, intentionally directed off stage. Who is she looking at? A lover, perhaps? She strokes the pet ermine in her lap with sensually elongated fingers. Her profoundly intelligent eyes mirror her attention—and so do the ermine’s!

There is precision in the lighting, in the theatrical posing and posture of Cecilia’s body, in the meticulous attention to details of her character; and in her expression and her focus and her physicality all emphasized by the dramatic staging. Leonardo’s Cecilia becomes truly a life force; a modern character—alluring and unrepentant and ironic, too.

Her picture tells a story that intimates her thoughts and simultaneously reveals the complexity of her character. Leonardo’s painting suggests a frame in the movement of a complex visual and cinematic story. More than anything else, Leonardo is a visual storyteller, whose images inevitably point to something beyond themselves, conveying meanings that move viewers emotionally in ways that could not possibly be anticipated. I wonder whether lawyers can attempt similar work with images, just as they often try to do with words.

LESSONS FROM LEONARDO

In his last chapter, Isaacson’s exploration of Leonardo’s biography and art and science becomes, curiously, a self-help book of sorts. Isaacson formulates a list of lessons of what the artist teaches us today, including: Be curious, relentlessly curious. Think visually. Retain a childlike sense of wonder. Observe. Start with the details. See things unseen. Respect facts. Indulge fantasy. Take notes on paper. It is as if he is attempting to make his open-ended exploration of Leonardo’s genius specifically relevant for his general readers, to provide a list of convenient “takeaways.”

So what are my storytelling lessons for lawyers? Trust your perceptions and intuitions, just as Leonardo did. Always keep your storyline in mind and employ analytical skills and artistic talents in service of it, just like Leonardo. Supplement intuitive perceptions with meticulous investigation and research, and be ready to give up ideas that are not working. Fit your observations into narrative frames without manipulation or distortion. Think like an artist; creativity and inspiration are important in legal storytelling as in Leonardo’s paintings, and so is revision and endless modification. Learn how to read and interpret surfaces and images, and trust your assessments of “character.” And understand how images strategically convey unfolding stories that inevitably pull an audience toward meanings that are often more powerful than words.

WARM REFLECTIONS

The book remains open in my lap. My lessons are trivial compared to the genius and majesty of Leonardo’s paintings and work, and the eloquence of his own codex reflections and observations. I urge lawyers interested in the now-crucial subject of visual storytelling to read Isaacson’s book, relish Leonardo’s art and share his principles of visual storytelling practice embodied in his art and science. Some new appreciation of Leonardo’s genius may rub off on you, as it did for me. Also, enjoy Isaacson’s rendering of Leonardo’s remarkable biography; Leonardo as an outsider, an illegitimate son who trusted his creativity and genius and led a fearless life of professional collaborations and personal engagement with the events and characters of his time. The fullness of his life informed his art and contributed to his scientific and aesthetic discoveries, too.

I recall that August day as the sun set and it was too dark to read. I packed my folding beach chair and returned to the car. My cellphone was vibrating. After sharing the afternoon with Isaacson’s Leonardo, I returned to the world of screens and surfaces and shards of endless spinning images. We still have much to learn from Leonardo.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.

“LADY WITH AN ERMINE,” circa 1490 by Leonardo da Vinci, is a portrait of Cecilia Gallerani, mistress of the Duke of Milan.
Plain Talk
A conversation on simplicity with Rudolf Flesch
Bryan A. Garner

Among the most innovative writing specialists of the 20th century was Rudolf Franz Flesch (1911–1986), who immigrated to the United States from Austria in 1938. Having already earned a doctorate in law from the University of Vienna, he enrolled in Columbia University and earned a PhD in library science. While working at Columbia's Reading Laboratory, Flesch became interested in the burgeoning field of reading comprehension.

Seeking to bring the scientific method to bear on readability, Flesch advocated a simple and direct style of writing: short paragraphs, short sentences, few prefixes and suffixes, and relative informality. He developed two measures for assessing readability: (1) reading ease and (2) human interest.

Although some criticized his insistence on plain style, Flesch's books proved enormously popular and influential. Since his death, variations on his readability formulas have been integrated into all sorts of software (such as Microsoft Word) to assess the quality of prose. Even today, lawyers have much to learn from Flesch.

As I've done with many long-gone authors, I sat down recently to interview Flesch about two of his best-selling books from the 1940s: The Art of Plain Talk (1946) and The Art of Readable Writing (1949). His answers are (with minor adaptations) verbatim.

Garner: In your first book, The Art of Plain Talk, you develop the idea that writers and speakers are always guessing about whether they're getting their points across.

Flesch: There's nothing more important to you as a speaker or writer than that your audience understand you; and on this point you can never be sure.

Garner: That's unfortunate, isn't it?

Flesch: It means you may never learn how to make yourself better understood. As long as you're just guessing, you have no way of knowing whether your guess was good or bad, and whether you're getting better or worse.

Garner: You try to teach people “plain talk.” How do you define plain talk?

Flesch: Plain talk is mainly a question of language structure and of spacing your ideas. If you don't carry simplification too far into primer style, your readers will not only stay with you, but they'll read you faster, enjoy it more, understand better and remember longer. Every single one of these statements can be proved by scientific evidence.

Garner: I know you brought empiricism to bear in your work in analyzing writing styles. You've been particularly hard on lawyers.

Flesch: They're the most notorious long-sentence writers. The reason is that they won't let the reader escape. Behind each inerminable legal sentence seems to be the idea that all citizens will turn into criminals as soon as they find a loophole in the law; if a sentence ends before everything is said, they will stop reading right there and jump to the chance of breaking the rule that follows after the period.

Garner: But isn't that questionable psychology?

Flesch: What is certain is that legal language is hard even on lawyers.

Garner: What's the best advice on writing, then?

Flesch: It's what the Fowler brothers said in The King's English (1906): Before allowing yourself to be tempted by the showier qualities, try to be direct, simple, brief, vigorous and lucid. Prefer the familiar word to the far-fetched, the concrete word to the abstract and the short to the long.

Garner: That yardstick would be pretty unkind to most legal writing today. I'm thinking especially about federal regulations.

Flesch: If we analyze the Federal Register, it is obviously designed to make reading as difficult as possible. The sentences simply never stop, colloquial root words are carefully avoided, and there is never a hint of who is talking to whom. The Federal Register is not supposed to be read at all. It simply prints things so that someday, somewhere, some government official can say: “Yes, but it says in the Federal Register...” All this government stuff, in other words, is not reading matter but prefabricated parts of quarrels.

Garner: You're especially critical of rules that begin with unless and then stack lots of negatives.

Flesch: Try to read and understand, “Unless you don't disapprove of saying no, you won't refuse.” Here it is in Federalese: “Unless the Office of Price Administration or an authorized representative thereof shall, by letter mailed to the applicant within 21 days from the date of filing the application, disapprove the maximum price as reported, such price shall be deemed to have been approved, subject to nonretroactive written disapproval or adjustment at any later time by the Office of Price Administration.”

Garner: That's certainly opaque.

Flesch: What does that mean for an ordinary person who has reported a ceiling price? Let's see: Suppose your price is not so high that OPA would disapprove of it.
Then OPA would simply not answer, and if 21 days go by without an answer, you would know that your ceiling is all right. All you have to do is send in your application and sit tight for three weeks. So here is what the Federal Register says between the lines: “You must wait three weeks before you can charge the ceiling price you applied for. OPA can always change that price. If they do, they will write you a letter.”

Garner: That’s stunningly simpler.

Flesch: Whenever the government says something in a negative form, turn it around to see what it means. For example: “Sale at wholesale means a sale of corn in less than carload quantity by a person other than one acting in the capacity of a producer or country shipper to (1) any person, other than a feeder; or (2) a feeder in quantities of 30,000 pounds or more.”

Garner: I assume you’ve reworked that regulation without the two other thans.

Flesch: Yes: “A sale at wholesale is a sale of less than a carload of corn by anyone except a producer or country shipper. But a sale of less than 30,000 pounds to a feeder is a sale at retail.”

Garner: Impressive.

Flesch: Underneath the particular features of the nasty, or official, style, there are all the stock elements of bad and unreadable style, and you are back in the familiar game of breaking up worm-sentences, substituting help for facilitate, writing you instead of “the persons named in Appendix 1,” making “upon consideration” into “we have

“Behind each interminable legal sentence seems to be the idea that all citizens will turn into criminals as soon as they find a loophole in the law.”
—Rudolf Flesch

Garner: Doesn’t seem too bad. How would you translate that?

Flesch: “Ultimate consumers are people who buy eggs to eat them.”

Garner: That’s certainly clearer. It’s so direct that many might fear you’ve lost meaning there.

Flesch: The clauses with the word generally in them don’t belong in a legal definition. And eat is better than use for consumption as food. And let’s just say people instead of a person or group of persons.

Garner: I suppose you’re quite right. In your books, you conceive of language as being essentially democratic.

Flesch: Language is the most democratic institution in the world. Its basis is majority rule; its final authority is the people. If the people decide that they don’t want the subjunctive anymore, out goes the subjunctive; if the people adopt okay as a word, in comes okay. In the realm of language, everybody has the right to vote; and everybody does vote, every day of the year.

Bryan A. Garner, president of LawProse Inc., is the author of Legal Writing in Plain English and more than 20 other law-related books. His most recent is the fourth edition of The Redbook: A Manual on Legal Style (2018).

“What is certain is that legal language is hard even on lawyers.”
—Rudolf Flesch
Practice

TO (SECRETLY) TAPE
OR NOT TO TAPE

IS RECORDING OTHERS LEGAL, AND IS IT ETHICAL?

By David L. Hudson Jr.

"What kind of a lawyer would tape a client?" tweeted President Donald J. Trump upon learning his former counsel Michael Cohen had taped a 2016 conversation between the two of them that dealt with many subjects, including payments to a former Playboy model who alleged a past sexual liaison with the president.

In a different tweet, Trump wondered, "Even more inconceivable that a lawyer would tape a client—totally unheard of & perhaps illegal."

A lawyer taping a client may be illegal in some circumstances, but it certainly is not unheard of. In fact, lawyers have surreptitiously tape-recorded conversations with witnesses, potential party opponents and clients.

Whether a secret recording is illegal and unethical depends on where it takes place and why.

The first question to address is whether state wiretapping laws have been violated and whether the attorney secretly recorded the conversation in a state with a one-party consent or two-party consent law. In many states, a person can secretly record a conversation as long as one party knows of it, and that one party can be the recorder. These are called "one-party consent" states. Other states are two-party or "all-party consent" states. In these jurisdictions, all parties to the conversation must know a recording is taking place.

State laws vary quite dramatically in this area, explains Hartford, Wisconsin-based attorney Gary L. Wickert.

"Currently, 38 states and the District of Columbia have adopted a 'one-party' consent requirement. Nevada has a one-party consent law, but Nevada's Supreme Court has interpreted it as an all-party consent law," Wickert notes. "Eleven states require the consent of everybody involved in a conversation or phone call before the conversation can be recorded. Those states are California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Pennsylvania and Washington." (Vermont currently has no statute.)

But even if secretly recording another person is legal—as it would be in a one-party state—attorneys must also consider whether such recordings are ethical. ABA Model Rule of Professional Conduct 8.4(c) states that it is professional misconduct for an attorney to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation." Furthermore, a paramount duty undergirding professional responsibility is that attorneys must follow a duty of loyalty to their clients.

"In all-party consent states, it would generally be unlawful as well as unethical for an attorney to secretly tape a client," says Carol Bast, a professor of legal studies at the University of Central Florida. "However, even some all-party consent states make an exception that permits secret taping to gather evidence of criminal activity."

A TALE OF TWO OPINIONS

In 1974, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 337. The committee concluded that "no lawyer should record any conversation, whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." The only exception was for the U.S. attorney general or state or local prosecutors who "might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements."

However, in 2001, the ABA changed its position. Formal Opinion 01-422 reflected that the issue often depends on state wiretapping laws.

The opinion noted that in those states that prohibit recordings without the consent of all parties, a lawyer could be subject to liability for secretly recording a client. "A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both," the opinion reads.

Thus, Opinion 01-422 cautioned that "a lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs."

And even if a surreptitious recording does not violate state law, it may still be unethical. In those instances, the committee was divided on whether such recordings violated the Model Rules.

But where a client was concerned, the committee was "unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded before recording such a conversation."

However, the committee did not go so far as to say that all secret recordings of clients were unethical. Instead, the opinion says it is not unethical for lawyers to secretly tape clients in two situations. The first is when "the lawyer has no reason to believe the client might object," and the second is when "exceptional circumstances" exist.
“Exceptional circumstances might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality,” Opinion 01-422 reads.

“For example, there is no ethical obligation to keep confidential plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved.”

EXCEPTIONAL CIRCUMSTANCES

Legal experts generally agree with the approach taken by the ABA in its 2001 formal ethics opinion. “The committee’s conclusion is that for an attorney to secretly tape a client is inadvisable,” says Bast, whose 2008 article “Surreptitious Recording by Attorneys: Is It Ethical?” was published in the St. Mary’s Law Journal. “However, the committee did recognize exceptional circumstances in which it might be permissible for an attorney to secretly tape a client. These exceptional circumstances include a conversation in which a client discloses a plan to commit a serious crime.”

But experts note that the exceptional circumstances requirement can set up a chicken-and-egg scenario, leaving room to question whether the decision to record was ethical or not.

“It may be difficult to predict in advance of taping that the conversation will involve an exceptional circumstance,” Bast notes.

The key question, according to professor Stephen Galoob, who teaches professional responsibility at the University of Tulsa College of Law, is whether the attorney’s secret recording violates the fundamental duty of loyalty owed to a client.

“There are at least two ways that an attorney’s recording her client could violate the duty of loyalty,” Galoob says. “First, the recording might increase the risk that the client’s confidences will be betrayed. The idea here is that the duty of loyalty not only governs a lawyer’s actual behavior but also the possible results of that behavior. If a lawyer creates an unnecessary risk on behalf of the client, then the duty of loyalty is violated even if that risk never materializes. In the fiduciary context, the irresponsible risking is the wrong.”

