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Asked and Answered: Where the Jobs Are: Hot careers for the Class of 2019  
Legal Rebels: Luz Herrera, professor and associate dean at Texas A&M University School of Law  
Modern Law Library: The Trial of Lizzie Borden, by Cara Robertson
BEHAVIOR UNBECOMING

Wendy Davis’ article “Bullying from the Bench,” March, page 46, is well-documented and well-written on a subject that should concern us all. What she does not discuss is the thin line that exists between a judge who requires attorneys appearing before him or her to toe the line in the name of efficiency and a well-run docket and the judge who abuses the process in the name of efficiency. Those attorneys who abuse the process by pursuing interminable delays will be the first to complain about a judge who requires them to toe the line. That is not abusive in my book.

Alan B. Schaeffer
Dayton, Ohio

Your article about “bullying judges” emphasized those judges who lost control at some moment or did specific anti-judicial things. But there were also judges before whom I tried cases who had a more insidious form of lawyer-bashing. One such judge refused to let the competing lawyers address the jury on voir dire and did it all himself. His first comments to the jury were to the effect that jurors got tired of the lawyers always talking, and he’d do the questioning “to protect” the jury from that abuse. Then he’d make scurrilous anti-lawyer comments before continuing, even once using the apparent “slip-of-the-tongue” comment speaking about the “liars-I-mean-lawyers.” This hurt both sides of the case with the jury, but particularly the plaintiff’s side. He was never stopped or censured before retirement, to my knowledge. Your article was both thoughtful and well-taken.

Paul G. Rees
Tucson, Arizona

CLARIFICATION

“Census Fracas,” April, page 20, should have clarified that California faces a “certainly impending” risk of losing a seat in the U.S. House while five other states face a “substantial” risk of losing a seat.

CORRECTION

“Reckless Requests,” March 2018, should have said that a Washington legislature study group decided to charge 1.25 cents for electronic copies, so a requester who asked for 10,000 files would pay $125.

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, 321 N. Clark St. Chicago, IL 60654. Letters must concern articles published in the Journal. They may be edited for clarity or space. Be sure to include your name, city and state, and email address.

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A Better Value
ABA reinvigorates benefits for current and new members

The American Bar Association, with an eye on a bright future, will begin introducing exciting changes starting this month as part of a new membership plan that offers greater value and significantly enhanced benefits.

For more than two years, staff and volunteers along with outside marketing experts have conducted meticulous research and developed a plan to position us to be an essential partner with our members: helping to build their practices, strengthen their networks and achieve success in their careers.

We will demonstrate that ABA membership is essential for all lawyers’ professional development and advancement. The ABA will connect with the legal community and increase awareness of the great impact the ABA has both inside and outside the legal profession.

Our new membership model consists of six key components:

New member benefits and resources: Members will be able to join the Law Practice Division and the Solo, Small Firm and General Practice Division at no additional cost. All members will have access to the content generated by both divisions, along with a wide range of premium information and CLE programs. Members will experience a newly designed ABA Career Center with greater emphasis on delivering up-to-date podcasts and webinars and will be introduced to an interview and résumé-building tool, ABA Career Forward. This benefit is offered to ABA members through Korn Ferry Advance and is designed primarily for young lawyers, solo practitioners and those looking to make a career change.

CLE marketplace: The ABA is expanding its vast selection of premier CLE programs—one of the association’s most popular benefits. Members will have access to an on-demand CLE library with more than 450 titles and growing, all available to members at no additional cost.

Content tailored for you: We will work to deliver content to you that is relevant to your practice and interests. This may include articles, digests, synopses, checklists, short videos and audio recordings. Content also will be available through multiple channels, including the ABA website, email and social media.

Members-only access: For years, much of the ABA’s information was available on our website to anyone. Now, only members will have access to a majority of ABA content. Some information will remain accessible to the public, such as the online ABA Journal and news updates, but most content will be behind a paywall and limited to dues-paying members. While only entity members will have full access to their entity content, all ABA members will have the opportunity to sample content five times a month from any ABA entity so that members can see the value in joining a section, division or forum.

Sensible dues structure: The cost of ABA membership is no longer a barrier to being an active member. The new ABA annual membership dues have been simplified to five categories: $75 for those admitted to the bar four years and less (including new members of the bar); $150 for those admitted to the bar for five to nine years, solo practitioners, small-firm members, judges, retirees, public service/government lawyers, and international (non-U.S. licensed) attorneys; $250 for those admitted to the bar 10 to 14 years; $350 for those admitted to the bar 15 to 19 years; and $450 for those admitted to the bar 20 years and more. Members belonging to more than one category will pay the lower dues rate.

Improved member experience: Our newly designed mobile-friendly website is available at ambar.org. We recognize that some users initially encountered technical difficulties with the website, but we have worked hard to address those problems. We know you will find an enhanced user experience with added ease of navigation.

We also have changed our logo and updated our look. But while our look may be new, our core mission remains the same. The ABA will continue to stand up for the rule of law, justice and lawyers throughout America.

The ABA is serious about showing every lawyer the value of membership. We want to communicate better with members and to give them what they want and need from an association. This new model is an important first step toward achieving that goal.

We welcome your ideas and comments.
Jay-Z’s ADR Problems

THE LACK OF DIVERSITY in arbitration and mediation has drawn increasing attention in legal circles, but it took someone with a huge audience and a lot of money at stake to propel the issue into the headlines.

In a dispute stemming from the $200 million sale of his clothing line, rapper and entrepreneur Jay-Z (whose real name is Shawn Carter) in November challenged an arbitration clause as discriminatory, stating it would force him to select an arbitrator from a list nearly devoid of his ethnic group. Only three of 200 arbitrators on the large and complex case roster provided by the American Arbitration Association identified themselves as African-American, and one of them had a conflict, he argued.

Jay-Z recently reached a compromise with the AAA, which offered him additional African-American arbitrators to choose from and expressed willingness to implement other means of improving diverse representation in future arbitrations. The wider controversy, however, is far from over.

“The Jay-Z case brought this [issue] to the fore, and we were very pleased to see that he took those steps,” says Linda Warren Seely, director of the ABA Section of Dispute
**Opening Statements**

Resolution. With more pre-litigation arbitration requirements in contracts, particularly those involving consumer and labor law, she says, the need for “diverse neutrals” in alternate dispute resolution is burgeoning.

ADR providers are offering possible solutions. JAMS, for example, drafted a diversity inclusion rider that may be incorporated into a dispute resolution clause. Through it, the parties agree to appoint a “fair representation” of diverse arbitrators—taking into account ethnicity, gender and sexual orientation—and to request providers to include a significant number of diverse neutrals on their rosters. The JAMS language is among the steps recommended in ABA Resolution 105, passed last year, which guides attorneys and clients in raising awareness and remedying the imbalance.

The participation of lawyers and clients is key, says arbitrator and mediator Linda Gerstel, of counsel at Anderson Kill and a founding member of the ADR Inclusion Network. She notes that the Jay-Z case was the first to focus on the responsibility of lawyers and litigants to actively promote increased diversity in ADR.

“We’re all stakeholders in this community,” says Jaya Sharma, an arbitrator in Madison, Wisconsin, who co-chairs the Section of Dispute Resolution’s diversity committee. “We have to work together and do something meaningful. All these [ADR] organizations are trying their darnedest to recruit women and minorities, and many of them have training programs. That’s great, but then mentoring has to go on. We can’t in all fairness place the onus all on arbitral associations. Everyone has to do their part.”

Sharma poses the question: “Is it a problem of supply or demand? In my opinion, it’s both. Half the battle is to get your name on a roster because that is how you are selected to arbitrate a case. That’s a good first step, but then you need to give [women and minorities] appointments.”

It’s hard to predict whether parties who agree to ADR can seek redress in the courts and what the consequences may be. Iconix Brand Group, the company opposing Jay-Z, claimed that if courts were to review arbitrator pools based upon demographic profiles, it would open “a veritable floodgate of litigation.”

Jay-Z counsel and Quinn Emanuel Urquhart & Sullivan partner Alex Spiro dismisses that argument. “You could say that about anyone or any case that dares to challenge the status quo,” he says. “But it won’t open a floodgate of litigation. It will be a floodgate of progress.”

Spiro maintains that the equal protection clause of the New York state constitution guarantees an ADR participant’s access to the judicial system, while Iconix argued in the case that parties who agree to arbitrate know they may be giving up some protections and rights in exchange for having their dispute decided quickly and privately. “Given that arbitration clauses have become ubiquitous for large corporations and regular people buying Starbucks gift cards, it is crucial that arbitrations operate fairly,” Spiro says. “Part of what that means is that they protect all people equally under the law. And what that means—at least to me—is that there ought to be some choice for people in the process to at least have the option of selecting among a diverse slate of arbitrators.”

While acknowledging there should be diversity in arbitration, Justice Saliann Scarpulla stated at a hearing on the Jay-Z matter in November: “This is a private agreement between two individuals. You could have said in your contract, ‘I want the Dalai Lama to decide my case,’ and that’s your private right.” She added, “If people are dissatisfied with the diversity of the AAA, don’t put the AAA panel in your agreement. Go somewhere else. Do something that makes a difference.” —Darlene Ricker

"THE JAY-Z CASE BROUGHT THIS [ISSUE] TO THE FORE, AND WE WERE VERY PLEASED TO SEE THAT HE TOOK THOSE STEPS."

—LINDA WARREN SEALY
IN THE AFTERMATH of the Civil War, the United States had a “Second Founding”—a period of Reconstruction and re-examining beliefs about freedom and equality under the law. Central to that effort were the 13th, 14th and 15th Amendments, which not only outlawed slavery but laid the groundwork for modern civil rights law.

On May 9, the National Constitution Center in Philadelphia will give the Reconstruction Amendments, as they’re sometimes called, pride of place with a new permanent exhibit: “Civil War and Reconstruction: The Battle for Freedom and Equality.”

“We think it’s crucially important at the National Constitution Center to give the Second Founding equal prominence to the first,” says Jeffrey Rosen, president and CEO of the center. “So you can see the original Constitution and its promise and its compromises, and then you can see the achievement and vision of equality in the Second Founding as well.”

Rosen, who also teaches constitutional law at the George Washington University Law School, says understanding the Reconstruction Amendments is vital to understanding “where the action is in constitutional law today.” The new exhibit explains in detail how all three amendments came to be, using original copies of the amendments to discuss their creation and the debates around their adoption. The exhibit will also discuss contemporary events that influenced or stemmed from the amendments, such as the rise of African-American political officeholders during Reconstruction.

Professor Thavolia Glymph of Duke University, a historian of the 19th-century U.S. who worked on the exhibit, cautions that Reconstruction did not instantly or universally create equality for newly freed slaves. In many ways, she says, the white majority found ways to negate those protections, such as convicting black people of crimes so they could be used as free prison labor.

“So you have these really important amendments that provide citizenship, the right to vote and freedom,” Glymph says. But “actual freedom fell short of the constitutional guarantees is one way to think about it.”

Part of that story will be told using contemporary artifacts—many on loan from the Gettysburg Foundation via the Civil War Museum of Philadelphia.

Rosen calls special attention to Dred Scott’s original petition for freedom, which eventually led to a U.S. Supreme Court decision that upset the nation and set the stage for the Civil War. The center will also display a fragment of a flag raised by Abraham Lincoln at Independence Hall and a pike belonging to abolitionist John Brown. The collection also includes everyday items such as advertisements for slave auctions, carpetbag luggage and a military hymnbook from the 1860s.

“What we’re trying to do in the gallery is tell the story of the evolution of the American battle for liberty and equality,” says Rosen, “and how the equality promised in the Declaration of Independence was thwarted in the original Constitution, resurrected by Lincoln at Gettysburg, fought for by Frederick Douglass and other heroes, and finally enshrined in the Constitution in the Civil War Amendments.”

Starting June 19, visitors can see some of that history come to life with performances of Fourteen, a theatrical performance of Civil War-era texts. The writings come from everyday people and influential figures—and some who were both. The first text is Scott’s petition for freedom. The opening date of the play—also known as Juneteenth, which commemorates the day the Union Army told slaves in Texas that they had been freed—will run intermittently throughout 2019 and 2020.

“Civil War and Reconstruction” will be prominently placed next to the center’s main exhibit on constitutional history. It will also drive new material to the center’s free online Interactive Constitution exhibit aimed at educators and students.

“We hope that this will be part of a revival of interest in the post-Civil War Amendments,” Rosen says. “It’s just one of the most central constitutional stories.”

—Lorelei Laird
IT’S NO SURPRISE there’s a lawyer behind the Legal Draft Beer Co., a microbrewery and taproom in Arlington, Texas. The corporate mission statement is called “The Beerdance Rights,” and it begins with the line, “You have the right to drink great beer.” The taproom calls its frequent customers “Repeat Offend-ers,” and the beers carry names such as Presumed Innocent IPA, Hung Jury Hefeweizen, Accused Amber and Bock Trial. There’s even a nonalcoholic offering called Moot Beer.

That lawyer—the one whose official title happens to be “chief justice”—is Greg McCarthy. He and his neighbor co-founded Legal Draft in 2015, and they’ve been successfully pouring on the legal humor to a growing audience of Texas beer drinkers ever since.

You and your business partner had been talking about going into the craft beer business for years before you actually launched Legal Draft. Was having a legal theme always part of the plan?

No. We actually went through three or four themes. Arlington is a baseball town, so we thought about baseball. We thought about calling it something about Arlington itself, but we found it hard to keep the interest going with those themes. Our marketing director is the one who first came up with the idea of using law as our brand. Up until then, I thought branding was what you did to cattle. She told me that the name has to tell a great story, and everything you do has to help with the telling of that story. Bless her for doing that because who knows what we would have come up with without her.

Law is definitely a great theme when it comes to funny names and phrases! I would totally buy a Mrs. Palsgraf Pale Ale or anything with Freestone Rider or Fee Simple Absolute on the label. How do you come up with Legal Draft’s clever beer names, and is it a difficult process?

We do occasional brainstorming sessions. Sometimes I’ll be reading a book, and something will prompt me to consider a name for a beer. But naming is actually a difficult thing in the beer business. There are 7,000 breweries in the United States, and you can run into some intellectual property problems. We thought of some great beer names, but our lawyer was like, “Great idea, but it’s taken.”

Obviously lawyers get the references, but have you ever had laypeople who didn’t quite understand the beer names?

Most people get it. I think there’s more confusion around the beer than
the names, like the difference between an IPA and a Hefeweizen or what is an India Pale Ale.

I suspect there are people who might try your beer just because of the names or the colorful cans. Does that bother you?

Good quality marketing is as important to us as it is to everyone else. I could list a half-dozen beers that sell really well across this state that I don’t particularly care for, but they sell because they have a catchy name and the brewery does a great job marketing them. Rather than shake my fist at the wind, we recognize the importance of branding and packaging. Still, we try really hard to have good liquid that will get us that second sale.

I know that Legal Draft leaves the brewing to its resident German brewmaster, but have you ever tried brewing it yourself?

Not in any real sense. I have made some batches of beer in my garage. Some were good, but one was so bad I poured it all out, and you can still see the stains running down the driveway.

The Legal Draft website calls you a recovering lawyer, but you do still maintain an active practice, right?

I do still have a bar card, and I intend to keep it. The “recovering lawyer” is more about marketing. My practice is divided into three distinct areas: mediation, personal injury and a very small business consulting practice for small businesses, mostly friends of mine who are longtime clients. But that’s only a small slice of time because the brewery keeps me so busy.

What does being Legal Draft’s “chief justice” actually involve?

I spend a lot of my time on the sales and marketing and the creative side. I work on what we’re going to do next and what we’re going to call it. I also handle all of the distributor relations and anything that touches on compliance. I am probably CEO and general counsel, but we are not very formal on titles.

What was the most unexpected element of going into the craft beer business?

I must admit, the workload and the complexity of the work was something I didn’t accurately anticipate. When you have a business that has so many moving parts, it takes an awful lot of time, and the workload is like having three full-time jobs.

How so?

When we launched this thing, I didn’t have any training or experience. There’s no mental case file when you’re running a business that you’ve never run before. For the first three to five years when I practiced law, a lot of what I did was fall flat on my face. One of my mentors would throw a file on your desk and say, “Here’s your case.” When you asked what he wanted you to do with it, he’d say, “It’s your case, I want you to work it.” He’d say, the way to get to the point where you know how to handle it is to exercise good judgment. The way to learn good judgment is by exercising bad judgment. When you’re a young lawyer, you can talk to people in the position to help you. Now, with the beer business, what makes it hard is knowing it’s all on our backs. We have very little experience to fall back on.

What’s the coolest thing about owning a microbrewery?

It definitely changes the conversation. Like when you get on an airplane and the person next to you asks what you do. When I say, “I am a lawyer,” they start reading a book. But now when I say, “I own a brewery,” they’re like, “Hey, I like beer!” and I can ask, “What kind of beer do you like?” It’s funny, but the biggest smiles and the biggest uplift come when I talk to lawyers who are still practicing. They say, “Hey, take me with you!” I try to tell them, if I were to go back to practicing law full time, it would be like going on vacation. If all I did was show up and take depositions and have the occasional trial, it would be a cakewalk compared to the day-in and day-out battles in the beer business.

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

**MY FIRST RECOLLECTION OF THE U.S. legal system** happened during my father and mother’s separation in 1995. Fearing the effect of acrimonious behavior that he had seen during courtroom proceedings regarding our custody, the judge warmly welcomed my sister, Aaima, and me, ages 5 and 7, respectively, to his chambers.

It was a mere two-and-a-half years after we had entered the United States in early 1993. At the time, my family lived with my uncle, who had been in the U.S. since the mid-1980s and who housed us in a small ranch home. After an intense dispute with my father and uncle, my mother found herself temporarily homeless with only the clothes on her back. Despite obtaining temporary work as a paralegal, she had little knowledge of the law or her rights. Her employer, a female attorney originally from India, not only provided her with shelter but assisted her in gaining custody of her children.

Yet my mother was still able to create enough stability, or some semblance of it, for my sister and me to excel academically, a pursuit that my mother would always say was critical in creating a brighter future. I would finish high school in New Jersey, where I achieved the highest standardized test scores and among the highest grades in my graduating class. I went on to begin college at New York University.

Despite my interest in cosmology in middle school, my mother, who feared I may become a stereotypically disheveled professor, steered me toward other professions. During high school and the earliest years of college, I had my eyes set on medical school.

Although we had always known of our lack of immigration status, much of its effects had yet to rear their heads.

In 2007, I lost my wallet, which contained my driver’s license, Social Security card and employment authorization card. While at a government office to replace these documents, the agent asked whether my mother, who had accompanied me, was aware of deportation orders that had been issued in absentia several years prior.

Hearing of these orders was devastating. My focus shifted from academics to wondering when we would be placed on a plane back to Pakistan. At the same time, I also realized that admission to medical school would be virtually impossible. Prior to the announcement of Deferred Action for Childhood Arrivals by President Barack Obama in 2012, U.S. medical schools rarely took students who were not citizens or permanent residents. On the rare occasion that they did admit international students, they usually required four years of tuition to be placed into escrow, a financial feat that would be impossible for me. Additionally, a few days prior to my sister’s first week at college at Rutgers University, her financial aid offer was entirely revoked due to her immigration status.

A scholarship and financial aid...
at NYU notwithstanding, I knew that my college tuition had already been placing severe financial stress on my mother. There was no way for her to bear the tuitions of both schools simultaneously. Without the drive and focus to continue, and knowing that my mother would not be able to afford payments to both schools, I decided to pause my education.

In 2009, I enrolled at Saint Peter's University, a small Jesuit institution in New Jersey that was significantly more affordable. While there, I chose to pursue a degree in economics and pursue law school.

I enrolled at law school at Washington University in St. Louis in 2011. The law school published a yearly profile on its incoming class, which included a section on which foreign countries were represented by students visiting the U.S. for their legal degree. The class of 2014's law school profile listed four countries: China, South Korea, Germany and Pakistan. Unlike China, South Korea and Germany, there were no students visiting from Pakistan. Just me. It was an acute reminder of how I've always straddled two identities: one in all but paper as an American, the other in little but paper as a Pakistani.

Zain Sayed is an employment attorney in Illinois, one of only about 10 states that admit DACA recipients to the bar. He works in Chicago for a midsize company that provides leave administration and human resources services.

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Did You Know?

Excluding women from the military draft is unconstitutional, a federal judge in Texas has ruled. The case was brought by the National Coalition for Men, which argued the Military Selective Service Act’s requirement that only American men register when they turn 18 violates the 14th Amendment’s equal protection clause. Men who do not register can face adverse consequences, including fines, imprisonment and denial of certain federal benefits. Judge Gray H. Miller of the Southern District of Texas agreed that women can also be drafted, since they can now serve in combat roles. The court did not specify what steps the government must take to comply with the declaratory judgment. Source: New York Times

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Survey Says

The current political climate may be prompting more law school applications, according to a new survey by Kaplan Test Prep. Of the 121 schools surveyed, 87 percent of law school admissions officers reported the current political climate in the U.S. was a significant factor in the application increase. Fifty-seven percent of pre-law students in a previous survey stated they planned to use their law degree to advocate for political or public policy issues. In the same survey, 45 percent said they were motivated to apply to law school because of the political climate, up from 32 percent the previous year. Source: Inside Higher Ed

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Khan Academy’s new free online Law School Admission Test prep program has been a hit since its June launch. More than 40,000 people are using the platform each month, according to the Law School Admission Council and Khan Academy, which partnered on the project. The goal was to make LSAT test prep more affordable and reach more prospective law students, including underrepresented groups. Traditional LSAT test prep costs range from hundreds of dollars to thousands. Source: Law.com

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... will be Haley Taylor Schlitz’s age when she starts Southern Methodist University Dedman School of Law this fall. The teen, who was homeschooled from fifth grade through age 13, graduates with an associate’s and bachelor’s degree in May. Schlitz says she decided to become a lawyer to fight for equality, particularly after experiencing racial inequities in the educational system growing up. Schlitz chose Dallas-based SMU because it offered the largest scholarship and it’s close to home—she plans to live with her parents. Source: Texas Lawyer
It’s Unanimous—Almost

Oregon may finally join 49 other states that require unanimous jury decisions in criminal cases

By Lorelei Laird

When an Oregon jury went into deliberations to consider sex-related charges against Olan Jermaine Williams, they quickly decided he wasn’t guilty of one of the two counts against him. The second was more complicated.

Williams, who is African-American and a married gay man, was accused of performing nonconsensual oral sex on a man who passed out from drinking at a party in 2014. The man had been left to sleep in Williams’ apartment while the party continued, but the man awoke that night to find someone in his pants without permission. He later identified Williams as his assailant.

Initially, the jury voted 9-3 to convict Williams of sodomy, with the jury’s lone African-American joining two others in voting to acquit. During the four hours of deliberations that followed, all three stood by their opinions. But after it became clear that deliberations could extend into the next day, one holdout changed her vote, saying she didn’t want to come back.

In 49 U.S. states and the federal court system, a 10-2 vote would not have been enough to convict. But this debate took place in Oregon, which is currently the only state that permits convictions (for felonies other than murder) on a 10-2 or 11-1 vote of the jury. That practice has come under criticism in recent years by people who say it was enacted for racist reasons; it denies minority viewpoints on the jury a voice and removes an important safeguard against wrongful convictions.

“If there’s one or two [holdouts] on a jury … it’s basically showing that the state didn’t do its job to prove the case,” says professor Aliza Kaplan of Lewis & Clark Law School. “And that’s how our system works, and that’s how it should work.”

The Oregon legislature is considering a constitutional amendment that would require a unanimous jury for a conviction. But the voters would also need to approve the change via referendum, and it has opposition. In particular, certain elected district attorneys oppose it, arguing that its main effect would be to increase hung juries, requiring the state to mount more retrials and crime victims to relive their traumas a second time.

Rep. Jennifer Williamson, a Democrat from Portland and a co-sponsor of the measure, says it can be a tough conversation to have with voters. The movie “12 Angry Men” is what people think of, so the idea that you have something less than that is baffling,” says Williamson, the majority leader of the Oregon House. “They’re pretty shocked that we have a lesser standard.”

A QUESTION OF RACE

If Oregon abandons nonunanimous juries, it will follow Louisiana, which abolished them via referendum last fall. The Louisiana campaign focused heavily on
Amendment challenges to both states’ systems but ultimately rejected them. Apodaca v. Oregon was an unusual plurality decision where the justices split 4-1-4, which meant a one-justice concurrence was the opinion that became law. That’s weak support for a rule that affects defendants’ civil rights, critics say.

That was one argument before the ABA House of Delegates when it passed Resolution 100B in August, urging unanimous juries nationwide. That resolution, and critics like Kaplan, also argue that nonunanimous juries raise the chances of wrongful convictions.

There’s some evidence for that belief: According to Innocence Project New Orleans, 13 of the 57 Louisianans who have been exonerated—and the only person exonerated by the Oregon Innocence Project—were convicted by nonunanimous juries.

And nonunanimous juries marginalize minority viewpoints, critics say. That’s a complaint in the Williams case, where the viewpoint of the African-American holdout juror didn’t affect the outcome. Asking the Oregon Court of Appeals for a new trial, Williams argued that because only about 2 percent of Oregonians are black, nonunanimous juries silence African-American jurors without actually excluding them.

“Because it basically denies a voice to that minority juror, there’s an equal protection problem,” says Portland attorney Ryan Scott, who represented Williams in his post-conviction motion for a new trial. That motion was denied, and Williams’ appeal was heard in October. His appellate attorney, Marc Brown, chief deputy defender of the Oregon Office of Public Defense Services, says a favorable ruling could end nonunanimous juries in the state. “If the court ... finds that this provision has a racial basis, I think it would be hard not to have it apply to everyone.”

A ruling hadn’t been made before the ABA Journal went to press. Even if it’s favorable to Williams, an appeal may be rendered unnecessary by the U.S. Supreme Court, which agreed in March to take up a case on nonunanimous juries, Ramos v. Louisiana. In that case, the defendant—convicted of murder on a 10-2 vote—asks the court to revisit the Sixth Amendment argument in Apodaca and its companion case, Johnson v. Louisiana.

HUNG JURIES
But Oregon could change the law on its own with Williamson’s bill, House Joint Resolution 10. In order to change the state constitution, lawmakers must pass the bill by June—and then voters must approve it in a referendum, likely in 2020.

A few years ago, the measure was opposed by the Oregon District Attorneys Association, hurting its chances. But last fall, the ODAA came out in favor of the change. The organization did not respond to ABA Journal requests for comment regarding its change in position.

Not every elected DA is a fan, however. Former Clatsop County District Attorney Joshua Marquis, whose term finished Dec. 31, says the issue has deeply split the DAs. Marquis was one of three DAs who wrote an editorial in the Oregonian last fall opposing a change to the nonunanimous jury system. The editorial said unanimous juries would do nothing but increase hung juries. Marquis was more direct in his remarks to the ABA Journal.

“The one place you see these [split verdicts] are upper-middle-class white men charged with sex offenses, usually against children,” Marquis says. “Those are the kind of cases that juries tend to break down 11-1 and 10–2.”

Marquis says he also hasn’t seen any evidence that racism has played a part in any recent wrongful convictions with split verdicts. But his biggest concern is that it will marginalize victims, especially victims of sex crimes.

Kaplan sees it as a question of defendants’ rights. “Personally, if I’m the defendant ... I want the state to truly prove their case,” she says. “And if I’m a juror and I’m spending my time watching all this and participating fully, I want to know that my voice and my thoughts matter.”
Minor Offenses

Lawsuit says diversion program meant to keep troubled kids out of the criminal justice system violates their constitutional rights

By Wendy Davis

In February 2018, the Val Verde Unified School District in California summoned a high school sophomore and her grandmother, Cindy McConnell, to a meeting to address the student’s attendance.

The student, identified in court papers as J.F., had continual problems getting to school by the 7:30 a.m. start time. A school board member, a Riverside County probation officer and other district officials were present; J.F. and her grandmother appeared without a lawyer.

At that gathering, J.F. says she was pressured into agreeing to a six-month term of “informal” probation through the county’s Youth Accountability Team program. The next day, she was given a probation contract with a slew of conditions. Among others, she had to agree to submit to drug testing, follow a curfew, perform 20 hours of community service, allow searches of her home or car, refrain from associating with anyone not approved by the program and tour a correctional facility.

She is now one of the plaintiffs in a class action lawsuit challenging Riverside County’s informal probation program.

“Many children have fallen prey and suffered the constitutional violations and abuse that prevails in Riverside County’s YAT program,” says a complaint brought by the American Civil Liberties Union, the National Center for Youth Law and the law firm Sheppard, Mullin, Richter & Hampton.

“Children are not informed of their rights, including the right to remain silent or to speak with a lawyer,” the complaint states. “Instead they are led to believe that if they do not agree to enter the YAT program, they may be referred to the district attorney’s office, even when they are not accused of a criminal offense.”

The lawsuit, filed last year and currently pending in federal court for the Central District of California, alleges that the Riverside County Probation Department violates youths’ due process rights, their Fourth Amendment right to be free from unlawful searches and seizures and their First Amendment right to associate with others. The ACLU argues that placement on “informal” probation leaves juveniles worse off than no intervention at all. One reason is that information gleaned through the program can be used against juveniles in future court cases; another is that children who participate in the program are presumed ineligible for diversion if they’re subsequently arrested.

“Rather than divert children, YAT draws more children into the criminal system,” the complaint reads.

GOOD INTENTIONS

Diversion programs generally aim to keep juveniles who have gotten in trouble out of court, especially when they’ve been accused of low-level offenses. These programs can address minors’ issues—whether it’s a need for counseling or help in school—without drawing them into the criminal or juvenile justice system.

Riverside County suggests its program will head off problems by working with troubled kids before their behavior escalates into crime.

Riverside’s Probation Department declined to comment, citing the pending litigation. But at a public meeting in January, the county described the initiative as voluntary. An official with the county’s Youth Accountability Team said the Probation Department planned activities for participants, including field trips to a football game, art projects and tours of Riverside Community College.

But advocates for juveniles say Riverside County’s initiative harms teens by subjecting them to a heavy-handed set of rules while failing to address participants’ underlying problems.

“There is a lot of evidence that for most kids who haven’t committed serious offenses, the less criminal-justice-type intervention we do, the better,” says Krista Larson, director of the Vera Institute of Justice’s Center on Youth Justice.

“I would like to keep the criminal-justice system separate from the education and social welfare systems,” adds Victor Rios, a University of California at Santa Barbara, sociology professor and author of Punished: Policing the Lives of Black and Latino Boys.

He says the justice system doesn’t have the right tools to help kids who are lagging in school or acting out in ways that don’t amount to crimes. Instead, the system subjects youths to additional rules and surveillance—which can lead to more accusations and entanglements with the authorities.

The result, he says, is that children who are already having difficulties become more enmeshed with the court system. “It’s almost a self-fulfilling prophecy.”

From 2005 through 2016, about 13,000 children were placed in Riverside County’s informal probation program, according to the lawsuit. Many referrals came through schools—and often for activity that isn’t criminal.

MISBEHAVING

The majority of recent referrals were for violations of the California Welfare & Institutions Code
Section 601, which deals with status offenses—including habitually refusing “to obey the reasonable and proper orders or directions” of parents or a guardian.

The ACLU says that section of the law is unconstitutionally vague. What’s more, Riverside County courts don’t even hear cases where the only allegations are violations of Section 601, according to the lawsuit.

For the 2016-17 fiscal year, more than 58 percent of the 1,926 referrals to Riverside County’s YAT program were for “defiance/incorrigibility,” according to the county’s most recent report.

The complaint elaborates that reasons for referrals include bad grades, disrespect and using profanity. In J.F.’s case, officials suggested that she could be involuntarily transferred to another school if she didn’t agree to the program, and that her grandmother could face criminal charges, the complaint alleges. After she entered the program, officers made at least five unannounced visits to her home, according to the complaint.

In 1967, the U.S. Supreme Court ruled that children who have been arrested have the right to counsel during juvenile delinquency proceedings. But juveniles don’t usually have a right to a lawyer before they’ve been brought to court, even in situations where they’re being asked to waive their rights—though there are some exceptions. In California, for instance, a law provides that minors under age 16 must consult with a lawyer before police interrogations.

Still, some advocates not connected to the lawsuit say the complaint makes a compelling case that the program is unfair.

“To be fundamentally fair, children need access to lawyers to help them through this process,” says Tim Curry, legal director of the Washington, D.C.-based National Juvenile Defender Center.

“I think the ACLU is correct to be concerned about this program as being violative of the 14th Amendment—and as potentially encroaching on a child’s right to silence and right to privacy,” says juvenile justice expert Mae Quinn, a visiting professor at the University of Florida Levin College of Law.

The lawsuit also asserts that the Riverside County program is unconstitutional because it disproportionately affects black and Latino minors. According to the complaint, in the 2015-16 school year, black students were referred to the program at almost three times their rate of enrollment countywide; and Latino students accounted for more than 39 percent of referrals, but only comprised 32 percent of students.