Galoob explains that when a lawyer records a client, it increases the chances of inadvertent disclosure or “intentional disclosure, in Cohen’s case” of a client’s confidences.

For example, Galoob says Cohen well may have violated a duty of loyalty to Trump: “Even if Cohen didn’t plan to betray Trump at the time he recorded the conversations, I think there’s a sufficient basis for saying that he violated the duty of loyalty based on the risks that he created that such conversations would be disclosed in the future.”

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I woke up to find these words in an email: “He committed suicide.”

Suicide: the action of killing oneself intentionally. I stood, staring at my iPhone as the word suicide repeated over and over in my head. There were so many emotions that washed over me all at once: anger, fear, regret, remorse, grief—and others that I have no words for.

This is the first time I was touched by suicide. As though I was on autopilot, I showered, got dressed and went to work. It seemed strange that time continued to pass and all of my day’s obligations still existed despite this tragedy.

Later that day, I searched for all the emails we exchanged and read each one. I looked at the words said and unsaid. I wanted to find the implied words; the words I should have heard. I went to Google, typed in his name and read through all 14 pages of Google results. I read through his Facebook posts. I don’t know exactly what I was looking for or why I was doing this, but I did it. I couldn’t escape the feeling that I must have missed something. Maybe if I found some clue that he was reaching out for help, I could go from grieving to being angry at myself.

After Justin died, suicide went from an abstract idea to reality. A few years later, when I fell into a deep depression, I caught myself thinking about suicide as a way to escape. Fortunately, with a combination of therapy and medication, it got better.

WHY DO LAWYERS COMMIT SUICIDE?

To fully understand the conundrum of suicide within the legal profession, it is important to assess factors that can lead to depression. Lawyers are 3.6 times more likely to suffer from depression than nonlawyers, according to the American Psychological Association. Substance abuse rates within the legal profession are also much higher than for the general population. Clinical depression and substance abuse are highly correlated with suicide rates. The legal industry has the 11th-highest incidence of suicide among professions.

According to Alex Yufik, clinical rehabilitation coordinator for the State Bar of California’s Lawyer Assistance Program, common contributing factors for lawyer suicide include depression, anxiety, job stress, unfulfilled expectations and a perceived sense of failure.

According to Rachel Fry, a clinical psychologist in Birmingham, Alabama, who often works with lawyers, “Lawyers tend to score higher in pessimistic thinking, which often results in higher success rates and becoming a better lawyer. However, this type of thinking is also highly correlated with depression.” What makes you a better lawyer can also predispose you to depression.

Additionally, lawyers are expected to work—and be successful—in adversarial situations. They have unpredictable schedules, and they often lack tools to deal with stress. All of this predisposes them to chronic stress and/or depression. Lawyers are also expected to be the ultimate problem-solver. Fry says she often hears lawyers say that the expectation is that they are “a superhero” with no room for error or humanness. Furthermore, the mental health stigma often discourages identification, discussions and access to care. Chronic stress and depression often trigger unhealthy behaviors such as substance abuse and personal problems, which can sometimes result in suicide or suicidal ideations.

WHAT ARE SOME WARNING SIGNS?

According to Fry, the warning signs of suicide aren’t always clear. Some individuals outwardly share their suicidal thoughts or plans, while others might keep their intentions secret. The main thing to look for is changes in patterns—someone acting differently, even if it feels
insignificant. Changes in patterns can include excessive sadness or moodiness; expressing helplessness or feeling defeated—that their circumstances can’t improve in the future.

Examples could include someone losing their sense of humor, someone continuing to be fully engaged but becoming more agitated and/or drinking more. While some of these signs mirror depressive symptoms, it is sometimes difficult to determine when the line shifts from depression to suicidal thinking, especially if someone is not seeing a professional.

Some obvious signs include someone talking about suicide, death or dying; seeking access to firearms or pills; giving away important possessions; experiencing relief or sudden improvement in symptoms and telling people goodbye for seemingly no reason. The person may also exhibit sudden calmness after making a decision to end his or her life.

Some more subtle signs can include withdrawing from family and friends, experiencing mood swings, feeling hopeless or trapped, increased substance use and/or experiencing sleep changes.

Often these changes can be brought on by a recent trauma or life crisis, including the death of a loved one, a divorce or breakup or a recent trauma or life crisis, including the experiencing sleep changes.

According to Yufik, approximately 50 to 75 percent of those considering suicide will give some warning sign. Every threat of suicide should be taken seriously.

WHAT IF YOU FEEL A COLLEAGUE IS AT RISK?

If you suspect a colleague is at risk for suicide, Fry says, remind yourself that regardless of the concerns you might have—offending them, overstepping a line or questioning if you will know what to do—there is some reason you are seeing a red flag. Even if your instincts are to avoid the situation, you might be the only one noticing and thus the only one with the opportunity to reach out to that person. While it can be uncomfortable to have the conversation, it is worth taking the time. It can play an important role in preventing suicidal behavior.

Here are some guidelines to remember when talking with someone who might be at risk for suicide.

• It is important to be direct, listen, refrain from judgment, remain calm and not agree to be sworn to secrecy.

It is important to take action (remove a gun or pills, encourage them to get to a safe location) and to assist them in obtaining additional help (crisis line, emergency room or another trained professional). Many people are afraid that asking someone if they have suicidal thoughts will make them worse; this is not the case. Talking with them can plant a seed and possibly create a safe place for them to share their experience.

WHAT CAN LAW FIRMS DO?

Law firms should take an active role in suicide prevention. Law firms traditionally have not viewed well-being as an important part of a firm’s existence and reputation. In fact, it is often treated as antithetical to the billable hour and prestige. This is shortsighted. The lack of transparency about suicide continues to build a stigma in our profession. There is negative bias against hiring mental health professionals or implementing wellness programs in law firms.

Firms have a unique opportunity to eradicate this stigma and to make wellness a part of their overall firm culture. Such changes are copacetic with the financial strength and reputation of the firm. And those firms that fail to confront this reality are going to suffer in the long run for being afraid to address a known lawyer culture problem. In August, the ABA Working Group to Advance Well-Being in the Legal Profession launched the Well-Being Toolkit for Lawyers and Legal Employers to help lawyers with substance-use disorders and mental health issues, and in the next month launched its Well-Being Pledge Campaign.

By early December, 42 law firms and one corporate legal department had signed the pledge.

Additionally, it is important that lawyers and staff are aware of mental health services and benefits available (coverage and access to counseling), so they can be accessed easily if needed. At the very least, there needs to be a dialogue within the firm regarding mental health, resources available and an identified person (whether it is a partner, HR person or mental health professional) who can help the firm figure out the best course of action depending on the situation.

It’s important to remember that while not every lawyer may develop a mental illness, each of us must care for our own mental well-being.

Jeena Cho consults with AmLaw 200 firms, focusing on strategies for stress management, resiliency training, mindfulness and meditation. She is the co-author of The Anxious Lawyer and practices bankruptcy law with her husband at the JC Law Group in San Francisco.

The Well-Being Toolkit for Lawyers and Legal Employers is at ABAJournal.com/toolkit. The National Suicide Prevention Lifeline is (800) 273-8255. A directory of LAP programs by state is at ABAJournal.com/lap.
Some law schools have started using virtual reality to augment their curricula. But legal, technical and financial obstacles stand in the way of widespread adoption by Anna Stolley Persky

This past summer at the University of North Texas Dallas College of Law, a small team of law students and school employees created a virtual reality crime scene. There was blood made of ketchup, a stapler, handprints and of course, a dead body. Using a 360-degree camera, the team staged an imaginative crime scene.

“It was an experiment at the request of a criminal law professor,” says Jennifer Wondracek, director of legal educational technology at the school. “We did it low-budget because we were trying it out.” The professor liked it, Wondracek says, and asked for another that could be used to supplement classroom material.

In fact, Wondracek says her department is ready to do a lot more, including re-creating actual crime scenes for the school’s criminal law classes.

And perhaps it won’t stop there.

Virtual reality technology has the potential to transform the law school experience. “We are at the beginning of what I think is going to be a revolution in the way we train our students,” Wondracek says. “We are right at the edge with virtual reality technology in both the law school setting and the legal profession.”

Virtual reality involves the use of computer technology to create a simulated environment, immersing a user in a 3D experience. In the past few years, the legal industry has begun slowly experimenting with VR technology—using it, for example, to re-create crime and accident scenes.

However, it might take a while before VR establishes a
foothold in most law schools.

At this point, only a handful of schools are experimenting with VR and augmented reality technology, and nobody yet knows exactly how it can best be integrated into the curriculum, says Ayyoub Ajmi, digital communications and learning initiatives librarian at the University of Missouri-Kansas City School of Law.

“The technology was developed before we knew we had a need for it,” Ajmi says. “What do we do with this technology now that we have it? We are in the early stages of figuring that out.”

In addition, many law schools appear reticent to even devote an initial investment in VR technology. One reason is that, in general, law school administrators and faculty have a limited budget and other favored projects they wish to fund.

Simply put, Wondracek says, many law schools don’t prioritize being on the cutting edge of technology.

“Law schools tend to wait for technology to develop a bit more before investing in it,” Wondracek says.

That being said, an increasing number of law schools are offering online programs that could benefit from virtual and augmented reality technology, says Fredric Lederer, a law professor and the founder and director of the Center for Legal and Court Technology at William & Mary Law School in Williamsburg, Virginia.

“As we begin to move law school online, one of the great concerns about online instruction is that we lose all the wonderful things of being physically present in class,” Lederer says. “But what if, using this technology, we eventually have a virtual reality classroom in which people participate together? Maybe that could allow online instruction in which students have the ability to see and interact with other students.”

**LAW SCHOOL RETICENCE**

Some law schools experimenting with VR technology are focused on creating videos that can be used to supplement classes. In doing so, they are using 360-degree cameras to create immersive experiences.

Panoramic imaging has existed for a while, Ajmi says, but the technology used to be prohibitively expensive. In recent years, the technology, including cameras, has gotten more affordable and therefore more accessible.

In general, law schools wanting to invest in VR technology can now do so for considerably less than in years past. The necessary headsets range in price but now can be purchased for as low as $20. Software apps can be accessed on student phones.

“Now, with an investment of less than $1,000, schools can provide students with a decent quality virtual reality experience,” Ajmi says. But he admits that even getting law schools to invest $1,000 in experimental technology can be challenging.

Kenton Brice, director of technology innovation at the University of Oklahoma College of Law, believes the first step is piquing administrative interest. After that, you have to convince faculty that the investment is worthwhile.

“You need their buy-in, or it won’t work,” Brice says.

In 2016, the University of Oklahoma launched the Oklahoma Virtual Academic Laboratory to provide students with technologically advanced immersive education experiences. The law school has followed suit, buying its own VR headsets and computers, Brice says.

“We are right at the edge with virtual reality technology in both the law school setting and the legal profession.”

—Jennifer Wondracek

“Part of the process has been working with the faculty to create content,” he says. “That has helped for faculty to reach an understanding that this is not a disruptive technology but one that can complement a curriculum, if you have the right content.”

Another concern is maintaining the security of student information as required under the Family Educational Rights and Privacy Act.

“The elephant in the room is student privacy,” Ajmi says. “As virtual reality goes online, the question will be: What happens to the data when it goes to a third party? The privacy and security of student information will be big issues.”

In addition, administrators may be reticent to purchase VR equipment because they know their faculty and law students are not particularly knowledgeable or adept when it comes to technology, much less able to get the most out of the equipment.

Further, many law students often have “little or no interest in technology,” Lederer says. “That creates a challenge,” he admits. “But what are they going to do when they have to use technology in their practice?”

In fact, lawyers have an obligation to know the benefits and risks associated with using the latest technology. In 2012, the American Bar Association modified its Model Rules of Professional Conduct to require lawyers to stay abreast of changes in the practice of law, including the use of new technology.
Business of Law

“Virtual reality is becoming an important technology,” Lederer says. “It would be helpful for students to know something about it before it hits you over the head in the working world.”

DRONES AND PHONES

Law schools experimenting with VR are piloting a variety of projects. Brice, at the University of Oklahoma’s law school, found a way to integrate the technology into the curriculum by partnering with the law school’s Oil & Gas, Natural Resources and Energy Center to create a 360-degree video of a water reclamation site in West Texas. Brice used 360-degree cameras tethered to drones to capture the site.

“You could tell them what water reclamation is and what it looks like, or you can have them fly around a water reclamation site and they can see it for themselves,” Brice says. “By doing that, we’ve created a context for what they are learning that they won’t get out of a textbook.”

The project forced Brice to get out of his comfort zone.

“I had to learn about video editing and piloting drones,” Brice says. “These are things I never thought I would be learning how to do, but I did, and now I have new skills.”

In addition, the school is using “Clouds over Sidra,” an immersive video about a Syrian refugee camp, with students in the law school’s human rights class.

“We wanted to motivate students in the human rights class,” Brice says. “The video provides an experience that students otherwise wouldn’t get.”

In addition to creating crime scenes, students at UNT Dallas College of Law have been pilot testing an eLearning Studios VR public speaking app for improving student trial skills.

To use the app, students only need a smartphone and a VR headset, Wondracek says. The app allows students to practice their advocacy skills within a realistic environment to help them prepare for advocacy tournaments. The American Association of Law Libraries provided the school with a $2,500 award to fund the project.

Wondracek says her goal is to eventually create a VR courtroom in which students could practice opening and closing arguments.

“We would like our students to learn how to make their arguments when there are distractions, like a jury shifting around or a door opening and closing,” Wondracek says. These are all things that throw beginning attorneys.

Meanwhile, students at the University of Missouri-Kansas City School of Law are using 360-degree cameras to record themselves conducting voir dire, Ajmi says.

“It’s a way that students can self-critique and faculty can critique,” Ajmi says. “Right now, it’s being used as a simple assessment tool.”

Ajmi adds that he wants the law school to go beyond creating “spherical videos” to true VR content that will be used as part of the law school curriculum, like virtual courtrooms.