Until last year, Los Angeles County also operated a “voluntary” probation program similar to the one in Riverside. But Los Angeles officials shut down the endeavor shortly after advocates released a critical report stating that the program “runs counter to research, and risks widening the net of youth involved in the justice system.”

The lawsuit against Riverside County officials could go to trial next year, unless the matter is resolved; the ACLU and the county are slated to attend a settlement conference in early July.

But the litigation already appears to be having an effect out of court. In October, the Coachella Valley school district voted to discontinue referring students to the Riverside County Probation Department.

“We want to avoid putting students in the criminal justice system,” school board member Silvia Paz told the Desert Sun. That sentiment appears to reflect a growing recognition that scared-straight type programs don’t help teens accused of low-level offenses or violating school policies.

“Most places are trying to de-escalate the response to minor behavior,” says Michael Harris, a lawyer for the Oakland, California-based National Center for Youth Law. Riverside County’s program “is ramping up the response.”

“There’s a value to diversion when it’s done correctly, and when it’s applied to the people who need that type of a program, and when you’re actually preventing children from going to a prison setting,” adds Sylvia Torres-Guillem, the ACLU of California’s director of education equity.

She says that programs can be helpful when officials “really assess the needs of the child.”

For instance, Torres-Guillem says, teens who are doing poorly in school might be able to benefit from a program that offers tutoring, and ones who have endured trauma might need therapy. “When you have kids who are struggling, sending them to a jail is not going to help them in their math class.”

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Justice by Numbers
Proposals resurface to expand the size of the court

By Mark Walsh

The U.S. Constitution’s Article III says the judicial power of the nation “shall be vested in one supreme court.” It says nothing about how many justices should serve on the court.

That has led to a range of sizes throughout U.S. history—from five to 10 authorized seats on the court. Now, those advocating an expansion of the high court by two, four, six or some other number of seats are having their moment.

In recent months, a concept that has been on the fringes of political theory has suddenly gained steam, with several progressive organizations calling for an expansion of the court and pushing Democratic presidential candidates to respond to the idea.

The idea is that if the Democrats win the White House and Senate in next year’s election and retain control of the House of Representatives, they could push for the additional seats on the high court. And those seats would presumably be filled with new left-leaning justices who would shift the balance away from the court’s conservative majority.

“We are in a dire democracy emergency in which the Supreme Court has belonged to the Republican Party and the donor class,” says Aaron Belkin, a political science professor at San Francisco State University and the executive director of Pack the Courts, a fledgling organization that calls for adding four seats.

‘A HOSTILE SUPREME COURT’
Belkin says two of those seats would “nullify” the fact that President Donald Trump’s first nominee to the court, Justice Neil M. Gorsuch, won confirmation in 2017 only after Senate Republicans refused to advance President Barack Obama’s nomination of Merrick B. Garland for the vacancy created by Justice Antonin Scalia’s death in 2016.

Belkin and some other progressives believe that Trump’s second nominee, Justice Brett M. Kavanaugh, should be effectively canceled out by adding a third and fourth new seat because the president lacks legitimacy or because of Republicans’ hardball tactics to confirm Kavanaugh.

“The court is a partisan institution,” Belkin says. “Nothing is going to change that.”

Mark Tushnet, a professor at Harvard Law School who leads the advisory board of Pack the Courts, says that Democrats need to realize that if they are to achieve their policy goals on issues such as the environment, immigration and health care, the increasingly conservative-dominated federal courts, including the Supreme Court, likely stand in the way.

“You have to figure out some way to deal with a hostile Supreme Court,” Tushnet says.

Other progressive groups that have been pushing to expand the court, among other radical ideas, include Demand Justice and Indivisible.

The groups’ efforts began to show some traction in March. First, former U.S. Attorney General Eric H. Holder Jr., who served under Obama, told an audience at Yale Law School that expansion of the court should be given serious consideration.

Soon after, Democratic presidential candidates began to offer thoughts on the idea.

Sens. Kirsten Gillibrand of New York, Kamala Harris of California and Elizabeth Warren of Massachusetts have said they would not rule out the idea, while former U.S. Rep. Beto O’Rourke of Texas and Pete Buttigieg, the mayor of South Bend, Indiana, have embraced the concept of expanding the court to 15 members, with five nominated by a Republican president, five by a Democrat and five by unanimous consent of the other 10.

Buttigieg told a CNN town hall in March that he is trying to stop the Supreme Court from “sliding toward being viewed as a nakedly political institution. I’m for us contemplating whatever policy options will allow that to be possible.”

LESSONS FROM FDR’S PLAN
While legal experts say the idea of involving justices in choosing some of their peers would require a constitutional amendment, merely adding seats to the court could be done by passing a law.

The Judiciary Act of 1789 created a Supreme Court of one chief justice and five associate justices. An 1801 federal law reduced the size of the court to five justices, but the new administration of President Thomas Jefferson did not allow that law to go into effect.

The six-member court grew to seven in 1807, to nine in 1837 and to 10 in 1863. In 1866, Congress passed a law that would have reduced the court by attrition to seven members, though the size fell only to eight members by 1869, when Congress passed a law setting the size at nine, where it has remained since.

President Franklin Delano Roosevelt’s famous “court-packing” plan came after he was re-elected in 1936, and after the Supreme Court had struck down many of his first-term New Deal programs. Roosevelt’s
The Docket

A proposal would have added a new justice for every sitting justice older than 70. (Six of the nine were then over 70, and thus the court might have grown to 15.)

Roosevelt’s plan lacked support among many congressional Republicans and Democrats, and even Chief Justice Charles Evans Hughes worked against it behind the scenes. (At the time, the ABA held a referendum on court-packing that members overwhelmingly opposed.)

When the court shifted course in 1937 and began to uphold New Deal measures, any momentum for FDR’s plan eroded further, and the president’s plan died in Congress.

Belkin says historians have misconstrued the lessons of FDR’s court-packing episode.

“He says that if the Democrats win power in 2020 and increase the size of the court to 11 or 13 members, Republicans would likely vow to add even more justices when they returned to power to counter those additions.

“It’s hard for me to see how the two parties don’t then get into an arms race,” Shesol says. Senate Majority Leader Mitch McConnell of Kentucky was critical of expanding the size of the court, saying on the Senate floor that “the far left has gone scrounging through the ash heap of American history, and they’re bawling about that discredited fantasy from the 1930s.”

In March, President Trump was asked whether he would consider an effort of his own to increase the size of the court. He said no. “The only reason [Democrats are] doing that is they want to try and catch up,” Trump said at a Rose Garden news conference. “So if they can’t catch up through the ballot box by winning an election, they want to try doing it in a different way. ... It’ll never happen.”

RISKING ‘DIFFUSE SUPPORT’

Neil S. Siegel, a Duke University law professor, says the Republicans’ use of hardball tactics in recent confirmation battles is a factor that wasn’t a factor with FDR’s court-packing plan. But that doesn’t justify the proposals of today, he says.

“Packing the court would substantially increase the public perception that the court is partisan and political in just the way, and to the same extent, that Congress is, and so we would risk jettisoning the significant amount of diffuse support that the court retains,” says Siegel, who served as a special counsel to Sen. Christopher A. Coons, a Delaware Democrat and Judiciary Committee member, for the confirmation hearings for Gorsuch and Kavanaugh.

He says the “legitimate” way to pack the court is to do what FDR ultimately had to settle for—winning elections and nominating and confirming justices of the president’s choosing as vacancies arose.

“Indeed, had most liberals been as focused on the court in 2016 as some of them appear to be today, perhaps it is certain conservatives inside and outside Congress who would be talking about court-packing now,” Siegel says.

Tushnet, who has debated the issue with Siegel, says he doesn’t worry that proposals by progressives and Democrats to add to the court will motivate Republicans to retaliate because conservatives are already mobilized around the court.

As to whether any court-packing plan could really happen, Tushnet says, “I think talking about it is a way of expanding the conversation about the role of the Supreme Court as an obstacle to the substantive policies that Democrats want. That in itself is valuable.”
Fear and Lawyering
Create a work culture of ‘psychological safety’ that encourages taking intellectual and creative risks

By Heidi K. Brown

In August, the ABA published a “Well-Being Toolkit for Lawyers and Legal Employers,” accompanied by a “nutshell” guide summarizing 80 tips to help lawyers thrive. The two-page guide highlights how a healthy legal workplace includes such factors as “psychological safety.”

I know, I know: A law firm is supposed to be all about intellectual, mental, and physical toughness, strength, confidence and assertion—not emotional sensitivity. Before readers bristle at the notion that I am talking about “safe spaces”—a term that has been (unfairly) criticized in the context of millennials on college campuses—let’s analyze what psychological safety actually means in the rough-and-tumble legal arena.

I first learned the term psychological safety in reading Randall Kiser’s book Soft Skills for the Effective Lawyer. Kiser quotes Harvard Business School professor Amy Edmondson, who defines the term as “a climate in which people are comfortable expressing and being themselves.” In a professional environment that cultivates psychological safety as described by Edmondson, individuals “feel comfortable sharing concerns and mistakes without fear of embarrassment or retribution. They are confident that they can speak up and won’t be humiliated, ignored or blamed.” Can this concept apply to the legal profession, in which many of us—perhaps on the less outwardly assertive side or naturally inclined toward heavy self-criticism—experience self-doubt and fear. What if we don’t figure out the answer to the client’s complicated question fast enough? What if we aren’t quick enough to respond to opposing counsel’s barbs? What if we aren’t 100 percent sure how to proceed, though we have researched and ruminated over every angle of the client’s scenario but don’t know whom we can trust or ask for a gut check? What if we take a strategic or tactical risk and end up making a mistake?

Law school tends to reward students who exude confidence—those who readily engage in Socratic queries, embrace performance-oriented activities like oral argument competitions, excel in networking and job interviews, and thrive in the “I must break you” (Rocky IV) approach to legal training. Law practice likewise often reinforces the bravado mindset: Never show weakness, fake it till you make it. Law firms (and clients) expect their lawyers to figure out the right answers. Mistakes can have high-stakes consequences.

Because of this pervasive ethos of the perceived infallibility of the “successful” lawyer, many of us—perhaps on the less outwardly assertive side or naturally inclined toward heavy self-criticism—experience self-doubt and fear. When we can’t figure out the answer to the client’s complicated question fast enough? What if we aren’t quick enough to respond to opposing counsel’s barbs? What if we aren’t 100 percent sure how to proceed, though we have researched and ruminated over every angle of the client’s scenario but don’t know whom we can trust or ask for a gut check? What if we take a strategic or tactical risk and end up making a mistake?

Many of us don’t feel psychologically safe to ask for guidance from someone who won’t size us up as unworthy of our jobs or our salaries. In contrast, we constantly feel on edge and at risk of professional harm. We forge ahead any way, second-guessing our research, our judgment, our decisions. We pretend everything is fine. It takes a toll.

What does psychological safety mean in the realm of the legal profession? To me, it means being able to say to a law office supervisor or mentor, “Hey, I have researched this client situation six different ways, I’ve spent three sleepless nights thinking about this, and I’m still not sure of the right move, and I need tangible advice.” Openly sharing with a supervisor or a mentor that we have

HEIDI BROWN: “Many of us don’t feel psychologically safe to ask for guidance from someone who won’t size us up as unworthy of our jobs or our salaries.”
exhausted our research angles and problem-solving processes yet aren’t
certain about our next legal maneuver doesn’t make us weak or unwor-
thy or less than. Quite the opposite. It means we care about the client
and are taking the courageous step of asking for a sounding board. Psychological
safety in the legal profession means cultivating—and being an ambassador
for—a work environment in which asking questions, testing novel ideas and
theories, taking intellectual risks and openly discussing prevention and han-
dling of mistake-making is encouraged and welcomed.

For decades, many law firms have been managed by a “survival of the fit-
est” ethos. In response to the fall 2018 suicide of a law firm partner at the Los
Angeles office of Sidley Austin, a senior columnist for the American Lawyer,
Vivia Chen, reflected on her experience as a law firm associate and wrote,
“You live in constant fear that the client or rainmaking partner who’s giving
you work might cut you off any moment…. The cult of perfectionism is
indeed pervasive in law firms—the notion that you should feel deep shame
about an inconsequential typo or experience terror for not properly reading
the unstated wishes of some client or senior partner.”

It does not need to be this way. We will not lose our perceived “edge” as
professionals if we take a kinder, more humane approach to training, mentor-
ing and developing legal high-performers. In fact, forward-thinking law
offices that foster psychological safety likely will garner a marked advantage
over those that don’t.

Law office environments lacking a code of psychological safety often breed fear. Fear
unequivocally blocks creativity and performance. Analogizing to the sports world—
a different niche of our American culture in which peak performance is the holy
grail—sports psychologist David Grand and Alan Goldberg indicate that the
“primordial state of fear” can plague an athlete. They explain how fear “dra-
amically disrupts the athlete’s ability to stay loose, calm and focused, which
is a critical prerequisite for expanded performance. What we call choking is
actually the fight/flight response acting out of time and place.”

Telling an elite athlete to “face your fears and just do it” is risky—to the
athlete’s mental and physical well-being. So why do we think the “just do it” bravado approach will work for lawyers? The best coaches help athletes
untangle performance fears, building their athletes’ mental and physical resilience. Good mentors in the legal profession can do the same.

FEAR INSPIRES MEDIOCRITY

Great law firm leaders will defuse fear and establish a platform of psy-
cological safety in order to nurture, attract and retain creative problem-
solving lawyers. Less-than-great law firm leaders will continue to stoke fear.

Ed Catmull, a co-founder of Pixar Animation Studios and former longtime presi-
dent of Pixar Animation and Disney Animation, has warned about the rela-
tionship between a fear culture (or a punitive culture when it comes to mis-
takes or failure) and a lack of creativity. He says, “In a fear-based, failure-averse
culture, people will consciously or unconsciously avoid risk. They
will seek instead to repeat something safe that’s been good enough in the past. Their work
will be derivative, not innovative. But if you can foster a positive understand-
ing of failure, the opposite will happen.” He suggests that the objective “is to uncouple fear and failure—to create an environment in which making
mistakes doesn’t strike terror into your employees’ hearts.”

Cultivating psychological safety in a law office environment does not mean
we need to coddle employees or lower standards of excellence. On the con-
trary, a workplace culture will thrive and excel when lawyers readily can
ask for help or guidance on a confusing legal quandary and admit to not
knowing the answer despite dogged research. Lawyers in such a culture can
take risks, suggest creative and out-of-the-box solutions to legal problems,
and raise perceived or actual mistakes to the attention of someone who
can help remedy them without fear of adverse consequences.

By directly embracing the concept of psychological safety, law offices can
foster creativity and innovative problem-solving and better serve clients
and the profession.

Heidi K. Brown is an associate professor of law and director of legal
writing at Brooklyn Law School. She is the author of The Introverted
Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy
(ABA 2017) and Untangling Fear in Lawyering: A Four-Step Journey
Toward Powerful Advocacy (ABA 2019).
Is Your Judge Your Facebook Friend?

Sharply divided Florida Supreme Court says it’s not a basis for disqualification

By David L. Hudson Jr.

A judge’s Facebook friendship with an attorney is not a legally sufficient basis to disqualify the judge from that attorney’s case, a sharply divided (4-3) Florida Supreme Court has ruled in a decision that produced three different opinions from the seven jurists.

“A Facebook ‘friend’ may or may not be a ‘friend’ in the traditional sense of the word,” Chief Justice Charles Canady wrote for the majority. “But Facebook ‘friendship’ is not—as a categorical matter—the functional equivalent of a traditional friendship.”

The majority concluded that a judge and attorney being Facebook friends does not mean there is a “close or intimate relationship” that might give rise to a need for the judge to step off the case.

Justice Jorge Labarga concurred with the majority but wrote separately “to strongly urge judges not to participate on Facebook.” He wrote that judges being friends with lawyers on social media is “inviting problems.”

Three justices dissented in an opinion authored by Justice Barbara Joan Pariente, who has since retired. She wrote that “recent history has shown that a judge’s involvement with social media is fraught with risk that could undermine confidence in the judge’s ability to be a neutral arbiter.”

She concluded: “The bottom line is that because of their indeterminate nature and the real possibility of impropriety, social media friendships between judges and lawyers who appear in the judge’s courtroom should not be permitted.”

The decision disagreed with the Florida appeals court’s decision in Domville v. State (2012), which had ruled that a trial judge’s friendship with a prosecutor in a criminal case disqualified the judge.

The appeals court concluded that the social media friendship “would create in a reasonably prudent person a well-rounded fear of not receiving a fair and impartial trial.”