However, Ajmi has noticed students are not exactly climbing over each other to use the technology the school already offers.

“Theyir schedules are full, and they have no time to learn the equipment,” says Ajmi. “In general, law school faculty focus on the traditional method of learning—the Socratic method. We should encourage students to be familiar with the technology by embedding it into the teaching.”

PHOTOS COURTESY AYYOUB AJMI; BY HUGH SCOTT/THE UNIVERSITY OF OKLAHOMA

“Now, with an investment of less than $1,000, schools can provide students with a decent quality virtual reality experience.”

— Ayyoub Ajmi

“You could tell them what water reclamation is and what it looks like, or you can have them fly around a water reclamation site and they can see it for themselves. By doing that, we’ve created a context for what they are learning that they won’t get out of a textbook.”

— Kenton Brice

By Ayyoub Ajmi

Parminder Khurana of the University of Texas at Austin has been collaborating with the law school’s oil and gas, natural resources, and energy center to create a 360-degree video of a water reclamation site in West Texas. The video was part of a pilot project to use VR technology in criminal proceedings. Khurana said students had to learn about video editing and piloting drones.

“By doing that, we’ve created a context for what they are learning that they won’t get out of a textbook,” said Kenton Brice, an M.A. student in the law school’s human rights program.

Brice said he was forced out of his comfort zone by the project. He had to learn about video editing and piloting drones. He added that he now has new skills.

“I had to learn about video editing and piloting drones,” Brice said. “These are things I never thought I would be learning how to do, but I did, and now I have new skills.”

In addition, the school is using “Clouds over Sidra,” an immersive video about a Syrian refugee camp, with students in the law school’s human rights class.

“We wanted to motivate students in the human rights class,” Brice said. “The video provides an experience that students otherwise wouldn’t get.”

In addition to creating crime scenes, students at UNT Dallas College of Law have been pilot testing an eLearning Studios VR public speaking app for improving student trial skills.

To use the app, students only need a smartphone and a VR headset, Wondracek said. The app allows students to practice their advocacy skills within a realistic environment to help them prepare for advocacy tournaments. The American Association of Law Libraries provided the school with a $2,500 award to fund the project.

Wondracek said her goal is to eventually create a VR courtroom in which students could practice opening and closing arguments.

“We would like our students to learn how to make their arguments when there are distractions, like a jury shifting around or a door opening and closing,” Wondracek said. These are all things that throw beginning attorneys.

Meanwhile, students at the University of Missouri-Kansas City School of Law are using 360-degree cameras to record themselves conducting voir dire, Ajmi said.

“It’s a way that students can self-critique and faculty can critique,” Ajmi said. “Right now, it’s being used as a simple assessment tool.”

Ajmi added that he wants the law school to go beyond creating “spherical videos” to true VR content that will be used as part of the law school curriculum, like virtual courtrooms.

However, Ajmi has noticed students are not exactly climbing over each other to use the technology the school already offers.

“Theyir schedules are full, and they have no time to learn the equipment,” said Ajmi. “In general, law school faculty focus on the traditional method of learning—the Socratic method. We should encourage students to be familiar with the technology by embedding it into the teaching.”

PHOTOS COURTESY AYYOUB AJMI; BY HUGH SCOTT/THE UNIVERSITY OF OKLAHOMA
Starting from Scratch
As the University of California at Irvine School of Law prepares to mark its 10th anniversary, those who helped build it reflect on its first decade

By Stephanie Francis Ward

While other law schools have experienced significant drops in both class size and median LSAT scores, the University of California at Irvine School of Law has bucked both of those trends.

UCI, which started its law school from scratch 10 years ago, has grown enrollment from 60 to 514 students while its median LSAT has never dipped below 162.

That was largely possible thanks to supportive university presidents and chancellors as well as a talented admissions staff who all understood that creating a diverse student body brings academic prestige, UCI Law Dean L. Song Richardson says.

“What makes us unique is that we truly don’t measure ourselves against what others are doing. We focus on how can we be where legal education is going and not where it has been,” says Richardson, a criminal law professor who took over in 2017 after founding Dean Erwin Chemerinsky left to lead the University of California at Berkeley School of Law.

“It was clear from the chancellor and provost that what they wanted was a top law school from the very beginning,” Chemerinsky says. “My experience at UCI was better than one could have ever imagined.”

That sentiment may seem surprising in light of the frosty reception he got when he arrived at UCI’s Orange County campus more than 11 years ago. After signing his UCI contract in September 2007, the school voided it a week later, reportedly under intense pressure from Orange County’s conservatives who didn’t want a well-known liberal in their midst.

For much of 2007, Chemerinsky focused on putting together the law school and fundraising while still teaching at Duke. By 2008, founding faculty was in place, and they worked with Chemerinsky as he continued to focus...
Leading the Way
Inspired by Europe’s sweeping GDPR, California’s new data privacy law could change how companies do business in the Golden State
By Jason Tashea

This past November, Californians were going to have the opportunity to vote on a sweeping data privacy ballot initiative. The language was set, the signatures were collected, but the initiative never made it to the ballot.

A creation of Alastair Mactaggart, a wealthy Bay Area real estate developer, the initiative aimed to bring accountability to the data economy. “I wanted to start to address how we as consumers can get control of our information,” says Mactaggart, who spent more than $3 million on the campaign.

While the initiative polled well with the public, there was significant criticism.

“We were strongly opposed to it,” says Kevin McKinley, director of California government affairs for the Internet Association, an industry group. He says the bill was unworkable because it was written with “far-reaching definitions that had no grounding in law in America or Europe.”

Legislators also had misgivings. California ballot initiatives, if passed, are hard to amend. With a June 29 deadline to take the initiative off the ballot, a trade was proposed: If the legislature could pass a data protection law, Mactaggart would pull the initiative.

After a flurry of negotiations, Gov. Jerry Brown signed the bill into law on June 28.

The California Consumer Privacy Act of 2018 is the strictest consumer data protection law in the country. The law applies...
to any company that does business in California and has gross revenues above $25 million; annually buys, receives or sells personal information of 50,000 or more consumers, households or devices; or derives 50 percent or more of its annual revenue from selling personal information.

“Privacy—back in the old days—was a peeping Tom looking over the fence,” says Democratic state Sen. Bob Hertzberg, a co-author of the bill. “Today, it’s companies with very sophisticated algorithms being able to track huge amounts of information about you.”

Tracking parts of the European Union’s General Data Protection Regulation, which went into effect last spring, the CCPA gives consumers access to their data, the right to have their personal data deleted and the ability to opt out of having their data sold.

The CCPA also goes further than any existing law in the United States. At the federal and state level, the U.S. has various data protection and privacy laws focused on specific financial, health and student information. However, these laws largely leave the bulk of the data economy—everything from data brokers to social media—beyond reproach.

This law has national implications, and lawyers are working to make sense of it while legislators make updates before it goes into effect in 2020.

**NOT GDPR**

In contrast to the GDPR, the CCPA does not give consumers complete ownership of their data; nor does it create data minimization standards, which require companies to only use as much user data as needed to complete a task.

But the new law creates leverage for consumers through a private right of action, allowing individuals to sue a company if their personal information is released as a result of a data breach.

Writing to the bill’s drafters in August, California Attorney General Xavier Becerra called the private right of action too limited. He said consumers should be able to seek legal recourse to protect their privacy, not just after a breach. Representatives from Becerra’s office did not return a request for comment.

Statutory damages are set at $100 to $750 per person, per breach or actual damages, whichever is greater. The damages are higher for a civil suit brought by the attorney general.

Defense firms believe this could set the stage for a new area for class action lawsuits. “Plaintiffs class action lawyers will look for an opportunity to test the cause of action by filing a case after the next big data breach is reported in the press,” says Kristen Mathews, a partner at Proskauer Rose in New York City. “If the cause of action turns out to be viable and lucrative for them, we will see these cases filed regularly after data breaches are reported.”

While not expanding the right of action, the law has already been amended once, in part due to Becerra’s letter. Changes included the removal of a requirement on consumers to notify the attorney general of a civil suit, clarifying the basis for the consumer right of action, and a six-month delay in attorney general enforcement. More amendments are expected.

California Democratic Assemblyman Ed Chau says he has taken note of these concerns raised by advocates, consumers, and industry representatives and will consider them, as he ultimately wants to make the law workable.

While the law continues to take shape, Hertzberg sees the potential for a national impact, similar to how California’s tailpipe emission standards became de facto nationwide industry standards.

However, Congress could override the CCPA. Last fall, Sen. Ron Wyden, D-Ore., proposed a strong data protection bill, but it showed little chance of passing. Sen. John Thune, R-S.D., is reportedly working on a separate bill. The Internet Association and other industry leaders prefer a federal law to a patchwork of state rules.

With the threat of a federal bill undercutting California’s work, Chau, a co-author of the CCPA, hopes California’s law will be treated as a floor and not a ceiling for U.S. privacy law.

“Europe is already ahead of us, as we’ve seen with GDPR,” he notes, admitting that California would “most likely not” have passed a strong privacy law without Mactaggart’s instigation. “So the question is: Do we really want to move backwards?”
Breakdown

Prisons and jails are being used to house mental health patients who’ve committed no crimes—and it’s perfectly legal.

By Julianne Hill
Andrew Butler was a popular kid at Hollis Brookline High School in New Hampshire, an honors student who was captain of the football and wrestling teams. Then, during college, Andrew tore his leg muscles, making even walking to class difficult. He started struggling with depression, and after talking with his dad, he decided to take time off from his chemical engineering studies at Worcester Polytechnic Institute in Massachusetts.

One weekend in July 2017, Andrew went camping in Vermont with friends. When he came back, he was acting strangely, running around in the woods, punching trees, clearly acting out on hallucinations that started after experimenting for the first time with psilocybin, the active compound found in hallucinogenic mushrooms.

Over the next few months, Andrew’s condition continued to spiral downward, which worried his father, who worked as a mechanical engineer. The single father took his only child to therapy and a psychiatrist, but Andrew’s behavior only worsened.

By October, his father needed to bring him to New Hampshire Hospital in Concord, the state’s only hospital for mental health patients. Andrew was diagnosed with schizophrenia, hospitalized for several months and given psychotropic medications.

But Andrew continued to change, and in January he tried to punch his father during a visit. “I could look in his eyes and could tell that he was not really there,” Doug Butler says.

Others in the hospital saw the attempted hit, and Andrew was labeled a danger to himself and others. He was transferred to the 60-bed secure psychiatric unit of the New Hampshire State Prison for Men, known as the SPU, the only facility in the state available to handle patients needing higher-level care. He and his father were told it would be temporary. “It felt out of my control,” Doug Butler says. “I was his guardian then, but they would not let me see him until I signed papers to send him there. On the papers, though, it didn’t say just two weeks. There was no time limit stated.”

There, Andrew was issued the same kind of jumpsuit as a convicted criminal and was assigned an inmate number. Andrew, then 21 years old, was held with pretrial detainees, those not competent to stand trial and those found not guilty by reason of insanity.

“When you move someone from the hospital to the SPU, you are transferring them from the Department of Health and Human Services to the Department of Corrections,” says New Hampshire State Rep. Robert Renny Cushing, a Democrat who sits on the state’s Criminal Justice and Public Safety Committee. “That is the moment you criminalize someone with mental illness who has done nothing wrong.”

Frankie Berger, director of advocacy at the nonprofit Treatment Advocacy Center in Arlington, Virginia, says it’s clear that New Hampshire doesn’t want to cover the cost of securing a part of its state hospital. “That’s what this comes down to—money,” Berger says.

**PRISON CELL TREATMENT**

At the SPU, Andrew was given Depakote, typically used for bipolar disorder. He was not allowed to take certain other medications because of their high street value, which could lead to theft by inmates within the prison walls. He was held in solitary confinement for 23 hours per day, guarded by corrections officers. Group therapy was held in 4-by 10-foot metal cages. His father’s guardianship was taken away.

Although its beds are used for mental health patients, the SPU is not an accredited mental health facility. Although he was being held in a maximum-security prison, Andrew was never charged with a crime. Although Andrew was told the transfer was temporary, his father says he was told Andrew might stay in the prison the rest of his life.

“It was four months later that they said he could be there for the rest of his life. I was outraged, sure,” Doug Butler says. “Everything was done under duress, and they took advantage of it, and they kept him in the goddamned prison.”

Andrew Butler’s case went to U.S. District Court in Concord where his lawyer requested he be transferred out of prison to a psychiatric facility. It is one of the latest cases in a long-standing but quiet battle in New Hampshire centered on using state prison beds for mental health...
patients in crisis who have not been charged with any crimes.

Other states use local jail cells for mental health holds; however, New Hampshire stands alone in its legal treatment of mental health patients within state prison walls.

In either case, those with mental health problems are being held in facilities normally reserved for criminal defendants and convicted criminals when no other facility is ready or willing to take them. And in both cases, some say these practices fly in the face of the U.S. Constitution.

“What is happening in New Hampshire is at the top of the list of unacceptable things I’ve seen in my work—and I’ve seen a lot,” the Treatment Advocacy Center’s Berger says. “When you tell people that this is happening and it is real, you’re met with bafflement and disbelief. And it is so much worse than it appears at first blush. It’s baffling, just baffling.”

Advocates around the country are calling for the end of using all levels of correctional facility beds for mental health treatment. Recently, Colorado overhauled its system, ending the practice of putting patients in jails by building up support systems around the state. But in New Hampshire, only a few of the state’s 424 legislators are taking on the issue, making it an uphill battle.

CIVIL RIGHTS VIOLATIONS

To extract Andrew from the prison’s psychiatric unit, his father contacted Sandra Bloomenthal, a Nashua, New Hampshire, attorney. In April, she filed a petition in the U.S. District Court for a writ of habeas corpus against the state for unconstitutionally imprisoning Andrew—a civilly committed patient in need of psychiatric care—in the men’s prison. The petition called for Andrew’s immediate release because of civil rights violations.