The Florida Supreme Court’s decision also conflicted with a 2009 ethics opinion from the state’s Judicial Ethics Advisory Committee. That opinion held that a judge’s social media friendship with an attorney appearing before the judge would violate Canon 2B of the Florida Code of Judicial Conduct, which provides: “A judge shall not ... convey or permit others to convey the impression that they are in a special position to influence the judge.”

“Of course Facebook ‘friendship’ creates the appearance of impropriety, which is what the JEAC said ... what Domville
concluded and what the dissent opined and stated at least three times by saying that in this case the judge should have been removed,” says Reuven Herssein, whose firm, the Herssein Law Group, is involved in litigation with a former client—United Services Automobile Association—over attorney fees and other issues.

The Herssein Law Group had sought the disqualification of Miami-Dade County Circuit Judge Beatrice Butchko because she was a Facebook friend of attorney Israel Reyes, who was representing an official with United Services Automobile Association.

The Florida Supreme Court explained that its decision is in line with the majority position. “The clear majority position is that mere Facebook ‘friendship’ between a judge and an attorney appearing before the judge, without more, does not create the appearance of impropriety under the applicable code of judicial conduct.”

‘FRIENDS’ IN OTHER STATES

For example, a Kentucky Supreme Court decision from 2013, McGaha v. Commonwealth, established that “it is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship.”

A 2014 Arizona judicial ethics opinion provides that a judge’s friendship on social media with an attorney does not create a per se disqualification requirement.

The opinion added in a footnote that “a person in the ‘close friend’ category is more likely to trigger disqualification than a person appearing as one of many on a list of friends.”

A lengthy 2016 opinion on judges’ use of social media from New Mexico’s Advisory Committee on the Code of Judicial Conduct reached the same conclusion: “Given the ubiquitous use of social networking, the mere fact that a judge and an attorney who may appear before the judge are linked in some manner on a social networking site does not in itself give the impression that the attorney has the ability to influence the judge.”

ABA Formal Opinion 462—Judge’s Use of Electronic Social Networking Media—provides: “A judge who has an [electronic social media] connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.”

The ABA opinion stresses that context is key. It adds that “simple designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge’s relationship with a person.”

The Florida Supreme Court decision “removes Florida’s status as an outlier among the overwhelming majority of jurisdictions which have looked at this issue and concluded that there is nothing inherently ethically improper with judges and lawyers being connected via social media,” says John Browning, a Dallas trial lawyer and expert on social media and the law.

However, Herssein argues the Florida Supreme Court’s decision not imposing a ban on judge-attorney social media friendships will have unintended consequences and will place more of a burden upon those who discover that there may be a close relationship between a judge and an attorney on the other side.

Under the prior law in Florida, he explains, there was no need to do anything other than identify that the judge had a social media friendship.

“Now, however, we need to get more,” he says. “For instance, have they communicated to each other in general, or on my case, or on an issue that may be related to my case, whether they are more than just ‘acquaintances’ … the only way to get more is through discovery. There are also issues of preservation of the social media data that needs to be dealt with. So, in a sense, this opinion opened a Pandora’s box.”

Browning, however, maintains judges need a presence on social media, particularly in jurisdictions with partisan elections.

“Not having a robust social media presence is political malpractice in the digital age,” Browning says. “Judges are increasingly expected to have some level of ‘digital citizenship’ in which they are accessible to the communities that they serve.”

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Illustration by Brennan Sharp/Shutterstock; Photo: Lynne Sladky
Mindfulness is the practice of bringing clear-minded attention to what is happening in the present moment. This seemingly simple practice has been shown to have a wide range of benefits, including decreasing stress and anxiety. Meditation is the primary tool for practicing mindfulness on a regular basis.

I started practicing mindfulness and meditation to overcome social anxiety disorder and overwhelming stress. The practice has given me relief from negative thinking and constant feelings of anxiety and worry. My own lived experience has shaped my deep desire to help lawyers interested in incorporating mindfulness and meditation into their daily lives. When I teach well-being and mindfulness workshops to lawyers, one common theme emerges: Most lawyers will readily admit to feeling almost constant stress and anxiety, yet few possess strategies for managing these struggles.

Here’s the thing about law practice: Many of us are in the human suffering business, where clients come to see us with complicated problems, both legal and emotional. It’s a stressful profession where we necessarily place the client’s needs first. The stakes are often high, and there are many demands. Many times we’re asked to deliver nearly impossible results. The litigious nature of our legal system leads to incivility. Yet there’s little discussion about the toll this work takes on our well-being. Lawyers are often taught to ignore their emotional well-being, but that is a mistake both for the lawyer as a person and as an advocate for the client.

Stress is defined as a reaction to a stimulus that disturbs one’s physical or mental equilibrium. Often when I teach stress management workshops, the lawyers talk about the various stimuli but rarely talk about their own reactions. They talk about wanting to force opposing counsel to change, to get her to stop acting like a jerk or stop engaging in other irritating behaviors. This is often a fruitless effort and likely wasted cognitive energy.

In looking at the definition of stress, it is clear that the only part of stress that one has complete control over is his or her own reaction. This is where a mindfulness practice helps. By getting to know our own knee-jerk reactions, we can open the door to changing our automatic thoughts and behaviors.

FEAR FACTOR

I used to get overwhelming anxiety before every court appearance. Weeks before the hearing, I would start rehearsing and thinking of all the things that could go wrong. It was like a broken record that I could not stop playing in my head. Every scenario led to the absolute worst-case results. I would regularly fall asleep thinking about the hearing, wake up in the middle of the night in a panic and think about the case as soon as I opened my eyes in the morning. My mind would replay every negative experience I’ve ever had in the courtroom. Soon, I would experience panic, tension headaches and tightness in the chest.

What I learned was that by paying attention to the moment-to-moment experience of this anxiety cycle, I can interrupt the familiar pattern and engage in more helpful reactions. For example, when my mind produces the thought: “You’re going to lose this hearing, and your client is going to lose her house,” it would lead to a physiological reaction such as shallow breathing. Rather than allow my mind to automatically continue and produce more catastrophic thoughts, I learned to add a moment of pause between the stimulus and the reaction. If I can slow down, I can see that the thought is only one of the many possibilities and outcomes. I can learn to question my thoughts, and for example, ask: What evidence do I...
Jeff Carr has been on a 40-year path of improving lawyer efficiency and effectiveness. “There’s an old saying that if you pay for service by the hour, you buy hours and not service,” he says. “And I still believe that very much.” In this episode of the Legal Rebels Podcast, Carr speaks with ABA Journal reporter Jason Tashea about why he came out of retirement, and how his principle of the Three E’s calculated the value of legal services to clients.

EASE YOUR MIND
Rather than allow myself to sit at my desk for hours, feeling the endlessness of anxiety and stress, I could go for a walk—the fresh air and movement would help me to reduce or even let go of the destructive thought pattern. Over time, I became more skillful at not allowing myself to fall into a full panic mode. I was able to interrupt the patterns of negative thoughts followed by feelings of stress and panic in the body much earlier on.

It was surprising to recognize that while the external stimulus (the hearing) was the triggering event to the stress and anxiety response, it was changing my own reaction (the negative thought loops) that was truly the key to liberating myself from the constant worries that kept me up at night.

The other important lesson I learned was avoiding what is sometimes referred to as the second arrow. The first arrow is the initial distressing thought, in this case: “I am going to lose this hearing.” But often, I would load up on additional negative self-talk: “You’re so nervous. Everyone will be able to see how nervous you are. Who are you to think you have any chance of winning?” I was able to identify these self-defeating thoughts as impostor syndrome. It was not based on reality or facts, but simply a psychological phenomenon that many other lawyers struggle with.

In addition to mindfulness, the other key to managing stress and anxiety more effectively has been regularly engaging in self-care activities. You can bring mindfulness into everything that you do, including self-care. What I do for self-care changes daily by paying attention to how I am feeling, being flexible depending on my schedule and focusing on activities that boost my sense of happiness. Self-care allows me to let go of stress and anxiety on a regular basis and return to homeostasis.

Stress and anxiety are a natural part of law practice, but learning that I can engage in intentional practices to conquer it was truly liberating. The beauty of mindfulness and meditation practices is that it doesn’t have to take a lot of time: A few minutes of practice is enough to see its many benefits, so give it a try. What do you have to lose except perhaps that consistent, nagging worry?

Jeena Cho consults with Am Law 200 firms, focusing on strategies for stress management, resiliency training, mindfulness and meditation. She is the co-author of The Anxious Lawyer and practices bankruptcy law with her husband at the JC Law Group in San Francisco.
“Is punctuation important?” a student once asked me. I responded with a question back: “Is dribbling important in basketball?”

A better response might have been that both the U.S. Supreme Court (way back in 1818) and the House of Lords in the U.K. (in 1916) have decided cases in which the presence or absence of a mere comma in a statute determined whether prisoners went to the gallows. And of course every few years we all hear about a new billion-dollar comma case hinging on how a contract or regulation is punctuated. That’s rare: I might have put commas around of course in the preceding sentence; those commas happen to be optional—as many are.

In fact, there was a time when almost all British contracts were wholly unpunctuated on grounds that punctuation shouldn’t be allowed to affect meaning. A little extra space was inserted between sentences, but the documents were bereft of commas, periods, semicolons and the like. That doctrine has been mostly superseded in the U.K., where contracts today are normally punctuated. Well, I say “normally,” but I really mean in the manner of British English. In that style, periods and commas go outside an ending quotation mark. So the word “normally” above, in quotes, would have the comma outside, not inside. That’s the more logical placement, true, but Americans who follow copy editing conventions uniformly tuck the comma inside the end-quote even though it’s not part of what’s being quoted.

Attentiveness to punctuation is a matter of temperament, I’ve come to believe. I know readers who are thrilled to see something like the previous paragraph. Their pulses quicken, and they begin taking notes to compose an email. Others, however, see a reference to placement of periods and commas in relation to end-quotes and immediately stop reading. They couldn’t care less and they consider the whole subject a stupefying bore. Oh, and that type doesn’t say couldn’t care less; they say they could care less—that type of reader. Not that I’m judging; I’m just describing what I’ve learned from years of experience.

But if you’re the type who’s read this far, you’re probably up for a punctuation quiz. So try your hand. Please answer all the questions before looking at the answers, which are keyed to both The Chicago Manual of Style (17th ed. 2017) and my Redbook: A Manual on Legal Style (4th ed. 2018).

For each passage, choose the best response that says something true about the quiz sentence. Not that you’re going to look up all the references (I doubt you’re the type). But it’s good to know that professional copy editors tend to edit by rules that can be studied and learned.

If you don’t score as well as you think you should, please don’t resolve to simply go without punctuation.

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**PUNCTUATION QUIZ**

1) The scientific term “groundwater,” is used instead of the older “subterranean waters” or “underground waters.”
   A. The comma after groundwater should appear after the closing quotation marks.
   B. A comma should appear after the phrase subterranean waters.
   C. The comma after groundwater should be deleted.
   D. The sentence is correctly punctuated.

2) Rhode Island’s Charter of 1663 was the first to use the formulation “liberty of conscience.” The principal drafter, Roger Williams, was a man of extreme and idiosyncratic religious views who was banished from Puritan Massachusetts. He wrote frequently, eloquently, and vituperatively in defense of freedom of conscience.
   A. The comma after eloquently is wrong and should be deleted.
   B. The apostrophe after Rhode Island is incorrect because the state doesn’t actually “possess” the Charter of 1663. It should read The Rhode Island Charter of 1663 ...
   C. The comma after Williams is wrong and should be deleted.
   D. The passage is correctly punctuated.

3) I emphasize the democratic themes of that message—social responsibility and transformative possibilities—over its author’s more liberal rendition—ethnocentrism and individualism—to bring greater clarity to the subject.
   A. The sentence has too many dashes: the maximum should be three.
   B. The sentence has too many dashes: the maximum should be two.
   C. The sentence has too many dashes: the maximum should be one.
   D. That the sentence has dashes at all makes it unsuitable for legal writing.
   E. The word its should be it’s.

4) The relatively high participation rate among older people provides a concrete example of this phenomenon: many commentators argue that the political power of groups like AARP leads to policies that favor the elderly at the expense of children, who by definition cannot vote. But most of the reform argument is not ultimately trained on financial inequalities at all.
   A. A comma should appear after But.
   B. The colon should be a semicolon.
   C. The comma after children should be deleted.
   D. The passage is correctly punctuated as written.
5) Like the Civil Code, Article 9 and the Model Law require a written agreement to create a security interest good against the debtor.

A. A comma should appear after Article 9.

B. Security interest should be hyphenated.

C. The comma after Civil Code should be deleted because the reference is clearly to Article 9 of the Civil Code.

D. The sentence is correctly punctuated as written, but the writer would be well-advised to insert the words that is before good.

6) For a writing to have legal significance, it must have some value or purpose other than its own existence. Thus a negotiable instrument is a substitute for money, a deed to real estate passes title from one to another, a mortgage creates a security interest in land or chattels, a bill of lading acknowledges the receipt of certain goods, as well as evidencing a contract to carry and deliver those goods, a will disposes of the property of one who is dead, and a receipt acknowledges payment or some other form of satisfaction of an obligation.

A. The comma after goods means that the commas separating the listed clauses should be upgraded to semicolons.

B. The comma after dead should be deleted.

C. The whole passage is a mess.

D. The comma after however should be deleted.

E. The sentence is correctly punctuated.

7) In this fraud in the inducement case, certain golden parachute provisions ran afoul of applicable employee benefit plan statutes.

A. A comma should appear after applicable.

B. The phrases fraud in the inducement, golden parachute, and employee benefit should be put within quotation marks.

C. Six hyphens need to be inserted in three phrasal adjectives; fraud-in-the-inducement case, golden-parachute provisions, and employee-benefit-plan statutes.

D. The sentence is correctly punctuated.

8) Most notably, federal courts will follow the state law of contributory negligence, however a federal court will not apply a state’s law or procedure that conflicts with an overriding federal interest.

A. The comma after notably should be deleted.

B. It’s a run-on sentence. One fix would be to insert a semicolon after negligence and a comma after however.

C. A comma should be inserted after overriding.

D. State-law should be hyphenated thus.

E. The sentence is correctly punctuated.

9) Stephen Johnson Field, the sixth child of David Dudley Field and Submit Dickinson Field, was born at Haddam, Connecticut, on November 4, 1816, the product of long-established New England Puritan stock.

A. The commas after Submit Dickinson Field, Connecticut, and 1816 should be deleted.

B. Only the comma after 1816 should be deleted.

C. The whole passage is a mess.

D. The comma after the word but that begins the second sentence should be deleted.

E. Because it is incorrect to begin a sentence with but, the first period should be a comma and the word but made lowercase.

C. The comma after Estates should be deleted.

D. The phrasal adjective Seventh Circuit in this context should be hyphenated.

E. The passage is correctly punctuated.

9. (C). See Redbook § 1.9(a) at 10; Chicago Manual § 6.9 at 367, § 6.41 at 383.

2. (D). See Redbook § 1.3(a) at 3–4, 1.6(a), (b) at 7; Chicago Manual § 6.19 at 371, § 6.28 at 377, § 5.23 at 232.

3. (B). See Redbook § 1.53 at 42; Chicago Manual § 6.85 at 399.

4. (D). See Redbook § 1.6(b), at 7, § 1.9(d) at 11, § 1.22(a) at 19; Chicago Manual § 5.250 at 316, § 5.23 at 232, § 6.28 at 377, § 6.61 at 391–92, § 6.22 at 373.

5. (D). See Redbook § 1.6(c) at 7; Chicago Manual § 6.29 at 377–78.

6. (A). See Redbook § 1.18 at 17; Chicago Manual § 6.60 at 391.

7. (C). See Redbook § 1.62(a) at 47–48; Chicago Manual § 5.92 at 255, § 7.85 at 444.

8. (B). See Redbook § 1.4(c)–(d) at 5, §1.5(a)–(b) at 6, § 1.17 at 16–17; Chicago Manual § 6.57 at 389–90, § 6.59 at 390–91.

9. (E). See Redbook § 1.10(a) at 13, § 1.11 at 13, § 1.6(b) at 7, § 1.54(c) at 44; Chicago Manual § 6.38 at 381, § 6.39 at 382, § 6.28 at 377, § 6.85 at 399.

10. (E). See Redbook § 1.5 at 6, § 1.9(c)–(d) at 11, § 1.62(a) at 48–49; Chicago Manual § 5.203 at 289–90; § 5.250 at 316, § 5.93 at 255–56, § 6.33 at 380.

Bryan A. Garner is the editor-in-chief of the soon-to-be-released 11th edition of Black’s Law Dictionary; the author of many books on legal writing, including The Winning Brief; and the president of Dallas-based LawProse Inc.

PUNCTUATION QUIZ ANSWERS

Answers: 1. (C).

§ 1.9(a) at 10; Chicago Manual § 6.9 at 367, § 6.41 at 383.

2. (D). See Redbook § 1.3(a) at 3–4, 1.6(a), (b) at 7; Chicago Manual § 6.19 at 371, § 6.28 at 377, § 5.23 at 232.

3. (B). See Redbook § 1.53 at 42; Chicago Manual § 6.85 at 399.

4. (D). See Redbook § 1.6(b), at 7, § 1.9(d) at 11, § 1.22(a) at 19; Chicago Manual § 5.250 at 316, § 5.23 at 232, § 6.28 at 377, § 6.61 at 391–92, § 6.22 at 373.

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Business of Law

Edited by Victor Li / victor.li@americanbar.org

Business is Booming

The legal tech market is soaring, and nowhere is this more apparent than Y Combinator, a highly sought-after seed accelerator that invested heavily in the sector in 2018. By Jason Tashea

As Jake Heller, CEO of Casetext, waited his turn to interview at Silicon Valley’s prestigious accelerator, Y Combinator, he witnessed quite a scene. Some of the founders were leaving the notoriously stressful interview in tears.

“It was havoc and chaos,” he recalls.

At that moment in 2013, Casetext wasn’t even Casetext—it was Law Commons. It was a proof of concept without a single customer. He describes the application as a “total long shot.”

In the allotted 10 minutes, he and his co-founder answered rapid-fire questions from YC’s partners on why they should receive the money, support and network that comes with joining one of the accelerator’s two annual classes.

A little later on, as he boarded an airplane headed to Chicago, he got the call: They’d been accepted. As he remembers, he leaped out of his seat, attracting the attention of the flight attendants, who asked him to fasten his seat belt.

Five years later, Heller says he thinks about his YC experience almost every day. It taught him how to run a business, be a manager, and it helped the company raise capital. “It was a really formative experience.”

Casetext is one of 19 legal tech organizations that have been accepted to YC, according to original analysis by the
ABA Journal and confirmed by YC. While the accelerator has been around since 2005, eight for-profit and nonprofit legal tech organizations have taken part since 2018. Some hope the increased matriculation is a sign of a maturing legal technology sector, while others think it’s mere happenstance.

Accelerators possess a specific role in the startup ecosystem, explains Dana Thompson, director of the entrepreneurship clinic at the University of Michigan Law School. Focused on early-stage companies, acceptance into an accelerator means receiving “concentrated advice and focus on their business model in a way that many other startups don’t get,” she says.

In the case of YC, a company trades 7 percent of its equity to the accelerator in exchange for $150,000 and support honing an early-stage business plan and product.

Having made early bets on companies such as Airbnb, Dropbox and Reddit, YC’s reputation leads many to see it as a bellwether for the tech sector.

“YC gives pretty strong signals when they believe an industry is changing,” says Tucker Cottingham, CEO of document automation company Lawyaw, which went through YC in 2018. “It was made pretty clear to us that they see the legal industry as undergoing a big change, and that technology is going to be a really big part of the future of how lawyers practice law.”


The accelerator is also paying attention to the access-to-justice gap by supporting nonprofits like Upsolve (2019), which helps people file Chapter 7 bankruptcy; Promise (2018), a platform to improve criminal justice systems; and Tarjimly (2018), a translation service for refugees.

“They want to help support initiatives that are bringing people out of poverty at scale using technology,” says Jonathan Petts, executive director of Upsolve.

While it’s not possible to take equity in a nonprofit, YC charitably offers grant funding and the same rigorous support provided to the for-profit participants, like helping an organization better connect with people in need of their service.

Even with an uptick in legal tech organizations at YC, they are only slightly more than 1 percent of all accepted companies, according to the Journal’s analysis.

Jonathan Levy, a partner at YC, says the accelerator doesn’t have a specific interest in legal tech—or any industry for that matter.

“The uptick in admissions is more likely the result of an uptick of legal tech startups, or just a coincidence,” Levy says. “We have different
Numerous data points indicate that legal tech is coming into its own. There was a surge in investments in legal tech companies—from $233 million in 2017 to $1.6 billion in 2018 (albeit about one-third was raised by LegalZoom), according to Forbes. Megafirms such as Dentons and Foley & Lardner both have venture funds. In February, Axiom, an alternative legal services provider, began the application process to go public. It follows DocuSign, which went public last year, raising $629 million in an April 2018 IPO.

Some of the YC grads aspire to join the legal tech pantheon of publicly traded companies one day. In the meantime, many of the founders told the Journal that their time at YC built a deep network that continues to pay dividends by providing help and insight as their companies grow.

“It helps us avoid major detours into somewhere we shouldn’t be going,” says Ray Mina, Lawyaw’s head of growth and marketing. “That is priceless.”

“We have different companies in different parts of the legal tech market and think most of them have great opportunities to disrupt an opaque industry.”

—Jonathan Levy

“willing
IRONCLAD
ROSS
Pigeonly
SimpleCitizen
Legalist”
Another Shot

After a viral photo showing a firm’s all-white and nearly all-male partnership class, businesses double down on mandating diversity from outside counsel

By John Roemer

In December, Paul, Weiss, Rifkind, Wharton & Garrison got some bad press for what was supposed to be a happy occasion. The firm posted photos of its new partnership class: 11 white men, and at the far end of the bottom row, one white woman. The picture went viral and reignited debate over the level of racial and gender diversity, or lack thereof, in the legal industry.

“We certainly can—and will—do better,” Paul Weiss Chairman Brad Karp said, apologetically. He blamed “an idiosyncratic demographic pool” and lamented that “one particular year would erase the firm’s diversity achievements over the past 75 years.” Karp has stated that one partner in the class is Latino and another is LGBTQ. Additionally, a March report from the nonprofit Lawyers of Color found Paul Weiss had the highest percentage of African-American lawyers—8.27 percent—among nearly 400 firms it researched.

The legal affairs media have documented the reality that women comprise only 19 percent of equity partnerships at the biggest firms and that just 9.1 percent are minority partners (the figures are from National Law Journal and The American Lawyer).

Other sources back up those numbers. “Paul Weiss became the scapegoat for a problem that is bigger than just them,” says the founder and CEO of Diversity Lab, Caren Ulrich Stacy. Her company, based in the Bay Area, leverages data, behavioral science and technology to experiment with ideas to boost diversity and inclusion in the law.

Stacy added that homegrown women—meaning women who joined the firm as summer and entry-level associates—and diverse attorneys “are not advancing to partnership at the same rate as their majority counterparts.” She adds that lateral partner hires are mostly white males. “If one or both of those levers don’t change, greater diversity in the equity ranks is not possible.”

As law firms grapple with surging calls for improved diversity in their partnership ranks, corporate clients have joined the chorus and added to the pressure in three ways: the carrot, the stick and moral suasion.

For instance, Microsoft’s decade-old Law Firm Diversity Program incentivizes inclusion by offering a bonus to its outside firms that increase the diversity of their partners.

On the other end of the spectrum, Hewlett-Packard Inc.’s diversity holdback scheme penalizes firms that do not meet its minimal diversity staffing requirements by withholding 10 percent of invoiced fees from those that fail to meet minimal diverse staffing requirements.

As for moral suasion, the Paul Weiss photo prompted a January open letter signed by 170 general counsels and corporate legal officers protesting that their outside firms’ new partner classes “remain largely male and largely white.” A leader of that effort, Michelle R. Fang of Turo Inc., promises an imminent follow-up this spring with more signatures and an action plan.

The chief legal officer of the Association of Corporate Counsel, Susanna McDonald, says she is impatient for improvement. “I hope the signers of the letter keep track of the actions firms take,” she says, noting that an increasing percentage of her members have come from law firms.

Companies that affirmatively try to diversify appear to succeed, Microsoft general counsel Dev Stahlkopf says. “We’ve seen quantifiable progress as a result of our incentive-based approach, and we believe that these advances have increased the quality of the representation we get and improved our results,” Stahlkopf says.

Meanwhile, HP executive communications manager Adrianna Masuko said in
an email that the punitive approach works, too. “When we began, nearly half (46 percent) of the firms met the minimum diverse staffing requirement; as of [the fourth quarter of fiscal year 2018], 88 percent of the firms met our requirements,” she said. HP requires quarterly diversity progress data from its law firm partners.

Diversity Lab’s own solution is to sign firms up to abide by the Mansfield Rule. (See "Slow Growing," October, page 52; and “Mandating Diversity,” October 2017, page 32.)

Named for a pioneering women’s rights activist from Iowa, Arabella Mansfield, who in 1869 became the first female lawyer in the U.S., the rule commits firms to affirmatively consider at least 30 percent women and attorneys of color for leadership and governance roles, equity partner promotions and senior lateral positions.

In August 2018, Diversity Lab announced that 41 firms had achieved Mansfield certification, including Arnold & Porter, DLA Piper, Littler Mendelson, Orrick Herrington & Sutcliffe, Reed Smith and WilmerHale.

Orrick management-side employment law partner Lynne Hermle, who heads an 11-female, two-male trial team that defends law firms accused of discrimination, says the Mansfield Rule works. “I think we’re going to see the most progress coming out of these types of objective, data-based approaches and joint efforts among law firms and corporate legal departments,” she says.

Stacy agrees, pointing to Diversity Lab statistics that show 40 percent of Mansfield Rule-certified law firms have increased diversity in their leadership ranks within the first year, and that over one-third of these firms are promoting more diverse associates to partner while hiring more diverse lateral associates and partners.

Of course, the best appeals might be monetary. The open letter reminds law firm partners that “collectively, our companies spend hundreds of millions of dollars annually on legal services, and we are committed to ensuring equality in the legal profession.” It was signed by lawyers from Booz Allen Hamilton; Chan Zuckerberg Biohub; Getty Images; Heineken, USA; Lyt; Toshiba America Electronic Components; 23andMe; U.S. News & World Report; Vox Media; Waymo; and others.

“We, as a group, will direct our substantial outside counsel spend to those law firms that manifest results,” the letter concludes. Fang, the chief legal officer who drafted the missive, acknowledges the skeptics who call for stronger action. “But when clients talk, law firms listen,” she says.

In the ever-evolving world of legal technology and cybersecurity, it can be overwhelming to determine the right platform or vendor for a firm.

But it doesn’t have to be.

The overall theme of 2019’s iteration of ABA Techshow, which took place from Feb. 27 to March 2 at the Hyatt Regency Chicago, was “future-proofing your practice.” In that vein, Sharon Nelson, president of Sensei Enterprises in Fairfax, Virginia, and Jeff Richardson, partner at Adams and Reese in New Orleans, stressed during their panel session that it was important not to get paralyzed by indecisiveness as a result of the abundance of technological options available in the marketplace.

For many, said Nelson, finding the right technology is “confusing” because it’s not what lawyers do: They practice law. While covering a plethora of technologies, she and Richardson focused on the need for security features such as device encryption, two-factor authentication and mobile device management, which allows a firm to control, find and wipe clean mobile devices if they are lost or stolen. But their vetting process also works for case management and billing software or hiring a security audit or training firm, for example.

For those who don’t have the time to read the blogs, listen to the podcasts and stay up-to-date on every new tool or security feature, Nelson recommended hiring an expert to be a “BS filter” and cut through advertising language and slick sales pitches. She also noted that getting endorsements from trusted colleagues is also a good way to vet technology because “they don’t have a dog in the hunt.”

Technology can be pricey—but lawyers don’t need to break the bank. During a different panel session, Sherri Davioff, CEO of BrightWise in Missoula, Montana, told the audience: “The most effective things in cybersecurity are free.” She and co-panelist David Ries, of counsel at Clark Hill in Pittsburgh, said the cheapest and...
The theme of this year’s ABA Techshow was “future-proofing your practice.”

most effective way to minimize risk is to minimize data. They offered several ideas for how this could be accomplished.

Ries recommended that attorneys classify their data based on its level of risk, and take inventory of where and how long they store it. Davidoff suggested attorneys store less data and delete data that they don’t need. “Then you can tell your clients: ‘We keep your data for five years or seven years,’ and that is your policy across the board,” she added. “Then they won’t be surprised when you don’t have it 10 years later.”

Davidoff suggested that attorneys create a data map and retention policy so they can decide up front which data they store and where it is allowed to go. She said they should also keep a record of when they delete information in case of a data breach or in case a client asks about it.

Ries said attorneys also should implement a comprehensive cybersecurity program that is appropriately scaled to the size of their firm and the sensitivity of their information. It should include an incident response plan that outlines steps that have to be taken if a data breach happens. They also should utilize password managers, such as LastPass; multifactor authentication; encryption on mobile devices; and business versions of cloud services, which typically are more secure than consumer versions.

“There are cost-effective ways to deal with most things in security,” Ries said. “Dealing with policies and procedures and training can be done with little to no cost, but you have to spend the time and effort to do it.”

Law schools can also improve their tech offerings without going into the red. Many universities provide free access to Microsoft Office 365 for everyone, said Joe Mitzenmacher, a reference and electronic services librarian at Loyola University Chicago School of Law. He recently discovered that Ross Intelligence, an online legal research tool that uses artificial intelligence, offers students free trial subscriptions. Mitzenmacher co-teaches a legal technology class and often relies on guest speakers to speak for free on topics such as cybersecurity. He also invites vendors to his class to teach students about software.

“For a practice management session, we used Clio with a free vendor demo. If Clio is not your thing, you could probably ask some of the other vendors,” Mitzenmacher said. “The idea was to get them using some practice management system so they could use any practice management system.”

The conference did not just focus on free or affordable technology. In her keynote address, Elizabeth “Betsy” Ziegler, CEO of 1871, a Chicago-based incubator, talked about advances in technology that are already being utilized, such as virtual news anchors built on artificial intelligence, fully automated restaurants and computerized contract review. Things we could see in the near future include 30-minute rocket flights halfway around the world and flying cars.

“The rate of change will never be slower than it is today,” she said.
ABA Treasurer’s Report

Another year has passed, and it is once again my opportunity to report on the finances of the ABA. I will start with our fiscal 2018 results as audited by Grant Thornton. I will then report on the year-to-date results for fiscal 2019, and finally I will outline the work on the fiscal year 2020 general operations budget. This last segment will cover a recap of the financial changes over the last four years and the challenges to be addressed as we implement our new membership model.

YEAR-ENd AUDIT AND FINANCIAL RESULTS

Grant Thornton issued an unqualified audit opinion for the fiscal year ended Aug. 31, 2018. The audit includes an audit of our government grants. The audit committee reviewed the audit and recommended acceptance by the Board of Governors, and the Board did in fact accept and approve the audit at its meeting Jan. 25.

The good news from FY2018 is that we added $3.7 million to our net assets. As you can see from the chart below (slight differences due to rounding exist throughout), on a consolidated basis, operating revenue was $199.4 million, and operating expenses were $209.3 million, producing an operating deficit of $9.9 million. Although we had a $9.9 million consolidated operating loss, we saw strong investment performance ($10.3 million investment income) which was not budgeted for operations. We also saw a decrease in the pension liability because of rising interest rates ($8.3 million). These two positive changes were offset by the one-time expense for the Voluntary Separation Incentive Program ($6.7 million).

The revenue shortfall is primarily due to general operations, made up of dues ($1.9 million), gifts, contributions and sponsorships ($1.2 million), meeting fees ($1.1 million), advertising ($0.4 million) and royalties ($0.3 million). The shortfall for sections ($1.7 million) was mostly due to meeting fees. These shortfalls were offset by favorable budget variances in grants ($1.5 million) and gifts ($1.2 million).

The association has historically managed expenses within or below budget, but the revenue component of the budget has been the weak point. In FY2018, expenses were $1.7 million favorable to budget and $6 million less than last year. Favorable variances in sections ($4.5 million) and gifts ($2.6 million) were offset by unfavorable variances in grants ($3.6 million) and general operations ($1.8 million). The general operations expense line was unfavorable to budget mainly due to legal fees.

FY2018 STATEMENT OF FINANCIAL POSITION
(BALANCE SHEET)

Go to ABAJournal.com/audited_results to see the final audited results.

Michelle Behnke
The association’s balance sheet is strong, but it is important to review the components and the changes in the components. At the close of FY2018, the association had $3.41 billion in assets and $1.65 billion in liabilities, resulting in total net assets of $1.75 billion. One of the largest positive changes in liabilities is related to our pension. We have made great progress reducing the pension-related obligation by $12.9 million since Aug. 31, 2017. Of the total unrestricted net assets of $1.62 billion, $50.9 million is attributable to general operations/Fund for Justice and Education, $111.2 million is attributable to the sections, and the balance are temporarily or permanently restricted funds.