“[He is] denied contact visits with his father ... denied contact visits with his attorney,” Bloomenthal wrote in the petition. “He has been tasered. The treatment he has received is cruel and unusual punishment without having been convicted of a crime and with no pending criminal process.”

In a later statement to the court, she wrote, “Andrew Butler is stripped of his basic fundamental constitutional rights by his incarceration. His present need for secure psychiatric care is not at issue. At issue is...
Andrew Butler’s cruel treatment and false imprisonment in a nonaccredited and nonlicensed facility, which is prison and not a hospital."

The suit caught the attention of local activists, who held rallies and marches for Andrew’s release. “These patients are having a prisoner experience, not a recovery experience,” says activist Beatrice Coulter, a registered nurse who worked at the SPU for five days before quitting and who is co-founder of Advocates for Ethical Mental Health Treatment. “There is a terrible blurring of the mental health world and the corrections world. It’s an awful hybrid of treatment that the state is passing off as legal.”

**NATIONWIDE FALLOUT**

States from New Hampshire to Colorado to Texas are dealing with the long-lasting and wide-ranging fallout from the 1980s-era moves to end the practice of warehousing people with mental illness in large state hospitals, known as deinstitutionalization. The goal of taking away federal support from these institutions was to create new smaller community centers to provide support. However, most of those centers have never materialized, forcing many people with mental illness to live without psychiatric care.

Since deinstitutionalization, the number of psychiatric beds has continued to fall. In 2016, an estimated 10.4 million American adults lived with a serious mental illness, according to the National Institute of Mental Health. That same year, the number of state and county psychiatric beds hit 37,769, down from its peak of 559,000 beds in 1955, according to the Treatment Advocacy Center. That means emergency rooms are backed up with patients waiting for psychiatric beds that stay full because there is no community program to support the patients when they are discharged.

“What we’ve done is made our jails and prisons the new mental health institutions,” says Moe Keller, director of advocacy at Mental Health Colorado and a former Colorado state legislator. “This is the 21st century in the United States of America. And this is the best we can do?”

**LACK OF RESOURCES**

“It’s something we’re seeing in state after state,” says John Snook, executive director of the Treatment Advocacy Center. “People are grasping for a solution, trying to figure out how to make the best of a terrible situation. It’s discrimination.”

New Mexico, North Dakota, South Dakota, Texas and Wyoming legally use county jail beds temporarily for mental health holds. Sometimes, those in a mental health crisis—typically those who have suicidal ideation—are handcuffed and transported in the back of a squad car and receive no medical attention while held in a cell.

In rural states, stretched county law enforcement resources, coupled with the lack of psychiatric hospital beds and community-based mental health services, leave few options for those needing immediate care. Small towns are often located hundreds of miles away from mental health hospitals, and transporting people in mental health crisis becomes the biggest issue.

“On the outlying jurisdiction eastern plains of Colorado, psychiatric resources are nonexistent,” says Gina Shimeall, a criminal defense lawyer who also volunteers with the National Alliance on Mental Illness in Castle Rock, Colorado. Law enforcement officers sometimes must drive two or three hours...
each way to the nearest hospital with mental health units, tying up those officers for an entire day. “Communities didn’t put these transportation times and costs in the budget,” the TAC’s Snook says. “We found Oklahoma law enforcement officers drove 1 million miles in one year just to transport people to mental health facilities. And sometimes, the hospital can’t even take them in once they arrive.”

Jenny Hill, program coordinator for the city and county of Denver’s Office of Behavioral Health Strategies, says if she lived in a rural area and had a stroke, she’d immediately get emergency medical care. “But if I’m experiencing psychosis, you can put me in a jail and hold me there,” she says.

LIVE FREE, OR DIE?

New Hampshire, where Andrew Butler was held in the state prison’s secure psychiatric unit, also faces a shortage of beds. An estimated 36,000 people in the state live with serious mental illnesses, according to the Treatment Advocacy Center. But in 2016, there were only 158 state hospital beds for psychiatric treatment. That means inpatient treatment during a psychiatric crisis has become nearly impossible. As a result, at any given time, 10 to 12 civilly committed people with mental illness are held in the SPU, according to testimony given in 2010 to a New Hampshire House of Representatives committee studying the issue. Some stay a few months; others stay years.

Advocates point to the cost savings of holding a patient in the prison. In New Hampshire, keeping a mental health patient in the SPU costs $307.21 per day, according to the Department of Corrections, while a stay in the state hospital psychiatric unit costs $1,413 per day, according to the state Department of Health and Human Services.

“This includes locking mentally ill women in the men’s prison. Also, patients with developmental disabilities are locked away in the prison as well. The civilly committed are exposed to criminally convicted inmates,” Butler’s attorney Bloomenthal wrote in response to the state’s argument that the court should dismiss the petition.

The SPU does have clinical staff, says Paula Mattis, director of medical and forensic services at the Department of Corrections, which oversees the prison’s SPU. Staff includes one full-time psychiatrist, two psychiatric nurse practitioners, eight nurses, three social workers, one mental health counselor and one recreational therapist.

HISTORICAL JUSTIFICATION

Before deinstitutionalization, New Hampshire ran a sprawling mental institution.

“There, those involved with the criminal justice system were held along with mental health patients,” Cushing says. “So, in a sense, it was exactly like what is happening in the prison now, with both populations in one place. But the big difference is they were in a hospital, a huge institution, and everyone’s mental health care was under direction of Health and Human Services. Everyone was clear that this place was all about treating health issues.”

As the federal government pulled support for larger mental institutions, the facility closed, and those mental health patients moved to the state hospital. Those who had been involved in the criminal justice system were moved to the SPU.

Soon afterward, as promises of building a secure psychiatric wing for the New Hampshire hospital were made, the most severely ill patients—who had not committed crimes—were “temporarily” moved to the prison as well, an arrangement that continues today.

The state has several statutes that allow this practice. “The state law is not in alignment with the U.S. Constitution, yet that’s what they’re operating under,” the Treatment Advocacy Center’s Berger says. “The state will have to have a fire lit under them—like get sued—to make these tough budget decisions.”

“There is a culture of complacency that has been created here in New Hampshire,” says advocate Coulter. “After 30 years, it has been given legitimacy.”

NEW PUSHES

For years, attempts to fund a new high-security psychiatric facility at the New Hampshire Hospital grounds—estimated in 2010 to cost about $13 million—have failed. Many of those attempts were launched by Cushing. However, in recent years, Cushing has pushed in new directions. In 2016, he joined the TAC and the American Friends Service Committee to file a complaint with the Department of Justice. “The state of New Hampshire is systematically and intentionally violating the Constitution, as well as the civil rights and civil liberties of a very vulnerable population of its citizenry,” the letter states.

After receiving no response, in May of 2018, he filed a Freedom of Information Act request for information about the 2016 complaint. In November, he received a notice from the DOJ denying the request, stating that “The records you have requested pertain to an ongoing law enforcement proceeding. After consideration of the responsive records, I have determined that access to the documents should be denied ... since disclosure thereof could reasonably be expected to interfere with law enforcement proceedings.”

Cushing responded to the denial in an email to constituents. “Given the totality of what has happened, I don’t believe any reasonable person could possibly conclude anything I do could in any way be construed as interfering with enforcing the laws concerning the rights of people being held in the Secure Psychiatric Unit.”
In addition, this year, Cushing sponsored House Bill 1565, requiring the Department of Corrections to apply to the Joint Commission on Accreditation of Hospitals to accredit the SPU as a psychiatric hospital. Though it passed New Hampshire’s House, the Senate amended the bill, downgrading the accreditation to a behavioral health facility. The DOC was required to file an interim report on the feasibility of accreditation by Jan. 1.

The first step will be reaching out to the National Commission on Correctional Health Care, which can determine what is necessary for accreditation, the DOC’s Mattis says. If the costs of updating the facility to meet standards exceeds its budget, the DOC can request that amount in its budget to be in compliance, she adds. Mattis is confident that they already meet the standards for medical care.

COLORADO JAIL HOLD

Jenny Hill, from Denver’s Office of Behavioral Health Strategies, recalls a night in 2010 when she had a breakdown. A survivor of child-physical and sexual abuse, the then-46-year-old, who lives in recovery from post-traumatic stress disorder with dissociation and trauma-induced psychosis, went to her ex-husband’s home in Colorado to discuss the financial settlement of their divorce. When he closed the door on her, Hill says, her anxiety heightened. She remembers hearing voices in her head, causing suicidal ideation.

Her ex-husband called the police. When officers arrived at the home in Aurora, Colorado, they handcuffed Hill, put her into the back of a cruiser and brought her to the municipal jail, says Hill, who testified before the Colorado Senate Judiciary Committee in 2017 about this experience.

Being handcuffed terrified Hill. The arrest amplified her anxiety, exacerbating her condition and preventing her from focusing on what officers were saying. She wanted to lie down, but that wasn’t possible in a patrol car. In the cold jail cell, she begged for a blanket for comfort. She was told she would be charged with a felony and could face prison time.

The jail offered no psychiatric treatments and no protection from others. During her 36 hours in the jail, Hill says she was injured by correctional officers after she panicked and became defensive when they approached her. "In my mind, I was protecting myself from further harm," she says.

One officer understood her condition. "I believe a supervisor who wore a Crisis Intervention Team pin [indicating he had training in handling a mental health crisis] brought me a blanket and took time to talk with me," she adds. "He helped me understand what was going on, and he helped me calm down." No charges were filed against Hill.

MAKING A ‘TERRIBLE CHOICE’

In 2016, the Colorado Hospital Association and the County Sheriffs of Colorado brought the 30-year practice of mental health holds—most often for people who were suicidal like Hill—to the attention of the state legislature. People having a mental health crisis in Colorado could be put on an “M-1 hold,” to have evaluators determine whether the individual’s behavior was so risky that they needed to be hospitalized against their will.

But without enough psychiatric hospital beds in the plains of Colorado, law enforcement could bring a person on an M-1 hold to a local jail for 24 hours while the sheriff’s officers called around the state for an available bed, even if the individual had not been charged with a crime.

"The sheriffs often had to make a terrible choice if the person was suicidal and in jail," Mental Health Colorado’s Keller says. "When the 24 hours were up, they had to decide: Do we hang on to the person, breaking the law, or do we let that person go, knowing they will complete the suicide?"

"The response from a criminal justice point of view is logical: ‘We know they are safer in our facility than leaving without treatment or a place to go.’ But that’s such a twisted view,” the TAC’s Berger says.

Chris Johnson, executive director of the County Sheriffs of Colorado, says the state is at least 2,500 beds short of what is needed for mental health patients. "This means a lot of people were overstaying the legal hold," Johnson says. "This is a Fourth Amendment violation issue. And the sheriffs want to obey the Constitution of the United States."

His group lobbied legislators, and in 2016, Senate Bill 16-169, which would have extended the time a person in a mental health crisis could be held from 24 to 48 hours, passed both houses.

After lobbying by advocacy organizations such as Colorado Mental Wellness Network, Colorado’s Democratic Gov. John Hickenlooper vetoed the bill. "We agree that appropriate mental health facilities are not always readily available to treat

PHOTOS BY NANCY WEST, INDEPTHNH.ORG AND BENJAVISA/GETTY IMAGES
persons having a mental health crisis. While well-intentioned, we are concerned that SB 16-169 does not provide adequate due process for individuals,” Hickenlooper said in a statement.

“When the Colorado legislature made that choice to put forth that bill and the governor vetoed it, that shined a bright light on this problem. It hit the media and made it so clear to other states doing this practice,” the TAC’s Berger says.

**TASK FORCE NEGOTIATIONS**

Along with the veto, Gov. Hickenlooper directed the Colorado Department of Human Services to create a mediated task force that included stakeholders ranging from medical professionals to law enforcement to public defenders to people who have lived with mental health issues.

Colorado had already intensified focus on behavioral health after the 2012 Aurora theater shooting, where gunman James Holmes killed 12 people and injured at least 70. At that time, the governor signed legislation creating a health crisis response system that included 24/7 walk-in crisis centers around the state that would treat people regardless of their ability to pay and allocated funding for a hotline and mobile vans.

Despite the task force’s directive from the governor to “recommend public policy changes to ensure proper mental health treatment and protection of federal and state constitutional rights for Coloradans experiencing mental health crises,” the negotiations were the “hardest negotiations ever,” Mental Health Colorado’s Keller says.

The most difficult part, says Doug Wilson, a Colorado state public defender on the task force, is that there is no data-sharing between the state’s different county jails. “In fact, there is no data on how many people had been held [on mental health holds]. The sheriffs said, ‘We don’t keep the data because they weren’t charged, and they weren’t booked. There was no system for that.’ ”

After several months of negotiations to carefully craft the language of the recommendations, the governor signed Senate Bill 17-207, allocating $7 million collected from the state’s marijuana tax for mental health support.

The resulting bill mandated that all walk-in centers throughout the state are appropriately designated, adequately prepared, and properly staffed to accept an individual in need of an emergency 72-hour mental health hold. In addition, mobile response units are required to be available within 2 hours, either face to face or using telehealth operations for mobile crisis evaluations. And importantly, the bill demands that at no time and for no reason should a person on an emergency mental health hold be detained or housed in a jail or lockup.

While it is too early to tell how these mandates will play out, Colorado’s moves have the attention of advocates. “Colorado is now a good place to watch,” says the TAC’s Berger. “These are big, important issues to tackle if we’re going to have systemic change. Let’s see how it shakes out.”

**PUSH TO GO HOME**

As winter turned into spring, Andrew’s friends and neighbors continued to protest his placement in the SPU. On May 24, the day of Andrew’s hearing in federal court on his habeas corpus petition to be transferred to a psychiatric hospital, friends and advocates walked 2 miles in protest from the prison to the courthouse. He was not granted a release, but the protest earned media attention.

Then, in June, five months after his temporary hold in the prison mental health unit began, Andrew was returned to New Hampshire Hospital. Two weeks later, Andrew was released to his father’s care on conditional release, mandated by law to take the psychiatric medications the state doctors prescribed.

“Any time they want to, they could latch onto him and throw him back in prison,” Doug Butler says. “They would not have to go to court. He’d be better off and have more rights if he was a criminal.”

Andrew, who has been living at his father’s house, is improving, his dad says. His friends and neighbors are supportive, and family friends have taken him on a vacation to the mountains.

Shortly after Andrew returned home, Doug Butler said he hoped his son would go back to school or find a job, or perhaps do both. Despite the steps forward, Andrew faces a long journey of healing. “He will have a lot of PTSD to deal with the rest of his life from all of his time in the SPU,” his dad says.
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Lawyers who switched careers to become literary agents are looking for the next blockbuster—and loving it
It’s a typical working weekend for Jeff Kleinman, Paul Levine and Priya Doraswamy. Kleinman is in Manhattan reading about a talking dog named Enzo; Levine is on a Los Angeles beach flipping through a memoir; and Doraswamy is in New Jersey watching a movie with her family.

This is work? It is if you’re a lawyer-turned-literary-agent—or a successful one, anyway.

Enzo’s musings turned into the New York Times best-seller The Art of Racing in the Rain. This coming spring, Kleinman will attend the movie premiere with his client, author Garth Stein.

He may even have another blockbuster on his hands. While listening to NPR, Kleinman heard about massage therapist Anthony Guglielmo, whose patients include sharks, walruses and penguins. A lifelong equestrian and animal lover, Kleinman had seen the healing power of massage therapy on horses. He wondered whether there might be a book in Guglielmo’s work. He cold-called him, and Guglielmo was game. Kleinman found a writer, put together a book proposal, took the author around to meet New York publishers and negotiated a
six-figure deal for *The Walrus on My Table*.

"I really love putting the entire project together: figuring out the writer, figuring out the marketing, figuring out what the book would be, talking to [the writers], learning about them and their lives," says Kleinman. "It's the whole thing, the creation of the story, inventing a new world. It's really cool."

It didn't take long for Kleinman, who was still practicing entertainment law when he made his first sale, to realize that the literary life was "way more fun" than reading deposition transcripts. But he also learned there was a flip side: If you think a 70-hour law firm workweek is a grind, how about a 128-hour one?

"Being a lawyer is a lot easier than being a literary agent," says Kleinman. "A lot."

In the literary life, he says, "You're not just working; you're breathing books 24 hours a day. So you better love it because it just doesn't stop. You're watching a TV show and thinking, 'Hmmm, I wonder if this actor has a book [in him].' You read something, and you're looking at the writing and wondering who the editor is. You're always 'on.'"

**TAKING THE LEAP**

Life had a different rhythm when Kleinman was an associate at Kaufman & Silverberg, an entertainment law firm in Washington, D.C. He typically started his workday at 9 a.m. and headed home around 6 or 7 p.m. Barring something unusual, he was done with work until the next day.

That was soon to change. The Kaufman firm was affiliated with a group of literary agents who shared their office space. "Within six months of becoming a lawyer, I was reading manuscripts on the side for the agents," says Kleinman. A few years later, the law firm restructured its arrangement with the agency, and Kleinman joined the latter in its new literary venture, Graybill & English.

"I am not a salesperson. That's not what I do. I share books I love with people who I think will also love them."

—Jeff Kleinman

"I was terrified I wouldn't be able to make a living as an agent, so at the beginning, I still did some legal work," he recalls. "In the first three months, I did my first six-figure book auction. And pretty soon, the agent work was paying the bills."

That came with its own price. Making a living as an agent can get "unbelievably wearying," says Kleinman. For example, between February and June of 2018, 60 manuscripts landed on his desk. He was excited about all of them—most were from his clients or authors he was interested in working with. That pushed the submissions to the front burner, and Kleinman would have to read them on top of his current workload.

"You have to find eight to 10 hours to read a manuscript, and you can’t do that on your day job time," says Kleinman, whose days are spent dealing with emails and phone calls, reviewing contracts and "running around doing everything you have to do to make a book deal happen."

**LONG HOURS, BIG PAYOFFS**

Ditto for Levine, a Los Angeles literary agent and practicing attorney who represents writers. He spends about a third of his time making book deals and the other two-thirds handling related legal
matters.

If you ask what his nonworking time is like, Levine, married and the father of a grown son, laughs and says, “You’re assuming facts not in evidence. Who says I have nonworking time? I work from 8 in morning until 10 at night. Basically, when I’m not asleep, I’m working.”

He says he walks “literally seven steps”—yes, he counted—from the back door of his house to the front door of his office in the garage. Unless a business meeting or luncheon takes him into the city, his routine is relatively rote: work from 8 a.m. to 6 p.m.; break for dinner; back in the office by 7:30; and work until 10 p.m. “Lunch is 20 minutes at my desk or kitchen table.”

That degree of self-discipline is how literary blockbusters come about, and sometimes a book is only the beginning. For agents such as Levine and Kleinman, who are based in film-centric Los Angeles and New York City, respectively, the next logical step is spinning them into movies.

In 2018, Kleinman’s agency, Folio Literary Management, acquired the storied literary agency Harold Ober Associates. Three Ober agents joined Folio’s team of 20-plus. Ober represented J.D. Salinger for his entire career. Among its other iconic authors: Agatha Christie, William Faulkner, Pearl S. Buck, Langston Hughes, Dylan Thomas and F. Scott Fitzgerald. Along with the purchase of the agency came the opportunity for Folio to make film deals on Ober’s literary properties.

Folio recently inked film deals for some hot properties of its own. The screen adaptation of To All the Boys I Loved Before, part of the popular trilogy by novelist Jenny Han, was released in August 2018, and a sequel is anticipated. Martin Scorsese’s ninth collaboration with Robert De Niro, The Irishman, based on the New York Times No. 1 best-seller I Heard You Paint Houses, was slated for release this year.

Levine is pursuing a film deal for debut author Cynthia Lim. He represents her new book, Wherever You Are, a memoir about life as a caregiver for her debilitated husband. As a result of a massive heart attack that deprived him of oxygen, he suffered a serious brain injury. The book chronicles Lim’s life and challenges before, during and afterward.

“Of the almost 2,000 queries from writers I had gotten over the past six months, hers was the only book I took on,” says Levine. “Every once in a while one comes in that’s really good.”

The odds are slim, however. Levine’s desk has three piles of submissions, with top priority going to proposals from existing clients. The second pile contains pitches from authors he has met, usually at a writers conference or who have been referred by a colleague. Lim’s proposal found its way to him from the third and least likely stack: the “slush pile” (cold queries that show up in his email).

A week after returning to LA from Lim’s book-signing party in September 2018, Levine was still on a high. “It was the biggest thrill,” he says, to see the look on Lim’s face when she held the first copy in her hands.

Even after decades of representing authors, Kleinman echoes that feeling. He says there is only one way to describe what he most enjoys about being a literary agent: “Making people’s dreams come true.”

“Those dreams have materialized for many of his clients, whose works became runaway best-sellers and Pulitzer Prize finalists. Among his recent big-time sales are The Snow Child (Eowyn Ivey), The Widow of the South (Robert Hicks), The Eighty-Dollar Champion (Elizabeth Letts) and Mockingbird (Charles J. Shields)." Wild success puts an agent in the spotlight with his client at book-signing parties and down the road at awards ceremonies, as Doraswamy recently found. A book she represents, One Part Woman, was a 2018 National Book Awards finalist. (The winner in her category of translated literature was The Emissary, by Yoko Tawada with translation by Margaret Mitsutani.)

Such pinnacles come infrequently, but even so, who would want to go back to practicing law after that?

THE ACCIDENTAL AGENT

Doraswamy almost did. Unlike most agents, she entered the literary world by default.

“This job found me. I’m not
kidding,” she says. A former deputy attorney general who prosecuted securities fraud cases in Newark, New Jersey, she thought she was on a temporary hiatus from law when her husband accepted an offer to head Citicorp’s commodities business for the Asia-Pacific region. It took them to Singapore for several years, where she met a literary agent whose children attended the same school as theirs. The woman had opened an agency in India and asked Doraswamy whether she would help her in Singapore.

“T’ve been a voracious reader all my life, but I had no idea what a literary agent did,” recalls Doraswamy. She had been looking for part-time work, mainly for mental stimulation, and figured there was no downside to giving it a try. First she apprenticed pro bono, and later the two became partners at Jacaranda Agency. They worked mainly with publishers in India and the United Kingdom and attended large book fairs in London and Frankfurt.

Without a publishing background and contacts, Doraswamy had to be inventive. “I did lot of cold-calling and emailing,” she says. “I’d send letters to publishers in the U.K. and say, ‘I’m coming to the London Book Fair. Can we meet?’ It was at a very grassroots level. Everyone has to start somewhere, and for me it was pretty much at the bottom.”

Doraswamy and her family eventually returned to the United States, where she founded Lotus Lane Literary. She did not resume practicing law.

“I decided to stay in literary work because I could set my own parameters—even though I work about 12 hours almost every day—and be around when my kids got home from school while balancing a career.”

In today’s publishing world, if you don’t have experience and contacts, the only viable way to become a literary agent is to take Doraswamy’s route, says Kleinman. But he notes that apprenticeship “can be hard if you’re used to running the ship and then have to take a much more menial position.”

On top of that looms a steep learning curve. “It takes time to learn who the players are, how the sale of a book is done, how authors get compensated,” says Levine. “Even when you figure out which editor at which house acquires which kind of material, it doesn’t do any good unless you can get him to consider your pitch. A literary agent’s job is to be a ‘buyer finder.’”

Kleinman has a different take: “I am not a salesperson. That’s not what I do. I share books I love with people who I think will also love them,” he says. “Writers think you’re selling widgets. It’s like, ‘I wrote a 5-foot-high, 7-foot-wide gray thing. Can you sell that?’ But you’re not selling a product. It’s much more of a feeling thing, like when you go into someone’s house and think, ‘Wow! This is beautiful.’”

**PUTTING LEGAL SKILLS TO WORK**

No matter how you look at it, selling books is a tough game. The publishing industry, cautions Levine, “is not for the faint of heart, and it’s not for somebody who is fresh out of law school.” Even so, what you’ve learned in law school equips you with some important skills in the literary world.

Doraswamy says that regardless of which milieu you’re in, you’re a storyteller. “As a lawyer, you’re telling your client’s story to the judge and jury. Your mandate is the four corners of the law. It’s a story steeped in facts, yet it’s also advocacy. How do you tell the story with the tools you have to convince the court it’s the right story?” she asks.

Although a novel is crafted for a different audience, Kleinman says it presents the same challenge: making the story resonate with the reader. He was in law school when he learned what he still considers his most valuable lesson about getting a message across in writing.

“I didn’t really care about grades as a law student. People would check their grades, and if they got a B, they would burst into tears,” he says. “All I cared about was getting better than a D because that meant I passed. But in legal writing class, I totally cared about grades because I knew I was a good writer. I figured, ‘At least in this class, I’ll get an A.’”

Surprise, surprise: His first paper came back marked with a giant B. Incredulous, Kleinman
asked the professor why. She said he didn’t have any transitions between paragraphs. “What are you talking about?” he asked. “Every paragraph flows from the one above. I used all that language you’re taught to use as a writer to link points in an essay. Didn’t you see all the ‘therefores?’”

The professor explained that wasn’t what a transition was. She told him transition means “first,” “second,” “third,” “fourth”—indicators of building an argument step by step. “I’ve never forgotten that. It has been insanely helpful, and not just in legal writing,” says Kleinman.

“I’m very nonsequential. That’s how my brain works. I make leaps from one thing to the other. But in order to write a nonfiction book proposal or a novel, you have to go from A to B to C. The chapters have to build sequentially. You can’t leap over things. As an editor, I’m really good with building characters and creating narrative urgency, and that’s because of what I learned in law school.”

Doraswamy compared story crafting to writing a brief. “In court, you’re creating a story using the facts and the law: ‘Here’s what happened. So-and-so violated the law, and here is why he should be fined or incarcerated.’ It’s the logical process of going from step one to step 10 to connect the dots. Whether it’s a work of fiction or fact, it all comes down to: Did we get to the crux of this matter?”

While some agents specialize in fiction or nonfiction, those interviewed for this article handle both.

“All I care about is that a book fits the old paradigm: ‘good story, well told,’” says Levine, although he intimates that his “sweet spot” is self-help and how-to books. Kleinman says an “up-market” agent like himself is drawn to literary rather than commercial fiction.

**PAYING DUES**

Whether an agent walks in a real or fictional world, there is a universal reality: The profession is not for someone who would be uncomfortable forgoing the finer things in life, at least for a while. Agents earn money solely from commissions, and you can’t expect to make a major sale right away. Even if you do, you only get 15 percent, and it doesn’t come in one big windfall. Say you sell a book for $100,000. The agent gets $15,000, which may sound good, but the payments are parsed out over three or four years. So you have to live on about $4,000 per year.

“When you have enough clients and really get going, a $4,000 check shows up and you go, ‘Oh, yeah. I totally forgot about that book.’ Then it becomes OK to have to wait for the money,” says Kleinman. Until then, he says, be prepared to live on credit cards for a few years as he did, although his lean years didn’t last as long as they tend to for a new agent.

If you live in New York City, which is the publishing hub of the U.S. and has one of the highest cost-of-living indices, "$4,000...
He dismisses it as “a myth and a glamour thing,” adding, “Actually being a non-New York agent sets you apart and makes you kind of special.”

That has proven true for Levine, who sold his first book in 1997. Author Sheila Copeland came to him after she had self-published her debut novel, Chocolate Star, which became an alternate selection of the Literary Guild and Doubleday Book Club. It turned into a series.

At the time, self-publishing was the only recourse for a writer who couldn’t get a publishing deal, says Levine. “There was no internet, no Amazon, so that meant you went to a printer in Montana because that’s where the trees are and that’s where the paper comes from, and you paid him to print copies of your book.”

Copeland followed that formula and sold 5,000 copies on her own, which was unheard of at the time. “I told that story to Random House, Simon & Schuster and St. Martin’s and got a bidding war going,” says Levine. The book went to St. Martin’s, and Copeland began a successful career as an author with multiple publishing deals.