## CONSOLIDATED FY2019 OPERATING RESULTS THROUGH JANUARY 31, 2019

<table>
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<tr>
<th>Consolidated ABA Results - January 2019 FYTD</th>
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<tr>
<td>(Amounts in Millions)</td>
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<tr>
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<tr>
<td>Operating Expenses</td>
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<tr>
<td>Operating Deficit</td>
<td>$(0.9)</td>
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<tr>
<td>Investment Income not in Operations</td>
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<tr>
<td>Other Non-Operating Items</td>
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</tr>
<tr>
<td>Change in Net Assets</td>
<td>$(13.9)</td>
</tr>
</tbody>
</table>

From the fiscal year-to-date FY2019 results we see that consolidated operating revenue through Jan. 31, 2019, was $77 million, which was $7 million below budget. Revenue budget variances are primarily due to unfavorability in grants of $4.3 million (timing), general operations of $21 million, and sections of $1.1 million. The main driver of the general operations revenue shortfall to budget is new membership model activity; however, this has no impact on net results. For the NMM, FY2019 budget included $7.4 million in expenses and $7.4 million in revenue (investment income for ops) signifying that the money would be spent from reserves. We record the revenue when we spend the money (incur expense). Unfavorability in section revenue is driven by meeting expenses ($0.9 million) and dues ($0.4 million).

Through the same period, consolidated operating expenses of $77.9 million was $11.1 million favorable to (under) budget. Favorable expense budget variances are mainly driven by sections ($4.4 million), general operations ($4 million) and grants ($3.3 million, timing). The section favorability is a result of lower expenses across all reporting line items. The general operations favorability is due to lower fringe benefits costs and lower legal expenses. Spending for the NMM has also been a bit slower than expected, resulting in favorability of $2 million, which is mostly timing.

Through Jan. 31, 2019, consolidated expenses are $5.8 million favorable to prior year, driven by general operations ($5.3 million), sections ($2.8 million), offset by gifts ($2.9 million). General operations year-over-year favorability is mainly due to lower salaries and benefits (smaller staff size after VIP) and lower legal expenses. Sections are favorable to prior year due to the $2 million transfer made from the Taxation Section to its quasi-endowment in FY2018.

On a consolidated basis, expenses exceeded revenue by $0.9 million, which is favorable to budget by $4.1 million and favorable to prior year by $5.7 million. The effect of the more volatile investment market resulted in a loss of investment income of $12.2 million, which mostly contributed to the $13.9 million reduction in total net assets.

I am also including a consolidated statement of financial position that shows a year-over-year (Jan. 31, 2019 to Jan. 31, 2018) comparison.

## PREVIEW OF FY2020 GENERAL OPERATIONS BUDGET

Given the continued softness in dues revenue in the past years (see chart), the FY2020 budget once again requires a careful look at expenses and some reprioritization of our work to gain efficiencies and reduce overall expenses. The budget task will be exceptionally hard because we have significantly decreased expenses over the past few years: The expense chart shows a net reduction of $13.4 million, or 13 percent, between FY2016 and the FY2019 budget (special initiative expenses are excluded from expense numbers). Also, FY2020 will be the first year of full implementation of the NMM, which adds to the complexity in the short term. Our preliminary analysis shows that we will need to cut the FY2020 budget by approximately $6 million because of the repricing of dues and relying less on our investment income to cover...
These are challenging issues. Everyone working on the issues wants the association to thrive and prosper. With the help of the many volunteer leaders and an incredible financial services team, we will continue to outline the issues and alternatives to help make wise financial decisions that lead this association to prosperity. Thank you for your commitment to help us achieve financial stability.

Repetitive budget cuts are not a sustainable method of realigning our revenue and expenses. We know that an organization cannot cut its way to financial health, but it is also the case that we cannot ignore the continued softness in revenue and therefore we must continue to manage expenses until we are able to stabilize revenue (both dues and nondues).

It is my honor to serve as your treasurer. Thank you.

Michelle Behnke
“As soon as they found out about my background, it was like, ‘No, we can’t hire you.’ ”

—Steve Price
As he rode the bus home to Chicago from the Vienna Correctional Center in downstate Illinois, Steve Price told himself that he wasn’t going back. At age 32, he’d already been to prison six times. He’d had enough. This time was going to be different.

This time, Price felt better prepared for re-entry. During his stints behind bars, he learned how to read. He earned a high school equivalency diploma. He trained to be a barber and passed the state licensing exam.

His mom, Eula, met Price at the bus station downtown and drove him to their home on the South Side where she cooked dinner. "I told her, I don’t think I’m going back to jail again," Price recalls. "And all she would say was that time will tell."

Her skepticism was well-placed. Price had a rap sheet that began at age 13, around the time he started running with a street gang. As an adult, his convictions were for nonviolent crimes—burglary, retail theft and drug possession. He was a heroin addict, and he stole to support his habit.

Once back home, Price checked in with his parole officer and went looking for a job. "As soon as they found out about my background it was like, ‘No, we can’t hire you,’” he says. He talked his way into cutting hair at a couple of barber shops, but he was unable to land a permanent gig.

He began to feel desperate. "I knew I wanted to change, but I didn’t know how. I didn’t know where to go, what to do, anything like that," Price says. "The parole officers didn’t have any information for us. They were overloaded, and they would just come to see me, and that was it."

Frustrated and depressed, Price hit the streets, looking to score drugs. "I was still really angry about a lot of stuff," he says. "I wasn’t ready. I focused on getting high."

He began stealing again, and before long, Price was back in prison. The year was 1996.

A REVOLVING DOOR

Such stories are common. People like Steve Price—poor, African-American, a high school dropout, raised by a single mom, forced to hustle on the street to survive—fall into a pattern. They get arrested, go to prison and are released with little or no preparation, counseling or drug treatment. Most have no job skills, and few employers are willing to hire them because they have a criminal record. So they wind up going back. Recidivism is a problem that for decades has continued to spin the revolving door of mass incarceration.

While the United States has consistently put more people in prison than any other country, it has come up short in helping rebuild their lives once they’re released. More than 600,000 people leave the nation’s prisons...
every year with little more than a bus ticket and 50 bucks. Within five years, more than half of former state inmates are back inside.

THE 'DECARCERATED'

While there’s been a growing bipartisan movement to end mass incarceration, such efforts still must grapple with the increasing number of “decarcerated” individuals. The national First Step Act, a major criminal justice reform initiative signed by President Donald Trump in December, offers some hope. It includes reforms that reduce sentences for federal drug crimes and funding for programs to reduce recidivism. The president in April announced plans for a “Second Step Act” in his fiscal 2020 budget that will focus on re-entry and reducing unemployment for those with criminal records. But these programs apply only to those convicted of federal crimes. Most incarcerated people are in state prisons and county jails. To complicate matters, state and local governments have thousands of laws, regulations and policies that create barriers that even the most determined people have trouble scaling when trying to get a second chance.

Drew Findling, president of the National Association of Criminal Defense Lawyers, has seen this firsthand in 30 years of representing criminal defendants. “Someone can leave prison, but in many ways, they remain imprisoned. They can’t get the job that pays a living wage. They can’t get into an apartment. They can’t even feel what it’s like to be a normal citizen,” Findling says. “You realize there are all these punitive measures the government takes that, while it doesn’t keep you caged, it does, in many ways emotionally and professionally and socially, keep you caged.”

According to the nonprofit Collateral Consequences Resource Center, there are nearly 45,000 measures that can stand in the way of a person with a criminal record seeking to lead a normal, productive life. These restrictions cover employment, licensing, housing, education, public benefits, credit, loans, immigration status, parental rights, interstate travel and more.

The resource center began as a project of the ABA Criminal Justice Section. The idea was to create a database of laws and regulations that affect those with criminal records and make it available to lawyers, lawmakers and advocacy groups. The database was launched in 2014 and was originally called the National Inventory of Collateral Consequences of Conviction.

Margaret Love, a Washington, D.C.-based attorney who specializes in clemency cases and restoration of rights, directed the ABA project, and what she found was distressing. “The phenomenon of collateral consequences is, in a sense, a part of the sentence,” she says. “People get tarred with a criminal record, whether they go to prison or not, and that can be disabling for their entire life. Until recently, there have been fewer and fewer ways for people to get out from under the cloud of a criminal record. The fact is that even arrests come up on rap sheets, and they are frequently used to disqualify people.”

While the number of such consequences remains high, efforts to reduce them have been successful. According to the resource center, 32 states, the District of Columbia and the U.S. Virgin Islands enacted at least 61 laws in
2018 aimed at reducing barriers to successful reintegration for those with criminal records, continuing a trend the center has tracked for the past six years. By the end of 2018, every state passed laws to address the problem.

In addition, more than 30 states and 150 cities in recent years have passed “ban the box” laws that prohibit employers from asking about arrests or convictions on job applications, according to the nonprofit National Employment Law Project. While this may stop employers from immediately tossing out applications from those who check the box, they’re still free to conduct criminal background checks before making hiring decisions. Many small businesses are also exempt from the law based on the number of people they employ.

Being a person of color adds another barrier to getting a job—criminal record or not. According to the NACDL report “Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime,” white people with criminal records are more likely to get callbacks for job applications than black people without criminal records.

Despite efforts to remove barriers for those with criminal records, the most harmful consequence remains the hardest to shake. “It’s the stigma—which encourages discrimination,” Love says. “And most of the time, it’s not embodied in any particular law. It’s just, ‘We don’t want to hire somebody with a criminal record.’

Recognizing a need to bring greater attention to this issue, Findling helped organize “Shattering the Shackles of Collateral Consequences,” an NACDL conference that drew attorneys, policymakers and formerly incarcerated people together in Atlanta last August. “We have a terrible system of direct consequences,” Findling says. “But also, the lingering indirect consequences that make a mockery of the notions of rehabilitation and redemption.”

NO FIRST CHANCE

Price grew up in Auburn Gresham, once a thriving working-class Chicago neighborhood that has been on the decline for decades. His parents were from Mississippi, where his mother picked cotton with her brothers and sisters. His mother was married at age 14 and moved to Chicago with his father, who ran a gas station on 79th Street. He was an alcoholic who died when Price was about 6 months old. Price was not close with his three brothers and sister and felt alone much of his childhood.

When Price showed academic promise in grammar school, he says his peers mocked him. A teacher in fourth grade had complimented Price on his multiplication skills in front of the class. “I went to recess, and the whole class jumped on me. So I felt being smart was not the way to go,” he says. “There was a point where I just wanted to be accepted, and I got involved in the gangs and the street life. Once I got involved in that, it was an ongoing thing, and I stayed in trouble for a very long time.”

Price would intentionally get in trouble to get attention from his mom, who cleaned houses, sometimes seven days a week. He looked forward to when she would have to pick him up from the juvenile detention center. “That was the time we could spend together, on the ride home,” he says, “because once we got home, our time together was over with.”

When Price turned 17, he made his first trip to adult prison. “My first charge as an adult was for burglary, and they gave me four years,” he says. “As I went into the prison, I learned quickly that I had to be this cold, callous person, because otherwise, you were going to be looked at as weak.”

He fought his way to getting the respect he needed to survive on the inside, but he lacked something more important that could help him on the outside: an education. “They had programs, but I was too ashamed to admit that I didn’t know how to read. I couldn’t tell anybody about it,” he says.

When Price was released, his job prospects were close to zero. “So, with me coming out of prison at the age of 19 and unable to read, I couldn’t get a job because I couldn’t fill out an application. So, I went right back to the street life and continued my life of crime.”

He got busted again. This time, seven years for burglary and auto theft.

REBUILDING LIVES

Apostle Joseph L. Stanford is founder and pastor of Ambassadors for Christ Ministries in the Auburn Gresham neighborhood where Price grew up. In the years since Price was a young boy, the area has suffered from economic hardship, white flight, disinvestment, unemployment and high-crime rates. Under Stanford’s

“Some people don’t have a first chance. They’re born into poverty. They’re born into drugs. People go into prison illiterate and come out illiterate and can’t get meaningful work.”

—Apostle Joseph L. Stanford
leadership, the church has created several not-for-profit, faith-based organizations to help rebuild the neighborhood, prevent violence and offer services to those released from prison like Steve Price. Stanford has counseled many people seeking a second chance.

"Some people don’t have a first chance," Stanford says. "They’re born into poverty. They’re born into drugs. People go into prison illiterate and come out illiterate and can’t get meaningful work."

It’s part of a cycle that Stanford and his colleagues are trying to break. "We can’t look to the government to help us. We need to help ourselves. If we don’t help ourselves, no one is going to help," he says. To that end, the church founded the Target Area DevCorp, a grassroots community organization that has a program to assist people released from prison. Its services include job readiness training, counseling and anger-management programs.

Many workers at Target Area are formerly incarcerated, and they visit prisoners before their release to talk about the re-entry program. "It’s important that we go inside before they get out," says Autry Phillips, Target Area’s executive director. "We build relationships with people on the inside. It’s really important that people on the inside know that someone on the outside cares about them."

Joshua Coakley, 43, who is formerly incarcerated, has regularly visited the Sheridan Correctional Center, a prison that offers substance abuse programs. His background gives him credibility to create trust among the men. But addressing their addictions is not enough for most of them once they get out. "They are lacking job readiness," Coakley says. "They say they want a job, they say they want to be employed, but they don’t know the first thing about getting up, getting ready on time, how to talk during an interview. About 90 percent of our guys never worked. They have no work experience whatsoever."

That’s where Target Area comes in. As part of the re-entry program, they provide anger management counseling, basic job readiness training and referrals to temp agencies. "They need money, a place to stay and food," says Coakley, a licensed minister and a re-entry director at Target Area who’s been out of prison since 2000. "With some of the guys coming home, their mindset is that they’re not concerned about education right now. It’s, ‘I’m concerned about the sandwich I want to eat.’"

Price might have benefited from such a program but was unaware it existed just blocks from where he lived. Instead, he spent his 20s in and out of prison for retail theft, drug possession, forgery and burglary. He used the time wisely by learning to read, studying for his GED certificate and enrolling in barber’s school—but even that was no guarantee he could make it on the outside.

CHANGING THE PATTERN

Across the country, organizations large and small, public and private, are working to help men and women successfully transition from prison to life on the outside. Many have been funded through federal grants under the Second Chance Act of 2007, long supported by the ABA and reauthorized by Congress last year. The act passed with bipartisan support during the administration of George W. Bush, who pledged during his inauguration to help prisoners reintegrate into their communities.

To learn what kinds of approaches work to reduce recidivism, the Koch Foundation, one of the country’s most politically conservative organizations, is funding an effort to develop evidence-based programs to help people like Price break the cycle.

Mark Holden, senior vice president and general counsel of Koch Industries Inc., is chair of an initiative known as Safe Streets & Second Chances. It aims to reduce recidivism by giving prisoners the tools they need to return home to get jobs and start their lives again.

"The fact that so many people return to prison again and again is completely unacceptable, it’s disgraceful and it’s not good for anybody, particularly for communities, for the individuals in prison and their families," Holden says. "We want to find the best practices we have and see if it can’t be a game changer as far as keeping people out of prison once they’ve been in."

To start, Holden says those going to prison should also be planning for their release. "Our goal for re-entry is that it needs to begin from day one of incarceration," he says. "Every individual who is going to be returning to society at some point will have their own personalized plan for re-entry."

To test that strategy, Safe Streets is conducting a study at prisons in Florida, Kentucky, Pennsylvania and Texas where participants will develop such personalized re-entry plans. "These are people who often aren’t asked

“They are lacking job readiness. They say they want a job, they say they want to be employed, but they don’t know the first thing about getting up, getting ready on time, how to talk during an interview.”

—Joshua Coakley
what they want or what their aspirations are,” Holden says. “We’re asking them those questions. Almost everyone wants to work more, they want to learn more, they want to have positive relationships, they want to be a positive part of their community.”

Carrie Pettus-Davis, an associate professor at Florida State University, is leading the study, which she says will compare those who have personalized plans designed by her team to those who receive the states’ own re-entry services.

Pettus-Davis found that the majority of those returning from prison rely on a case management model, which means mostly getting referrals to various re-entry services throughout their communities. “The problem with that is oftentimes people are referred to waitlists, or they’re referred to low-quality services or they are referred to places they can’t reach because of geographic or transportation barriers,” she says.

She believes that those who receive consistent services and plan their exit from prison while still incarcerated will fare better. “Ultimately, we believe a focus on well-being that happens using a continuum of care starting from the beginning of incarceration and ending afterwards is going to produce better outcomes,” she says.