Things may have gone differently for her without the major city—such as Doraswamy in suburban New Jersey (15 minutes from Manhattan) or Levine in Venice Beach (same distance from LA)—has its advantages. But in this technological era, agents can do their job from anywhere.

Even though he is one, Kleinman shudders when he hears a writer say he wants a “New York agent.”

Paul Levine Literary Agency materialized after he began attending writers conferences across the country, which he still does. Editors are usually on speaker panels. Three or four years into solo practice, he realized he knew about 100 editors at various publishing houses.

“I figured that was enough to start my own literary agency, so I printed up some letterhead and business cards, got myself listed in literary agent directories and online agency lists, and away I went!” says Levine. For him, the major change wasn’t the difference between being a lawyer and an agent but shifting from representing publishers to advocating for authors. Levine reported for duty with the necessary arsenal.

“I knew what publishers would try to get away with because it used to be my job to help them do it,” he says.

Levine maintains a positive attitude to keep his job fresh. It’s rare when he takes on an unsolicited pitch like Lim’s. “Every email I get, I hope it’s the next one,” says Levine. “This one was.”

Darlene Ricker, a legal affairs writer and book editor based in Lexington, Kentucky, is a former staff writer and editor for the Boston Globe and the Los Angeles Times.

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Doraswamy in suburban New Jersey (15 minutes from Manhattan) or Levine in Venice Beach (same distance from LA)—has its advantages. But in this technological era, agents can do their job from anywhere.

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Darlene Ricker, a legal affairs writer and book editor based in Lexington, Kentucky, is a former staff writer and editor for the Boston Globe and the Los Angeles Times.
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GUARDIANS OF THE SIXTH AMENDMENT

BY LISA TAYLOR
SONYA BURST THROUGH THE DOOR. a large fraying black purse stuffed to the brim on one shoulder, a briefcase overflowing with papers on the other, a file clutched in her left hand, and an extra-large coffee in her right. Her gray suit was wrinkled, a stain slightly visible on the pale blue shell underneath. The sensible black heels she donned every day, perfectly scuffed and aged, on her feet. Her graying, curly hair was untamed, made worse by the glisten of sweat coating her face and neck from the Southern humidity.

“I know. I know. I’m late.” She called over her shoulder to her paralegal, Kate. “Sarah had a dentist appointment this morning, and Dave had an early meeting, so I had to take her.” She beelined for her office down the hallway, Kate following closely behind. “What’s on for today? I can’t remember.” The women barreled past their co-workers, her gaze affixed only on her destination.

Sonya wrestled open the door of her cramped government office and switched on the flickering fluorescent lights. Somewhere beneath stacks of files was a desk, chairs and a computer. But at first sight, the room looked more like a paper graveyard.

Atop a bookshelf in the corner stood three picture frames—one showing a couple in their early 30s at the beach playing in the sand with two toddlers; another, a family photo taken at Disney World; and the last, the senior picture of Sonya’s oldest daughter, Tiffany, who would graduate in three months. Timeworn children’s artwork was haphazardly taped to the walls and the sides of a filing cabinet, with “I LOV YU MOMY” in crayon scrawled on most of the pages.

Dumping her bags onto the floor and unceremoniously plopping the file in her hand onto one of the many piles, Sonya turned her attention to the barely visible computer screen that woke at her touch. Kate, removing from a chair a pile of files as tall as her arms were long, took a seat and pulled out her calendar. “You have five initial appearances in 30 minutes in front of Judge Bridgeman. Downstairs in Courtroom 3. And two detention hearings. But we haven’t heard back from the third-party custodian in Mr. Young’s case, so you may want to have him waive. Then you have appointments down at the jail.” She handed Sonya a printed schedule. “And tomorrow you’re covering court in New Maple, 10 arraignments, three initial appearances and three sentencing hearings.”

Sonya’s face remained unchanged as she logged into her email, 60 new messages awaiting her. Just another day working in the federal public defender’s office. The guardians of the Sixth Amendment could barely keep their heads above water, but the chaos was their normal. And with the new administration, the caseload seemed to have doubled in only a few months. It was all she could do to just go through the motions, let alone zealously advocate for each of the nameless, faceless files that endlessly piled up around her.

“OK. Thirty minutes, you said.” Sonya took a generous sip of her now-cold coffee, reading through the list of defendants whose liberty depended on her that day.

A blinking light emanating from the telephone caught Sonya’s attention. Pressing the button, the robot in the machine answered, “You have 15 new messages.”

“Fifteen?” She looked incredulously at her paralegal. “I was here until 8 last night, and it’s only 9:15.” Each of the voices that spoke to her through the machine were clients calling from jails and prisons located throughout the state, wanting to know...
the status of their cases: “Did you talk to the government like I told you?” “Ask for a continuance next week.” “I wanna appeal my plea.” “How the hell did I get 60 months? You promised I would only get probation!”

Sonya jotted notes on a crumpled legal pad that had maybe five blank pages left, the remaining pages bursting with handwritten text margin to margin. Once the messages concluded, Sonya turned to her paralegal and gave an exasperated smile. “Thanks, Kate.”

... 

The Byrum County Jail was truly her least favorite place in the world. It was dark and damp—everything you would expect of an old county jail that had not been updated since its creation. Sonya flipped through the five redwells resting in her lap as she waited to be called to meet with her clients—drugs, drugs, drugs, drugs and drugs. She estimated probably 80 to 85 percent of the cases she handled were “drugs and guns” cases. Those cases were the easiest for the government to prove—you either had drugs or guns on you, or you didn’t; you either had permission to have those drugs or guns, or you didn’t. And then add a prior felony on top of it, case closed, Not much wiggle room for her to argue.

“Sonya Church.” A uniformed officer stood in front of a door that was ajar, peering at her over crooked reading glasses, an old wooden clipboard in his hand. Grabbing her bags and files, she stood and followed the officer to the all-too-familiar meeting room. The room contained only a table, two chairs and a window where the officers monitored their meeting from the hallway.

She took a seat and opened the first file in her stack. Da’Vonte Moore—a 23-year-old black male who was picked up after he sold a confidential informant heroin three times over a span of two weeks. It was his fourth time being picked up for selling drugs, but this was the first time he had been picked up by the feds. An unregistered firearm had been found in his waistband when he was arrested, and about 100 individual baggies of heroin were found in his car: Drug Trafficking 101.

She heard the sound of chains gradually growing louder as Da’Vonte made his way down the hallway toward the little room. He barely made eye contact with her as the guards sat him in the chair, the handcuffs and leg chains remaining in place.

“Officer, you can take those chains off.” Sonya hated counseling clients who were chained like zoo animals. It made the small, dim room seem smaller, and the rattle of the chains would often interrupt her train of thought.

“Sorry, ma’am, no can do. There was an incident earlier today where this gentleman attempted to assault a guard. We’ve been instructed that the chains stay on.”

“Man, I ain’t assault nobody! Y’all know that’s some bullshit.” Da’Vonte’s face curled into an exasperated and angry look as he shook his head at the officer exiting the room. He finally turned his attention to his attorney.

“I ain’t assault nobody,” he repeated.

“All right, Mr. Moore. Just calm down. I’m Sonya Church from the federal public defender’s office, and I represented you at your initial appearance in front of Judge Sunstrom last week.”

“I remember you, Ms. Sonya.” Da’Vonte’s left fingers attempted to rub the parts of his right wrist being constrained by the handcuffs. “Damn, these are tight.”

“I’m here to talk to you about your detention hearing on Wednesday. Basically, since the government moved to detain you pending the outcome of your case, you are entitled to what’s called a detention hearing, where we hopefully show the judge that you can be trusted to attend court and follow the laws while we figure out what to do with your case. You understand?”

“Yeah, kinda. Can’t I just plead to probation or whatever? That’s what I’ve done before.”

“Well, Mr. Moore, before you were in state court. This is a federal case. The rules are totally different. You definitely are not getting probation. Honestly, you’re looking at 10 to 40 years in a federal prison for this.”

Da’Vonte’s attention left his right wrist and shot to his attorney’s face. Then he started laughing. “Shit, you playin’, Ms. Sonya. I only sold a dime or two. I even took a discount for that shit.”

“I’m not playing. They claim to have audio and visual from the guy you sold to that clearly shows you sold him heroin three different times. There will be no doubt in any juror’s mind that not only are you guilty of these crimes but that it’s very probable you’ll continue to sell heroin in the community if they let you out. And no one wants to let a guy out who is going to sell their kids or their siblings or their spouses heroin. Especially discounted heroin.”
“Man, I knew that guy was a snitch. I could feel it.” His head fell into his cuffed hands. “So what you gon’ do, Ms. Sonya?”

“Well let’s take it one step at a time. At the detention hearing, the government will probably have the lead agent on your case testify about the evidence against you. And then we will offer evidence indicating you can be released pending the end of the case, and that you will not be a danger to the community, and you will come to court when you are supposed to. That usually requires what’s called a ‘third-party custodian.’ That’s somebody who will baby-sit you while you’re out, make sure you’re not breaking the law, that you’re in the house when you’re supposed to be, that you get to court. Things like that. Can you think of anybody to do that? Your mom or a grandma or a girlfriend?”

Da’Vonte thought for a few seconds. “I guess you could try my mom. But she works a lot down at the old people’s home. So I don’t know if she could get off work. My grandma maybe could do it.”

“All right, tell me about your grandma.” Sonya retrieved her dilapidated legal pad and pen. “She’s 75, on disability, has a bad heart.”

“I’m sorry. My mom also has some heart problems.”

“Yes, she has trouble breathing. Can’t walk too long without having to sit down.”

“Bless her. What’s her living situation like? Have you ever lived with her?”

“Um, she lives downtown, off Bleecker. My aunt and her three kids live with her. I lived with her for a few months when I was little when my mama didn’t have a job. But that was like 10 years ago.”

“OK, and is there room for you to live there? How many bedrooms does she have?”

“I mean, I guess she could make room. I could sleep on the couch or the floor or something. She only got two bedrooms, so my cousins all sleep on the floor, usually.”

This wasn’t the first time Sonya had heard of this type of living situation—multiple family members piling into small houses where there was no room for them. And she knew judges were often unwilling to put a drug dealer that carried a gun into a small home with an elderly matriarch and children living under the same roof.

“Have you ever had a job? Did you graduate from high school?” She had seen judges let out a guy like Da’Vonte if they had a job to go to or college classes they needed to attend. But few ever did.

“Nah, I tried to work at that Burger King on 3rd and that Food Lion on 15th when I was 17, but they ain’t hire me. My mom told me I needed to get a job to help her with some of the bills and groceries and stuff. I’d just been picked up for my first charge—I had a blunt on me and got hit with simple possession—so I think they ain’t wanna deal wi’ a criminal. But I did graduate from high school. Just can’t do much with that diploma now.”

“Good for you for finishing high school. So many of my clients get sucked into that cycle. Once you pick up one charge, a lot of employers go running, and then selling drugs becomes the only viable way of making a living and supporting your family. You’re definitely not alone in that.”

“Yeah. But I won’t do that shit no mo’. I don’t wanna go to prison!”

“I can tell you in my experience, based on your charges and the type of environment you would be in at your grandmother’s house, that a judge, especially Judge Sunstrom, is not going to let you go. Can you think of anyone else? Maybe we can see if your mom can get Wednesday off from work?”

Da’Vonte sat quietly, thinking. “Nah, I can’t ask her to do that. She got my brothers and sisters to worry about. Well, can’t we just try with my grandma? At least see what the judge says?”

Situations like these were always tough for Sonya. She knew what Judge Sunstrom would do: She would sit on the bench quietly, take sparse notes and ultimately keep Da’Vonte detained.

Sonya’s clients did not have the wealth of experience she had and the jadedness that came with it. It was hard sometimes, reminding herself that, while this was her thousandth time going through this process, it was the first for the client. They always believed that their cases were unique and special, and that a judge would see them for who they really were. Sonya knew each client’s case was just another box on the speeding conveyor belt that was federal drug prosecution. All the boxes were the same, and they were all going to the same destination. But out of the two people in the room, only Sonya could appreciate that harsh reality.

“Well, it’s your right to decide what you want to do. But as your attorney, I’d advise you to waive your detention hearing. I can tell you unequivocally that you will be detained. No judge will let you out to those conditions. Frankly, the hearing would be a waste of time.”

“Waste of time? If I got 10 to 40 years in prison waitin’ for me, what else do I got but time? I don’t give a damn about wastin’ no judge’s time or no prosecutor’s time. They got a job ‘cause of me.”

Sonya was really talking about wasting her time, a vision of her office packed full of files coming to mind. She had four other defendants to talk with that day about their detention hearings, all of which were scheduled for Wednesday. Frankly, the more hearing waivers she got, the better.

“It’s your decision, Mr. Moore. I’ll do whatever you like, but I want to realistically set your expectations. You need to go into that hearing expecting to fail, do you understand?” Subtle persuasion sometimes worked—don’t tell the client what to do, just simply make them think it was their idea.

“That’s fine. Let’s do it.”
Well, that didn’t work.

Wednesday arrived. Luckily, Sonya had successfully convinced three of her five clients to waive their detention hearings. Da’Vonte, however, remained immovable. He gave her his grandmother’s contact information, and unfortunately for Sonya, she was more than willing to serve as third-party custodian. Unlike other defendants’ grandmothers who were volunteered to be third-party custodians, Da’Vonte’s grandma, Ms. Ethel, was responsive to all of Sonya’s messages and consented wholeheartedly to the duties that came with the role. She even made a point of telling Sonya that she would be at the court 30 minutes early, just in case.

It was Sonya’s practice (when she wasn’t serving as the transport for her daughters’ medical appointments) to arrive at the courthouse an hour before court commenced in order to speak with her clients in the holding cells. After 18 years of practice in this court, every guard knew Sonya to the point where she rarely had to knock on the door before it was unlocked and opened for her. She handed one of the deputy marshals a list of her clients and asked to speak to Da’Vonte in particular. She made her way into another all-too-familiar tiny meeting room in the bowels of the federal courthouse.

Hands and feet shackled, the deputy marshal sat Da’Vonte across from Sonya. “Hi, Ms. Sonya.” He seemed in much better spirits than he had been on Monday. “How are you, Mr. Moore?”

“I’m great! I’m excited to see my family! Have you seen any of them yet?”

“No, I haven’t been in the courtroom yet, but I’ve spoken to your grandma a lot over the last couple days. She definitely loves you; says you are the best grandson a lady could have.”

Da’Vonte’s face lit up. “Yeah, my grandma’s dope.”

“Well, don’t forget what I told you on Monday: Your expectation should be to stay detained.”

Da’Vonte nodded his head, but the expression on his face remained unfazed. “I hear ya, Ms. Sonya, but I have to try. I can’t just lay down and let ‘em throw me in a cell without puttin’ up a fight.”

The detention hearing was a disaster, just as she had expected. Ms. Ethel took the stand and proclaimed her grandson’s innocence, testifying

DA’VONTE WAS NOT GETTING OUT OF JAIL TODAY, AND ALL SHE COULD CONCENTRATE ON WAS GOING THROUGH THE MOTIONS AND GETTING TO THE END OF THIS HEARING.
that he is a God-fearing boy who would never touch a drug. She blamed any misbehavior on the devil and then accused the prosecutor of lying on cross-examination. In sum, not the optimal qualities of a suitable third-party custodian.

When the DEA agent testified, Da’Vonte balked at nearly every sentence. The agent testified that DEA had been investigating a dealer named Pit for months. Through their investigation, they came upon Da’Vonte and another low-level dealer named Kush, each of whom sold for Pit. The agent testified that they arranged for a confidential informant to meet Da’Vonte and purchase $500 worth of heroin. The DEA had equipped the informant with audio and visual recording devices, but the batteries in both of the devices died before the buy took place. However, the government had testimony from the informant, plus the fact that Da’Vonte had the $500 of marked government money and an unregistered firearm on his person when he was searched and arrested. Once he was apprehended, his car was searched, and nearly 1 kilogram of heroin was found, packaged in small individual baggies.

Throughout the agent’s testimony, Da’Vonte continuously tapped Sonya’s shoulder, whispered to her and took notes. He was as actively engaged as she had seen a defendant in some time. When the agent testified that he had $500 on his person at the time of his arrest and 1 kilo of heroin stashed in his car, Da’Vonte audibly exclaimed, “Are you serious?” Judge Sunstrom reprimanded him on the record, instructing Sonya to control and silence her client. Sonya sternly told Da’Vonte to be quiet.

“Ms. Sonya, he’s lying! Ask him about that $500. I ain’t had no $500 on me! Dude asked for $500 worth, but I told him on the phone I only had a hit or two on me. Pit ain’t give me that much to sell! Ask him about those baggies. This is some bullshit.”

Sonya frowned and put her hand up in front of him, silently admonishing him.

“Ask him! Anything he say gon’ be a lie.”

Her patience began to fray. This hearing was a waste of her time to begin with, and now Judge Sunstrom was shooting daggers at her from the bench. Da’Vonte was not getting out of jail today, and all she could concentrate on was going through the motions and getting to the end of this hearing.

“I have no further questions, your honor.” The prosecutor turned his attention to Sonya, a neutral, unfazed expression on his face. Unlike the passionate TV lawyers who are portrayed as hating their opposing counsel, things between her and the assistant U.S. attorneys were always cordial. This was a job.

“Cross?”

“Yes, your honor.” Sonya intended to make this as brief as possible.

“Agent Willis, how often do you send confidential informants into controlled purchases with malfunctioning equipment?”

“Well, we do our best not to, ma’am. Unfortunately, things happen. But it’s rare that the batteries would die like they did.”

“Is it not part of DEA’s procedures and protocols to test the functionality of their equipment before they send an informant into a potentially dangerous situation?”

The agent smiled in an unfriendly way. “Sometimes things happen. We do what we can. But as I said before, we had more than enough evidence to prove that the defendant is the dealer, even without audio and visual.”

“And agent, did this confidential informant know my client? Did he claim to have purchased drugs from my client in the past?”

“Ma’am, I’m sure you understand that I cannot divulge any information about the CI to protect his or her safety. So I am going to decline to answer that question.”

This was pointless. “No further questions, your honor. Thank you.”

Da’Vonte turned on her ferociously. “Are you kidding? You ain’t ask him what I told you to ask him! I told you to ask him about that $500! I sold the dude $20 worth of heroin. One hit! $500 woulda been like 3 grams.”

Sonya furiously threw her hand up to silence Da’Vonte. Openly admitting his wealth of heroin-dealing knowledge 8 feet away from a federal prosecutor probably was not the greatest idea. Plus, Judge Sunstrom was looking at her to begin her closing argument for why Da’Vonte should be let out of jail. She rose from her seat to give the best argument she could muster, given the impossible circumstances. Da’Vonte sat in his chair shaking his head back and forth and bouncing his foot off the floor.

When she concluded her argument, Judge Sunstrom predictably ruled that Da’Vonte was a danger to society, Ms. Ethel was unfit to serve as his third-party custodian, and he needed to be detained pending the outcome of his case.

The deputy marshals walked over to escort Da’Vonte back to his holding cell. As he was being led away, he turned to Sonya. “You ain’t do what I told you.” He then smiled and waved to his family who watched him retreat with tears in their eyes. Sonya picked up the next file in her stack as the second detention hearing began.

It had been a week since Da’Vonte’s hearing, and she had received four emails from him and two voice messages from his mother. Every communication reiterated the same point: Da’Vonte did not sell the informant $500 worth of heroin, and he certainly did not have a kilo of heroin in his car. The government was lying. She had responded to each of the emails briefly with relatively the same message: “I will look into it.” His arraignment was still about three weeks away—a lifetime to a public defender.

After being in court all day, Sonya returned to the office to attempt to prepare for tomorrow’s cases. It was 4:50. Tiffany’s senior night for basketball was tonight, and Sonya had promised she would be there at 5:15 sharp. “Five minutes to prepare six cases. Great,” she thought.

Kate poked her head in the office. “Sonya, Peter’s on the phone. He’s calling about that Moore case.”

“OK, you can transfer him. Thanks.”

She answered the phone on its first
ring. "Hey, Peter. How are things?"

"Busy as always. But I'm sure I don't need to tell you that." They both chuckled at the ridiculous reality they shared, even on opposite sides of the courtroom.

"So this Moore fella. Think he'll plea to possession with intent? Lower the weight to 500 grams. I can't do anything about the gun, but at least we can knock out the weight a little bit. We'll recommend 10 years, so on good behavior he'll get out in a little over eight, likely with time served. Much better than the max of 40 years."

Pleading in a drug and gun case was always the way to go: They found the drugs and gun on you, they have agents to testify, you have a criminal record, you don't have a job. If you plead, then you get an "acceptance of responsibility" credit, which helps to knock down the sentence, and often the prosecutor offers to knock down the drug weight, which also lowers the sentence. Trying a drug case was futile.

"Sounds good to me, but you know it's not my decision. I'll run it by Mr. Moore and let you know."

"All right, I'll keep the deal on the table until this time next week. Is it's not my decision. I'll run it by Mr. Moore and let you know.

"Okay, have a good night."

She hung up. 5:01. Damn.

...  

"No way in hell, Ms. Sonya. Nope. The government thinks they can pull this shit on me, but they ain't. I know what they tryna do. I sold that shit a hit three times. I ain't have nothin' in my car, I ain't have no $500 on me. I sold that shit to him for 20 bucks. You think Pit would let me drive around with a kilo in my car?"

They were back in the dark, damp attorney room in the Byrum County Jail.

"Listen, I get it. Rarely are the facts that the government alleges fully true. That's just the way it is. But you have to look at the risk here. You could be looking at at least 40 years in prison! If you plead, you get out in eight with good behavior."

This part of the process was tedious. Explaining to a client why he should admit to something he insists he did not do was a delicate art. It required sympathy and empathy mixed with just the right amount of persistence and hard-balling.

"It's ultimately your decision, but I advise you take the deal. It's generous."

Da'Vonte covered his face with his cuffed hands, his head shaking from side to side.

"My family's gon' be crushed."

"They'll be a lot less crushed with eight years than they would be with 40." Deciding to plead guilty was always a numbers game.

"Fine." He removed his hands from his face. "But I sold that man three hits in two weeks for 20 bucks each. I'm about to go to the penitentiary for 10 years for a couple 20-buck sales." He closed his eyes and shook his head again.

Up until this point, Sonya had not believed a word of his story.

Every defendant insists they are being set up. But the fervor with which he spoke now was convincing, and his story had never changed since she met him.

Even if he was telling the truth, it did not change the fact that he had zero chance in court.

He had never worked a day in his life but somehow was able to have a car, put gas in that car, eat and clothe himself. How was he doing that if he..."
wasn’t making his money some other way? Plus, no matter what he said, no jury would find him not guilty with the evidence the government had. And those files piling up in her office did not allow her the option to try an unwinnable case. That is not how things worked here.

So she put those uneasy feelings aside and focused on the eight versus 40-year calculation that she had imparted on Da’Vonte only moments ago.

“All right, let’s go over this plea agreement word for word, just to be sure we’re on the same page.”

Da’Vonte pleaded guilty at his arraignment, and Judge Bridgeman sentenced him to the recommended 10 years. He’d get out in eight with good behavior, and then serve five years of supervised release.

The judge complimented Sonya on her zealous advocacy and told Da’Vonte he was lucky to have her as an attorney. “This is a good deal you got here, sir, given what they found you with.”

Sonya had received a few voice messages from Da’Vonte’s family asking if there was anything she could do. But she explained to them her representation of Da’Vonte had ended.

Case closed. One less file in her office.

She headed off to the Byrum County Jail to meet with a new client who had just been picked up for selling drugs to an informant. How original.

She was perusing the client’s file for the first time when she heard the familiar clatter of chains approaching the little room. A young black man sat before her; dreadlocks piled atop his head.

“Hi, Mr. Edwards, my name is Sonya Church, and I’m here from the federal public defender’s office to represent you in this case.”
Substance-use disorders and mental illness can tear apart families. But those issues have united many entities in the American Bar Association to work toward one goal: improving the well-being of legal professionals.

Since a 2016 survey on substance-use disorders among lawyers revealed troubling outcomes, many entities, including the ABA Working Group to Advance Well-Being in the Legal Profession, the ABA Commission on Lawyer Assistance Programs, the National Task Force on Lawyer Well-Being and others were jolted into action. They launched campaigns, pledges and a toolkit—with more to come.

“We want lawyers to get help to move from ‘doing OK’ to thriving, as well as get help when there is a serious impairment,” says Terry Harrell, executive director of the Indiana Judges and Lawyers Assistance Program and chair of the ABA Working Group to Advance Well-Being in the Legal Profession.

Of the 12,825 attorneys who responded to the survey, 20.6 percent reported problematic alcohol or other substance use, and 36.4 percent qualified as problem drinkers. Respondents were impacted in many ways by substance-use disorders, including missed deadlines, inappropriate behavior and family concerns.

The survey led to a task force and the creation of the ABA Working Group to Advance Well-Being in the Legal Profession. They presented Resolution 105 at the 2018 ABA Midyear Meeting in Vancouver, British Columbia, asking all stakeholders in the profession to review the national task force report to improve well-being throughout the profession. The resolution was adopted.

The group had also worked on a resolution proposing a model impairment policy for legal employers, which it planned to introduce at the 2019 ABA Midyear Meeting in Las Vegas on Jan. 23-28. But it will be held for fine-tuning based on feedback from various stakeholders.

“In our efforts, we have discovered that it is difficult and may not even be useful to draft a one-size-fits-all policy,” Harrell says. “There are too many different kinds of legal employers of vastly different structures and different sizes. We have decided that it may be more helpful to legal employers if we simply create some guidelines to assist them in drafting their own internal policies.”

TAKING THE PLEDGE
That’s why the ABA Working Group instead decided to launch the Well-Being Pledge Campaign in September,
asking legal employers to commit to offering resources and confidentiality to help lawyers with substance-use disorders and mental health issues. It also developed the Well-Being Toolkit for Lawyers and Legal Employers, which was launched in August.

At least 42 law firms and one corporate legal department had signed the pledge as of early December.

More corporate legal offices, as well as government offices, could be included later, says Patrick R. Krill. Krill is a lawyer, licensed substance-use disorders counselor and principal of Minneapolis-based Krill Strategies. He helped develop the framework of the pledge campaign as a member of the working group.

Pittsburgh-based law firm Reed Smith was one of the early signers of the pledge. The firm coupled it with its Wellness Works initiative, which launched in 2018. The pledge was distributed to the firm’s 25 offices worldwide, and a copy was posted on its intranet along with related programs, says Casey Ryan, Reed Smith’s global head of legal personnel and a member of the working group.

The reception of the pledge was “100 percent positive,” Ryan says. It also helped to destigmatize substance-use disorders and mental illness and could encourage people to come forward confidently and to learn from others in similar situations.

“Lawyers are our greatest asset, and every law firm should care for its people,” Ryan says.

TOOLS FOR THE JOB

The Well-Being Toolkit for Lawyers and Legal Employers was created by Anne M. Brafford, founder of Los Angeles-based Aspire, a consultancy for the legal profession, in partnership with the ABA. It provides initiatives, strategies and resources, including a concrete eight-step action plan for lawyers and legal employers.

The toolkit came about after the 2017 report by the National Task Force on Lawyer Well-Being grabbed the attention of legal employers who saw lawyers were struggling to thrive. They wanted to act, but many weren’t sure how to get started, Brafford says.

“The toolkit was intended to respond to the collective question: ‘Now what?’ We’ve been inundated with thank-you notes for providing concrete steps tailored to the profession to help organizations get started on a topic they care about,” Brafford says.

In the short term, Brafford hopes the toolkit motivates legal employers. She also expects the toolkit to evolve and improve as she and other ABA officials learn more about what works, what doesn’t and what legal employers need to continue to grow in this area.