This focus on an incarcerated person’s overall well-being represents a shift in how re-entry programs are modeled, Pettus-Davis says. It’s based on helping them develop healthy thinking patterns, effective coping strategies, meaningful work trajectories, positive social engagement and favorable interpersonal relationships.

THROUGH THE FIRE

By the time Price was in his 40s, he was still circling through the revolving door of prison with more convictions for drug possession and theft. He couldn’t shake his addiction, didn’t get referrals for treatment once he was out and didn’t seek help on his own. During his years in and out of prison, Price fathered three children he rarely saw.

After being released in the winter of 2009, Price promised himself he’d work harder to find employment. He was thrilled when he landed a job as a maintenance engineer at a senior citizens’ home. “I was on the job for seven days,” he recalls. “One day I was out doing snow removal, and the lady called me into the office and said, ‘You need to turn in your keys and go. Your background check came back, and we can’t keep you.’”

He was crushed. “That really messed me up. I loved that job, and they told me I was doing a good job,” he says. “That devastated me. I started getting high. I couldn’t deal with the rejection.”

Price caught another conviction for burglary and was sentenced to six years. But then, he did something he never did before. “I was ready to start learning about my addiction,” he says. He applied to join a substance abuse program and was accepted to the Sheridan Correctional...
Center.

One day, the prisoners got a visitor. His name was Steve Perkins, public safety manager at Target Area DevCorp, who came to talk about its prisoner re-entry program. Afterward, Price walked up to Perkins and told him he grew up in that community. “That’s how he introduced himself,” Perkins recalls. “After that, when I would come back, I’d always have conversations with Steve.”

When he got out in 2013, Price signed up for the re-entry program. His mom once again allowed him to move back home.

“My mom was a great lady. No matter what I did, she supported me,” Price says. “But she didn’t understand my life. She was a good Christian woman her whole life. She didn’t understand what I was going through or how to help me in any way.”

Price seemed to be doing well, but then he stopped going to the program. He says he wasn’t used to being around so many people on the outside. “All this distrust and paranoia kicked in, and I started using again,” Price says. “It didn’t take long. Six months later, I was locked back up.”

He got eight years for burglary. It seemed to be his destiny.

**EARNING HIS PLACE**

Four years later, at age 56, Price was once again released from prison and moved back home with mom, who was in her upper 80s by then. He had grandchildren, and he was just plain tired of being incarcerated. He got ill in prison and developed blood clots in his legs, which required a liver transplant.

After coming home, Price decided to go back to Target Area DevCorp, despite having let himself and the staff down.

“We always told him he had a place to come,” Perkins says. “But he had to earn his place.”

Price stopped by every day asking how he could help. “I’m available. If you need me, I’m here,” he would say. He cut hair for men at group meetings and did odd jobs around the building. Perkins says it took time, but Price earned back trust. “I had to have him work for free for a while. I wanted to see if he was serious,” Perkins says.

“They made me feel wanted,” Price says. “They made me feel like they’re not going to judge me. They made me feel like I was part of a family—and I never felt that before. Volunteering and giving something back made me feel good. It made me want to get involved in even more.”

After volunteering for months, Target Area offered
Price a paying job with benefits as a violence interrupter. “We go into communities and talk to people, and if something is going on, we try to defuse the situation,” he says.

On the streets, he runs into people he knew from kindergarten as well as a new generation of young people at risk of falling into the same patterns that put Price in prison. “Knowing my history, they were shocked to see me doing this,” he says. “When I get out there and talk to these people, I see me. I see everything I was involved in, and it makes me want to help them turn their life around. I tell them if I can change, anybody can change.”

Price says he’s motivated largely by wanting to be around for his children and grandchildren. “What I had to realize was that it was no longer about me,” he says. “I realized that when I went to prison, they were right along with me. I didn’t realize how much they were hurting.”

He hopes someday to find other work, although he favors working with young people and counseling troubled youth. “People who need inspiration and guidance,” he says.

His mom died last fall at 89. “My mom passed away after all this time, seeing me go in and out of jail and getting in trouble,” Price says. “The best part is that I was able to turn my life around before she passed, and she got to know I’m OK. I was glad to know she didn’t have to worry about me anymore.”

Price knows he’s made poor choices but wishes he had a helping hand when he most needed it—a father, a mentor, an employer willing to give him a shot. “We need a second chance,” he says. “We need someone to say, regardless of what you’ve done in the past, let me allow you to try something different. We need that.”

“I tell them if I can change, anybody can change.”

—Steve Price

Look for more of this series in upcoming issues of the ABA Journal and at ABAJournal.com
Inside a loft building just west of Chicago’s downtown, a group of men and women are gathered in a circle, clapping hands, stomping their feet and singing the theme song to The Jeffersons television show. “Well, we’re movin’ on up,” they shout. “Movin’ on up!”

The high-energy singalong sounds like a rollicking jubilee church service as the men and women welcome their peers into the circle with cheers and high fives. The gathering, known as Morning Motivation, takes place on a fall morning at Cara Chicago, a nonprofit that provides job readiness training to formerly incarcerated people, and perhaps most important, helps build their confidence.

“The notion of incarceration goes far beyond the experience itself. It becomes part of how you see yourself,” says Maria Kim, president and CEO of Cara Chicago. “We want people to have an understanding of what they can be. The jobs skills part is equally important to the self-worth part of it.”

Among those in the crowd is Regina Brown. Five years clean of drugs and alcohol, Brown has a full-time job and hope. “These motivations in the morning get you going,” she says. Participants share stories and celebrate milestones such as getting their first interview or landing a job.

Coaches help guide people recently released from prison through employment skills training as well as life coaching. “You have to be personally stable,” says Nora Vail, manager of coaching and retention. “Health, housing and child care are important. Those can jeopardize people’s ability to get a job.”

And when they’re ready to head out for job interviews, Cara has an extensive wardrobe of donated clothing that participants can borrow. Before she came to Cara, Brown never had a real job. “Alcohol and...
drugs took a part of my life,” she says. “I got to a point where I didn’t want to do it anymore. My son was looking at me like I wasn’t the same mom.”

Child welfare workers took Brown’s son away after her last arrest at a crack house. A judge sentenced her to a residential treatment program, and Brown stayed in a recovery home for 18 months.

Brown had to think beyond treatment. She got a referral to Cara, which helped her land her first job—picking up trash and sweeping streets. The company that employed her, Cleanslate, is owned by Cara, which created the business to help people acquire work experience.

After completing a year with the Cleanslate program, Brown got connected with the Chicago Transit Authority, which employs those with criminal records through its Second Chance Program. Again, the work was laborious—cleaning trains and buses—but it was work. Brown was forced to leave after a heart attack, but she has since landed a less labor-intensive job working for Catholic Charities in a mother-and-infant program. Cara has partnerships with businesses, nonprofits and hospitals willing to hire its graduates, and it is always seeking to encourage others.

Cara also helps clients by connecting them with lawyers at Cabrini Green Legal Aid who can help seal or expunge their records, if eligible. That’s important because while Cara can help clients with records get jobs with businesses already sympathetic to their plight, many others aren’t willing to take a chance.

“If we’re able to remove those barriers so people can work, it makes all the difference for those who are trying to overcome a criminal conviction,” says Kimberly Mills, a supervising attorney with Cabrini Green Legal Aid. “Their past doesn’t define them. Their past is often the result of trying circumstances and trauma, and sometimes it’s all about survival.”

Getting a fresh start has helped Brown, whose record was expunged, see her life in a new light. “I never thought my life would ever be this awesome,” Brown says. “There is hope. You just have to change your life, change everything about your life. There is hope. It’s real.”

—Kevin Davis
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Social media giant plans to create a judicial-like body to address controversial speech

By Mark F. Walsh
For the last two years, Facebook has been a company swamped by scandal and public scrutiny.

From being a conduit for Russian meddling in the 2016 election to having the personal data of millions of its users misappropriated by consulting firm Cambridge Analytica, to its role in abetting violence against Muslims in Myanmar, the company has been hit by a stream of damning revelations.

Partly in response, Facebook issued a series of new policies and practices last year to provide more transparency and accountability in how it moderates speech on the platform.

Those steps included releasing internal guidelines for enforcing its community standards—Facebook’s public content-moderation rules—doubling the number of content moderators and reporting on content enforcement actions.

One initiative, announced in a November blog post by Facebook CEO Mark Zuckerberg, captured the attention of legal scholars, lawyers and civil society advocates. It would create an independent body to hear appeals of content decisions by Facebook—either removing or leaving up posts—and its decisions would be binding.

“The purpose of this body would be to uphold the principle of giving people a voice while also recognizing the reality of keeping people safe,” Zuckerberg wrote. It is set to launch by December after a period of initial consultation with experts, followed by global workshops and soliciting of public proposals.

Months earlier, in an April interview with Vox, Zuckerberg had floated the idea of an oversight body, “almost like a Supreme Court,” to define the scope of acceptable speech on the platform. The high court analogy reinforced the notion of Facebook as an emerging, if
enormous, nation-state (population 2.3 billion) creating a separate judicial arm.

Unlike an American government entity, though, Facebook as a private business isn’t legally bound to guarantee free speech rights under the First Amendment. Still, Facebook seeks to strike a balance between promoting free speech and competing concerns like user safety, the user experience and its own business interests.

How well the nation-state analogy fits Facebook is one of a host of conceptual and practical questions the project raises: Who will staff this body, and how will they be chosen? How will Facebook ensure the body’s independence? And how will this all work given the scale at which the company operates?

UPHOLDING COMMUNITY STANDARDS

Facebook began providing more details in late January when it released a draft charter for what it calls its oversight board. After consultations the last few months with academics, civil society groups and other experts, the document outlines the basic structure and function of the board. The primary purpose of the board, it states, will be to review specific decisions made when enforcing its community standards. Beyond those standards, it will be guided by a set of values including voice, safety, equity, dignity, equality and privacy. Board members will consist of experts in content, privacy, free expression and human rights, among other areas, and be supported by a full-time staff. Board decisions will be final in the specific instance but could potentially factor into future policy.

The board would not reverse Facebook decisions where doing so would violate the law, which Lawfare contributor Evelyn Douek noted is consistent with the company’s existing policy of respecting the laws of local jurisdictions globally where it operates.

The draft charter suggests that body may number up to 40 global experts who serve part time for fixed three-year terms, and that the initial appointments would be made by a chair or selection committee commissioned by Facebook.

To help foster independence, the board won’t include current or former Facebook employees or government officials. Compensation for board members would be standardized and fixed for their terms. Rules would require their recusal to avoid conflicts and bar them from being lobbied. And board deliberations would remain private.

Exactly how members would be paid is still unclear. One possibility is that Facebook would fund the board, but through a separate entity to preserve its independence.

In recent months, the company has hosted a series of workshops with experts and organizations in cities such as Singapore, New Delhi and Nairobi to solicit feedback on the draft charter. In April, it also began seeking public input on the oversight board through a web-based form that includes a questionnaire and essay section. The questions cover topics such as how board members should be selected, how decisions should be made, and how long members should serve.

Facebook has tapped Baker McKenzie to help manage the process, which will result in a report in June summarizing the findings after the six-week public comment period.

“This is a big deal for us, so we’re reaching out to get feedback because it will have an important impact on what we’re doing,” said Peter Stern, policy manager at Facebook, at the time the draft charter was unveiled.

Among others, that feedback is coming from law scholars, lawyers and other legal experts Facebook has reached out to as part of its process. Legal specialists are also likely to play a key part in the board’s ongoing development and eventual operation.

“The board would be looking to recruit significant figures from journalism, human rights, safety and the legal profession, and could expect them to be from a wide variety of countries and cultures,” Stern says.

Those selected would be addressing what Facebook considers its most difficult content decisions. Such cases often involve deciding what constitutes hate speech. That’s because they typically require more cultural and linguistic context to decide than other types of banned content like terror propaganda or nudity, according to Monika Bickert, head of global policy management at Facebook.

“There’s no universal definition of hate speech,” she noted while speaking in December about Facebook’s content-moderation system at Harvard University’s Berkman Klein Center for Internet & Society.

Conversely, the board might also have to determine when content that
might otherwise be removed for violating its community standards should stay up because of its newsworthiness or public interest value.

While the oversight board is very much a work in progress, legal experts are already weighing in. Interviews with more than a dozen lawyers and academics who focus on areas such as internet law, content moderation and human rights indicate support for the project. But that support is mixed with skepticism.

That’s not only because of the practical challenges of building a global appeals system but also uncertainty about Facebook’s motives.

“We have a lot of questions and concerns about how to actually implement this in a way that would actually be fair and adequately protect the due process rights of [Facebook] users,” says Corynne McSherry, legal director at the Electric Frontier Foundation. “I genuinely think the jury is out on that.”

Advocacy groups such as EFF have increasingly called on Facebook to disclose more about how it makes content-moderation decisions. They’ve also pushed for more due process—such as providing ample notice of content takedowns and the ability to appeal such actions.

That’s hardly surprising given the storm of public criticism Facebook, Twitter, YouTube and other internet platforms have faced in connection with the proliferation of fake news, fake accounts, online harassment and bullying, as well as election interference in the last few years. The so-called techlash has placed mounting pressure on the platform giants to police online speech more aggressively while also protecting free expression.

Days before Zuckerberg’s November blog post, more than 90 civil society groups published an open letter to Facebook asking that it clearly explain to users why its content had been taken down and to permit appeals, including review by people not involved in the original decision.

Earlier in the year, the U.N. special rapporteur on the promotion and protection of the right to freedom of opinion and expression released a report calling on social media companies to adopt human rights law as the global standard for ensuring free expression on their platforms.

Among the report’s specific recommendations was a suggestion on how to handle content appeals: “Among the best ideas for such programs is an independent social media council modeled on the press councils that enable industrywide complaint mechanisms and promotion of remedies for violations.”

David Kaye, the U.N. special rapporteur, says he welcomed Facebook’s step to create an appeals body, even if it’s not the broader type of social media council he recommended. “Overall, I think this is heading in the right direction,” he says.

But he questions why the guiding values listed in the draft charter didn’t include free expression, substituting the weaker term voice. Beyond just enforcing Facebook’s community standards, “I think it’s better for the board to make a broader assessment of whether the rules and their application are consistent with human rights law,” he says.

Facebook has previously said it looks to international human rights law for guidance when it comes to setting limits on speech. It has also noted its involvement with groups such as the Global Network Initiative, which promotes free expression and privacy rights.

A FACEBOOK ‘CONSTITUTION’

Others have suggested the company should go so far as to draft a constitution of sorts to help guarantee the board’s independence. That’s what Kate Klonick, a professor at St. John’s University School of Law who focuses on internet law, and Thomas Kadri, a PhD in law candidate at Yale Law School, proposed in a New York Times op-ed in November.

“Facebook should consider—especially if it continues to act as a type of governing body—adopting something like a constitution that is harder to amend than its ever-shifting content-moderation rules, which it could alter mercurially to get...
around decisions issued by its court that it doesn’t like,” they wrote.

A Facebook “Supreme Court,” with its own constitution, could prove more hospitable than an actual court. Suing internet platforms such as Facebook over free speech violations has been a mostly losing proposition for plaintiffs. Courts have generally found that as private companies, they’re free to exercise editorial control over content on their properties.

What’s more, the Communications Decency Act gives Facebook and other online intermediaries broad immunity from liability for content posted by their users.

A judge last year, for instance, ruled against right-leaning political activist Chuck Johnson in a suit he brought against Twitter for kicking him off the service after he posted a threatening tweet. The court rejected his arguments on the grounds of both the First Amendment and the decency act, finding that while Twitter invites public use, “it also limits this invitation by requiring users to agree to, and abide by, its user rules.”

Such rulings don’t mean Facebook can simply ignore calls for greater accountability. With governments around the world probing its business practices and signaling increased regulation, the company has reason to take more action on its own.

Consider that Facebook began allowing users to appeal content takedowns in April 2018. Specifically, that means the ability to appeal removal of posts for nudity/sexual activity, hate speech or graphic violence.

Previously, users could only challenge actions such as account suspensions or entire page takedowns on Facebook. The appeals expansion was announced in tandem with the release of the internal guidelines its 15,000 content moderators globally follow in enforcing its community standards.

Both moves came a couple of weeks after Zuckerberg was grilled by lawmakers in Washington, D.C., about the company’s data security and privacy lapses in relation to topics like the Cambridge Analytica scandal, Russia’s exploitation of Facebook in the 2016 election and racial targeting via its ad platform.

Even after updating its appeal policy, Facebook was slammed in a May EFF report on platform censorship for allowing only a limited scope of appeals. It earned a rating of only one star out of five overall across criteria that also included transparency reporting, providing timely notice and limiting the geographic scope of takedowns when possible.