“In the long term, our hope is that the toolkit, along with many other well-being initiatives percolating in the legal profession, will contribute to a growing awareness that ‘lawyer well-being’ is not an oxymoron, as so many joke,” Brafford says. “There are things we all can and should do to raise lawyers’ well-being and protect the reputation of the profession as a magnet for the best and brightest who want to solve the world’s problems.

“Everyone in the legal profession contributes to its culture, which can either support or harm our collective health and happiness. This makes lawyer well-being a collective responsibility; a team sport to which we all contribute. The toolkit is one more ripple in what we hope to become a growing tidal wave of positive change in the legal profession.”

ELIMINATING STIGMA

CoLAP is working on some projects to eliminate the stigma surrounding mental health and substance use disorders, says Bree Buchanan of Austin, Texas. Buchanan is the chair of CoLAP and co-chair of the National Task Force on Lawyer Well-Being.

For example, CoLAP is raising about $25,000 from donations to create a high-quality video with legal professionals sharing their personal experiences on these issues. The goal is to promote awareness, especially to people just starting to struggle. The video is expected to be completed this winter.

Research shows that the best way to break down a stigma is to have contact with someone who has had a substance-use issue and is now in recovery, says Buchanan, who also has been in recovery for nine years.

In addition, CoLAP aims to follow up the 2016 lawyer survey with another survey focusing on judges and stress, resilience and impairment issues. It could be published in 2019, Buchanan says.

Once the judicial survey is completed, CoLAP will reach out to other ABA entities to develop programs, CLE sessions and other educational events. It will also promote well-being throughout the legal profession.

“We’re drawing attention that needs to be drawn for the well-being of everyone in the legal profession: law students, lawyers and now judges,” Buchanan says.

CoLAP recently worked with their counterparts in every state during Law School Mental Health Day in October, offering speakers, materials, a webinar and other programs at law schools.

“Before, it was like watching The Paper Chase. If you couldn’t take it, you had to get out of the profession,” Buchanan says. “We’re getting to an era when it won’t be like that anymore. But we’re not quite there yet.”

Krill agrees.

“It’s incredibly heartening and gratifying to see the profession come a long way since I was admitted about 16 years ago. Just look at the last three years, especially,” he says. “We’ve really been making progress. But we have a long way to go. The conversation is really accelerating, and a culture change is happening for the health of the profession and for the sustainability of the profession. That’s an incredibly positive development, and it’s gaining momentum.”
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When Margaret Stock first received the Pentagon’s September 2016 memo, she thought someone had made an amateur mistake.

“I’m an attorney, and I taught constitutional law, so I obviously recognized immediately [that], hey, somebody at the Pentagon didn’t do their job; they’re putting out an unconstitutional memo,” Stock says.

But it wasn’t an error. The memo essentially shut down the Military Accessions Vital to the National Interest program, which recruited immigrants with certain highly desired skills. The program had more than 10,000 participants, and the memo ordered extra background checks on all of them. To Stock’s eye, the implication was that non-citizens posed a threat to national security. She thought that was ludicrous and obvious national-origin discrimination.

But until the checks were completed—and Stock says the military had no capacity to complete them—the recruits were grounded, ineligible for orders even to basic training. Furthermore, the memo said MAVNIs, as people enlisted through the program are known, were ineligible to be officers for six to eight years. Because all doctors are officers, that instantly eliminated all the doctors the program had intentionally recruited. Individual services were welcome to continue MAVNI but only after meeting requirements that Stock says were impossible to meet.

Word got around, and soon messages started coming in from MAVNIs to Stock’s Anchorage, Alaska, law firm, Cascadia Cross-Border Law. They still come in, and Stock is doing what she can to help.

“It’s been just a flood of people with problems calling me,” she says. “People in America would be appalled if they knew what the Pentagon was doing.”

**SERVICE TO THE COUNTRY**

If Stock seems passionate about MAVNI, that might be because she helped create it. For 28 years, she balanced her career as an immigration lawyer with another as a soldier in the U.S. Army Reserve, retiring as a lieutenant colonel when she reached the statutory maximum service. As an immigration lawyer, she’s served on the ABA Commission on Immigration (and served as a state co-chair for the American Bar Foundation Fellows); spoken at ABA meetings; and created the American Immigration Lawyers Association Military Assistance Program, which connects military families to pro bono immigration lawyers.

As a soldier, Stock says she “had an exciting time for 28 years” deploying to Japan, Korea and around the United States. The Army was what brought her to Anchorage, where she was stationed at Fort Richardson in the mid-1980s. It also gave her the flexibility to earn graduate degrees from Harvard University and the U.S. Army War College and later teach at the U.S. Military Academy at West Point, New York. She’s been vocal about her belief that immigrants benefit the military.

That may be why, in 2006, Sen. John McCain, who died last year, called Stock and asked her to testify before the Senate about recruiting more immigrants to the military. Soon, she was ordered to active duty to help create a program for recruiting immigrants with vital skills—medical skills and certain languages—who the military was having a hard time finding through ordinary recruitment. In exchange for their service, these recruits would be able to jump to the front of the line for naturalized citizenship.

Initially, MAVNI seemed successful; it was approved under then-President George W. Bush and implemented under former President Barack Obama. When Stock hit her statutorily required retirement date in 2010, the government kept calling for advice. But Naomi Verdugo, who worked with Stock on MAVNI before her own retirement, says certain people at the Pentagon didn’t trust the foreign-born, and they kept adding more screenings.

“It seems like an appetite that can never be satisfied,” Verdugo says. “Eventually the program becomes

**No Summer Soldier**

*When things go wrong, immigrants serving in the military look to Margaret Stock*

*By Lorelei Laird*
have a weaker military because we are refusing to recruit people who are talented immigrants.”

**NORTH TO THE FUTURE**

More than two years after that 2016 memo, Stock is still getting messages daily.

As a result, she’s become a kind of a hub for MAVNIs seeking legal representation. She can’t do it all herself—her office has six attorneys, and she could use more—so she’s been recruiting lawyers all over the country to help. There are at least five pending class actions related to MAVNI, she says, mostly backed by large law firms. If she can’t fit callers into one of those, or find them another lawyer, she takes it herself. One case she convinced her husband—an experienced civil litigator but not an immigration lawyer—to take it on. It’s all self-directed, Verdugo notes.

“I think that’s pretty incredible that she has taken it upon herself, and it really is largely herself, to get their careers back on track or get their clearances or help with these lawsuits,” she says.

Stock’s husband, Neil O’Donnell, is one reason she’s still in Alaska. They met mountain climbing—in a snowstorm—and she says they still enjoy the outdoors, which the state provides in abundance. Stock notes that there’s also plenty of immigration law work.

“We could use four or five more attorneys, frankly,” she says. “[There are] not enough people for the people who need pro bono help, so we do a substantial amount of pro bono work.”

In fact, Stock has recently ended a stint of doing nothing but pro bono work. In 2013, she was a recipient of a “genius grant” when she was announced as a MacArthur fellow for her work on immigration and national security. That came with five years of funding, which enabled her to take meritorious cases without worrying about her legal fees.

She also spoke around the country about her belief that immigrants are a boon, not a threat, to national security.

The grant ended this past fall, but Stock still wants to get that message out. She believes this is a dishonorable period in American history, like the World War II-era discrimination against Japanese-Americans. As then, she says, she thinks it’s fueled by fear.

“I think that’s what’s going on at the Pentagon right now, they are terrified of foreigners, and so they’re doing things that actually hurt our nation’s military,” she says. “And I think we’ll overcome that eventually. We’ll have to. If we don’t, we’re not going to be a superpower anymore.”

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**Your ABA**

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**ABA Notices**

**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. A list of the district and at-large positions conducting elections, and the election rules and procedures, can be found at ambar.org/2019BOGElection.

Mary L. Smith, ABA Secretary

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**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, 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 in San Francisco, California. The deadline for any ABA member to submit proposals is March 8. Proposals will be published in the July/August ABA Journal. For details, go to ambar.org/AmendmentsNotice.

Mary L. Smith, ABA Secretary
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When appellate attorney Cynthia E. Tobisman decided to write her first novel, *Doubt*, she had a goal in mind.

“I wanted to create a lawyer character to whom justice wasn’t an abstract idea,” Tobisman told attendees of the 2018 Harper Lee Prize Awards in Washington, D.C. “I wanted it to be something that for her required righteous action. I wanted a character that understood the law as a tool to try to make the world a fairer place, especially for people who have the cards stacked against them.”

That character, Caroline Auden, is also the heroine of *Proof*, Tobisman’s second novel and the winner of the 2018 Harper Lee Prize for Legal Fiction. The prize is given each year by the University of Alabama School of Law and the ABA Journal to a novel-length work of fiction that best illuminates the role of lawyers in society and their power to effect change.

“Proof” best captures the spirit of iconic characters, [the] role of the legal profession in addressing social issues, and the concluding legal monologue of *To Kill a Mockingbird and Go Set a Watchman*, said Dr. Hilary Green, an associate professor of history at the University of Alabama and one of the four judges who selected the winning novel. “Caroline Auden is the perfect cross between lawyer Atticus Finch and the grown-up Scout.”

“It’s exciting to see this award go to a practicing attorney who’s relatively new to the fiction scene,” says Molly McDonough, editor and publisher of the Journal. “We also love seeing attention being drawn to the important field of elder law. We look forward to seeing what Cindy Tobisman will bring to the genre of legal fiction.”

The Harper Lee Prize was presented to Tobisman in an August ceremony at the Library of Congress to coincide with the National Book Festival. She received a copy of *To Kill a Mockingbird* signed by Harper Lee, who approved the creation of the award in 2010 to mark the 50th anniversary of her novel. Past authors of Harper Lee Prize-winning books include John Grisham, Michael Connelly, Paul Goldstein, Deborah Johnson, Attica Locke and James Grippando.
CONGRATULATIONS to Marla H. Norton of Wilmington, Delaware, for garnering the most online votes for her cartoon caption. Norton’s caption, below, was among more than 300 entries submitted in the Journal’s October cartoon caption-writing contest.

“They say you are entitled to a trial by a jury of your peers. This defendant must be a real Bozo!”
—Marla H. Norton of Wilmington, Delaware

AND ALSO CONGRATULATIONS to Paul Agathen of Washington, Missouri, for garnering the most online votes for his cartoon caption. Agathen’s caption, below, was among about 100 entries submitted in the Journal’s November cartoon caption-writing contest.

“Trust me. I have extensive experience as a soul practitioner.”
—Paul Agathen of Washington, Missouri

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, Feb. 10, with “January-February Caption Contest” as the subject line.

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

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In the late 1970s, two forces drove anxiety over the nation’s economy: oil and inflation. A 1973 oil embargo prompted by war in the Middle East, followed by a 1979 spike in oil prices, plunged the nation into a dizzying round of inflation peaking at 14 percent, and the U.S. dollar was having trouble remaining stable.

Until 1971, when Richard Nixon freed the U.S. from the gold standard, public faith in currency depended on the price of gold. To average Americans, the tethering of currency to a precious metal, whether gold or silver, seemed a sensible thing. But at least two events in history, both involving silver, revealed the disruptive vulnerabilities of both.

On Feb. 20, 1893, the Philadelphia and Reading Railroad declared bankruptcy, sparking the Panic of 1893. Though commodity speculation and outsize railroad debts metastasized the panic, many blamed the rivalry between gold and silver for the nation’s economic woes.

Historically, a gold-based currency was considered conservative and stable. But in the decades after the Civil War, farmers in the nation’s rapidly expanding agricultural base grew to resent the increasing strength of the gold-based dollar, which required them, in effect, to pay debts in dollars more valuable than the money they borrowed.

Their need became a movement that championed a silver-based currency and drove passage of the 1890 Sherman Silver Purchase Act. The act required the government to buy 4.5 million ounces of silver each month and issue certificates redeemable for either silver or gold. Though a boon to farmers and miners, it was a spectacular boondoggle. Speculators redeemed silver certificates for gold, then traded it on the open market, depressing the prices of both metals. Speculation was so rampant that by August 1893, President Grover Cleveland called a special session of Congress to repeal the Silver Purchase Act.

Silver remained part of the nation’s coinage and a major tenet of the populism characterized by presidential candidate William Jennings Bryan at the turn of the century. But in 1879, silver speculation returned with a vengeance in the form of billionaires Nelson Bunker, William Herbert and Lamar Hunt, sons of legendary oilman H.L. Hunt.

Starting in 1973, the Hunts used their inherited billions to accumulate substantial amounts of silver and soybean futures contracts. But unlike other traders who simply traded contracts for a profit or loss, the Hunts began taking delivery of the actual soybeans and silver, and regulators suspected a goal of market manipulation. By April 1977, the Hunts controlled an estimated third of the U.S. soybean crop. The Commodity Futures Trading Commission stepped in, fining the family $500,000 and asking a federal court to order them to disgorge a three-month profit of up to $100 million.

But barely two years later, the Hunts began the same behavior in the silver market. Again, they not only bought futures contracts but took delivery of the actual silver, accumulating vast stocks of the metal in Swiss vaults. Between January and December 1979, as the price of silver rose from $6 to $32 per ounce, the Hunts borrowed against the increased value of their hoard and used the money to buy more silver—whether in futures contracts, bullion or stock in mining operations. As prices rose, silver poured in from everywhere: jewelry boxes and pawn shops, tea sets and coin collections, bank vaults and burying ground. By the time the price reached $49.45 per ounce on Jan. 18, 1980, the Hunts controlled, in one way or another, more than 69 percent of the world’s silver supply.

On Jan. 21, 1980, at the urging of regulators, the Commodity Exchange, the main marketplace for silver, enacted rules on silver purchases that in effect required the Hunts to sell. As they sold, silver prices declined; the Hunts had to pay their margin calls, and decline begat decline.

The results were disastrous. On March 27, 1980, a day known as “Silver Thursday,” the price of silver plummeted to $10.80 per ounce, and the Hunts, once legendary billionaires, were well on their way to bankruptcy.
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