**MONITORING BILLIONS OF POSTS**

But if Facebook’s ambitious plans for the oversight board are borne out, Eric Goldman, a professor at Santa Clara University School of Law and co-director of its High Tech Law Institute, suggests the company could potentially leapfrog the competition.

“With respect to the appeals process, if Facebook raises the bar, it makes other companies wonder if they have to keep pace with Facebook or look like they’re falling behind,” he says.

Alex Feerst, head of legal at publishing platform Medium and a fellow at Stanford’s Center for Internet and Society, for one, is watching closely. “I have an appreciation for how large and complex this is,” he says of Facebook’s creation of an outside appeals body. “People will be watching to see how they go about solving problems and try to learn from it.”

Indeed, the sheer scale of the project is daunting. Consider that billions of pieces of content are posted to Facebook each day in over 100 languages globally, with more than a million content-related complaints reported a day as well.

Facebook has developed automated systems that can identify much of the content it bans in certain categories such as nudity and terrorism. In his November blog post, for instance, Zuckerberg noted that the company’s AI systems now flag 99 percent of terrorist content before anyone even reports it. In March, Facebook announced similar efforts against content supporting white nationalism and white separatism. But automated tools aren’t as effective yet in categories that involve more linguistic and cultural nuance such as hate speech, bullying and harassment. That’s where human reviewers come in. A *New York Times* investigation published in December underscored just how difficult the task is, and how flawed the process.

Facebook last year, for instance, acknowledged it was too slow to combat hate speech in Myanmar used to incite violence against minority Rohingya Muslims. About 700,000 Rohingya fled the country in 2017 in what the U.S. condemned
as ethnic cleansing.

To better inform its decisions, the oversight board would be able to call on outside cultural, linguistic or sociopolitical experts when necessary. That would be in addition to any arguments or material submitted by Facebook users.

The draft charter doesn’t indicate what type of caseload the board might carry. Facebook’s Stern says it’s contingent on other factors, like the size of the board and how cases are selected. But the numbers associated with its existing content-moderation efforts are eye-popping.

A report Facebook released in November showed that in just the third quarter, it took some type of action on about 63 million pieces of content, excluding fake accounts and spam. That total included 30.8 million related to nudity/sexual activity, 15.4 million concerning graphic violence and 2.9 million deemed as hate speech.

Facebook hasn’t yet disclosed how many of these matters have been appealed since April 2018, but even a small fraction would still represent thousands of cases, some of which could wind up before the oversight board.

On the last point, the charter suggested cases could be referred to the board by Facebook users challenging a decision as well as by Facebook itself—highlighting especially difficult issues or ones that have sparked significant public debate.

In that vein, think of the public outcry in 2016 over Facebook’s censorship of the Pulitzer Prize-winning 1972 photo “The Terror of War,” showing terrified children fleeing a napalm attack in Vietnam. The platform later reinstated the photo because of its historical importance.

Once referred, cases might then be heard by panels from a rotating set of an odd number of board members. At the end of a session, panels could choose from an eligible slate of cases for the subsequent panels to decide.

Stern stressed, though, that such draft proposals are still under discussion.

For reference, 7,000 to 8,000 cases are filed with the U.S. Supreme Court each term, and it ends up hearing oral arguments in about 80 of those cases, or about 1 percent of the total filed. Similarly, Facebook’s oversight board will hear only what it deems the toughest or most important cases.

**COURTING LEGITIMACY**

Stern and other Facebook officials have downplayed Zuckerberg’s Supreme Court analogy, but the oversight board isn’t without judicial aspirations. The charter envisions independent panels that act like judges, interpreting the equivalent of Facebook laws (its community standards), and issue binding decisions that will serve as a form of precedent.

The quasi-judicial structure itself bestows a sense of fairness and legitimacy. That’s what Facebook badly needs to make the oversight board a success. “What Facebook is trying to do is maintain enough legitimacy with users that will still use the platform,” says Rebecca MacKinnon, director of the Ranking Digital Rights project at New America.

Facebook last year ranked fourth out of 12 internet and mobile companies in the Ranking Digital Rights Index, which rates major tech companies based on their policies relating to governance, freedom of expression and privacy.

But Facebook’s self-interest and the public interest aren’t necessarily at odds in the oversight board, according to Klonick, who is among the legal scholars the company has reached out to for input on its development.

“It’s very much in the best interests of users,” she says. “Having a diverse body of individuals look at this, having something that’s independent and not tied to Facebook are all really great steps and long overdue, in my opinion.”

In a 2017 law review article she wrote on the “New Governors” of online speech, Klonick argued that platforms’ content-moderation efforts are shaped by three factors: American free speech norms, corporate responsibility and the economic necessity of fulfilling users’ expectations.

For Facebook, there’s the added dimension of public scrutiny it’s come under. The oversight board is emerging amid the ongoing sense of crisis surrounding the company. Every week seems to bring a new issue. Facebook’s plan to merge its WhatsApp, Instagram and Facebook Messenger apps on the back end, for example, has already raised regulatory questions in Europe. So it’s likely the board will continue to be eyed with skepticism until it proves it’s more than just a rubber stamp or a way for Facebook to outsource tough decisions.

The yearlong public process Facebook has undertaken to launch the oversight board, soliciting advice from various groups worldwide, seems to reflect an awareness it has to gain trust from users, civil society groups and others.

“We’re trying to add transparency and accountability and independent judgment, and we think the board is a good way to do that,” Stern says. □

Mark F. Walsh is a New York City-based freelance writer. He is a former reporter for American Lawyer Media publications.

“What Facebook is trying to do is maintain enough legitimacy with users that people will still use the platform.”

—Rebecca MacKinnon
Texas lawyer is the top volunteer for ABA’s free online legal aid clinic  

By Amanda Robert

Jack Fan was scrolling through the Texas Legal Answers website one day when he came across a question about whether homebrew beer can be bartered.

Fan, a sole practitioner in Dallas who does estate planning, probate and family law, says his initial reaction was that he had no idea—but then he went down the rabbit hole of legal questions.

He looked up applicable state statutes, and after a few minutes of online research, responded to the person who posted the question. He advised that bartering nominal amounts of homebrew beer was acceptable, but it shouldn’t become a primary source of income.

Fan also provided contact information for the Texas Alcoholic Beverage Commission, so the poster could confirm his interpretation of the law.

“Some people ask some really bizarre questions from left field, but I go and start researching,” he says. “It makes me a better lawyer, being more knowledgeable.”

Fan has spent a fair share of his time fielding questions since he began volunteering with Texas Legal Answers, part of the ABA’s Free Legal Answers virtual legal aid clinic. The service allows income-eligible clients to post civil legal questions for pro bono attorneys in their state.

According to the ABA Standing Committee on Pro Bono and Public Service, which annually recognizes attorneys who provide extraordinary pro bono services through Free Legal Answers, Fan has answered more questions than any other attorney in the country. In 2018, he responded to nearly 1,100 of them.
“Many times these people are asking for your help because they can’t find anyone else,” Fan says. “They are desperate for any sort of assistance or help, so when we answer these questions, we are not just offering some legal guidance, but also some moral support and encouragement.”

**PRACTICE MAKES PERFECT**

Fan grew up in Dallas and heard often from his parents that they wanted him to be an attorney. After graduating from American University Washington College of Law in 2007, he started his own business instead. He ran DC Social Sports, a private adult sports league in Washington, D.C., until selling it, returning to Dallas and starting his own law practice in 2015.

“One of the things that is difficult when you haven’t practiced law is that you’re not exactly employable,” Fan says. “Pro bono work became my way of connecting with the community; it was my way of connecting with the judiciary.”

In his first year, Fan accepted at least 35 referrals from the Dallas Volunteer Attorney Program. The cases included drafting estate plans, wills and powers of attorney, as well as divorces and probate matters.

He also volunteered often in neighborhood legal clinics, interacting with residents, listening to their problems and figuring out the best way to solve them.

In June 2017, Fan saw a call for volunteers for Texas Legal Answers in a State Bar of Texas email newsletter. He was drawn to the idea of doing pro bono service from his own home, particularly after driving back and forth to the legal clinics.

He also appreciated the convenience of the program for the people who needed it.

“There is an overwhelming need of low-income individuals in Texas, and I’m sure throughout the country, who simply don’t have the ability to wait three or four hours to speak with an attorney for 15 minutes,” he says. “So any virtual resource where someone might be able to answer questions for them is a tremendous need that I also recognized.”

Fan answers questions on nights, weekends and holidays. He explains that it usually takes only a few minutes to open the website portal, look over questions and provide responses.

The questions are classified by subject matter, allowing attorneys to quickly identify issues they feel comfortable addressing.

Many times, Fan says, people ask where to find specific forms or for guidance on how to handle an issue themselves.

In the past, he has helped people who are getting divorced with where to start or how to file as pro se litigants. Some of his more complex questions included how to reinforce rights in a probate matter after a relative has taken someone’s share of the estate and whether a tenant needs to pay a landlord who was not fulfilling their end of the rental agreement.

Hannah Allison, the administrator of pro bono programs for the State Bar of Texas, describes Fan as her biggest supporter of pro bono—both in person and online—and appreciates that he also takes the time to address questions outside of his practice area.

“Even if it’s a question he can’t give advice on because it’s too layered, he still figures out a way to identify the legal situations within their narrative and give as much information as he can to empower clients to move forward in their legal process,” she says.

Just as Fan used his early pro bono work to build his practice, he uses the questions from Texas Legal Answers to strengthen his understanding of ongoing issues in the law.

“I will get a paying client down the road that does ask a similar question, and because I’ve already heard the question and know more about it, it provides a better platform to address my clients’ needs,” he says.

**BUILDING CONNECTIONS**

Fan never intended to answer more than 1,000 questions for Texas Legal Answers, mostly because he says he lost track.

He does admit he hoped to be a top question-answerer, but only so he could assist as many people as possible.

According to the ABA Standing Committee on Pro Bono and Public Service, 73 of the 5,700 volunteer attorneys registered with ABA Free Legal Answers answered 50 or more questions in 2018.

More than 58,800 questions have been submitted by the program’s clients since it launched in 2016.

Allison offers an update on Fan’s totals as of late March: He has answered 1,693 questions and entered 296.1 hours of pro bono time since joining Texas Legal Answers less than two years ago.

“He clearly goes above and beyond,” she says. “Let’s just start with the quantity, holy cow. And he is fulfilled by doing these answers, by these 20 minutes or so of getting these pieces of information to people all over the state.”

Fan has continued his work with neighborhood legal clinics, working to expand to locations outside of Dallas so they help more residents. He has also focused on educating senior citizens on end-of-life planning through free will clinics.

He rejoined the ABA in January after meeting Michele Wong Krause, a Dallas-based member of the Board of Governors, at a local bar association event.

As a law student, Fan served as a liaison to the Tort Trial & Insurance Practice Section, but he canceled his membership when he didn’t immediately practice law. Fan says Krause gave him a good reason to renew by pointing out the importance of building a network beyond where he practices.

It’s an argument that resonated with Fan, who has always viewed getting involved as a way to become a better lawyer.

While he says he didn’t initially expect personal perks from pro bono service, he now recognizes the positive impact it has on both his reputation and his connections within the legal profession.

“Beyond the feel-good nature of giving back to the community, I think most people underestimate the impact that pro bono has on your own practice,” Fan says.

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Criminal Justice Section • CLE Credit

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THE DRIVE TO THRIVE
ABA president-elect nominee speaks to value for members

By Amanda Robert

To Patricia Lee Refo, the story of how she first got involved in the American Bar Association is not at all uncommon.

When she was a first-year associate at Jenner & Block in Chicago, a senior partner looked at her and said she not only needed to join the ABA, but she needed to be active in the Section of Litigation.

“I was young enough that I did exactly what I was told and went from there,” says Refo, the ABA’s president-elect nominee. Refo has served in several other leadership roles in the association, including as chair of the Section of Litigation from 2003 to 2004.

Refo explains that she “grew up as a lawyer” in the ABA. In addition to her professional growth, she made many close friends and met Don Bivens, a Phoenix attorney who eventually became her husband.

“After a while we had enough frequent-flyer miles to go to Mars,” she says. “We joke that our wedding was a Section of Litigation meeting. They actually gave us a trophy the year we got married. It’s a little bride and groom on a trophy stand, and it says, ‘Best Use of Section of Litigation Leadership Meetings.”

Refo also points out that the term for which she has been nominated includes a U.S. presidential election, which may present familiar challenges for the ABA.

“We try to remind the public of the proper role of the court system and the justice system and to remind everyone about the importance of the independence of the judiciary,” she says. “These are not new issues, but these are issues that we will be talking about always, because they are the core values for which our association stands and for which our democracy stands.”

Refo was nominated at the ABA Midyear Meeting in Las Vegas in January after a rare contested race with G. Nicholas Casey, a former ABA treasurer. She will face a vote by the House of Delegates at the ABA Annual Meeting in San Francisco in August, after which she would become the president-elect.

Judy Perry Martinez is currently serving as president-elect and will automatically assume her one-year term as president at the close of the annual meeting. She would pass the gavel to Refo after the 2020 ABA Annual Meeting in Chicago.

The close of the 2020 annual meeting will also mark the end of Michelle A. Behnke’s three-year term as treasurer. Kevin L. Shepherd, a partner with Venable in Baltimore, was nominated to assume her position after another contested race with Timothy Bouch of Charleston, South Carolina. Shepherd has been a member of the Board of Governors since 2016 and serves as chair of its Finance Committee.
Meet the Candidates

By Amanda Robert

We asked all the candidates for leadership positions the same three questions: What is the reason you decided to serve the association as a leader? What plans do you have for your term in office? And finally, what is a positive experience you’ve had as a member of the ABA? For the candidates’ full responses, go to ABAJournal.com.

PATRICIA LEE REFO
PRESIDENT-ELECT


Reason to serve: “I think being engaged in the practice of law for this many years is, frankly, the most important preparation for leading the ABA. Because that’s what we do.”

KEVIN L. SHEPHERD
TREASURER

Partner with Venable in Baltimore. Member of the Board of Governors since 2016. Chair of the Finance Committee and member of the Executive Committee. Liaison to the Task Force on Gatekeeper Regulation and the Profession, serving as its 2010-2015 chair. Member of the House of Delegates since 2011. Chair of the Section of Real Property, Trust and Estate Law (2005-2006). President of the American College of Real Estate Lawyers in 2010. Member of the Anglo-American Real Property Institute. Received JD in 1984 from University of Baltimore School of Law.

Reason to serve: “My financial background. I am the chair of the finance committee at Venable, and I have chaired that committee for the past 20 years. I think I can bring that experience and expertise to bear on the challenges facing the ABA in the financial arena. Plus, in addition to that, I feel very strongly that the ABA needs to maintain its primacy in advocating for an independent judiciary and maintain the rule of law. We need to do that, and to do that, you need to be financially strong. I am rather passionate about that.”
Your ABA

WILLIAM K. WEISENBERG
DISTRICT 7


Positive experience with the ABA: “Serving as chair of the Standing Committee on Judicial Independence was a fairly significant matter. I’ve always been very interested in my career in dealing with the courts and dealing with issues affecting the public’s perception of the value and importance of our courts and democracy. Efforts to enhance public understanding of the role of the judiciary is a very important responsibility and function of the organized bar. A number of the projects we engaged in during my time on the committee, as both a member and chair, were devoted to those efforts.”

LAURA BELLEGIE SHARP
DISTRICT 8


Plans for term: “Having sat in the House of Delegates for so long ... I am concerned that the American Bar Association maintain its vitality. I absolutely agree with the notion that we represent the lawyers of America, whether or not they choose to be members. The American Bar Association is headed in the right direction, and I’d like to help continue to direct it that way. We need to stabilize our finances and make sure we are offering member benefits that are appreciated by the members, meaning that they understand that they are there and utilize them. I ran for state bar president two years ago, and I literally met 9,000 attorneys during a 2½-month period. It was amazing to me the number of attorneys who were asking for member benefits.”

WILLIAM K. WEISENBERG
DISTRICT 7


LAURA BELLEGIE SHARP
DISTRICT 8


PLANS FOR TERM: “HAVING SAT IN THE HOUSE OF DELEGATES FOR SO LONG ... I AM CONCERNED THAT THE AMERICAN BAR ASSOCIATION MAINTAIN ITS VITALITY. I ABSOLUTELY AGREE WITH THE NOTION THAT WE REPRESENT THE LAWYERS OF AMERICA, WHETHER OR NOT THEY CHOOSE TO BE MEMBERS. THE AMERICAN BAR ASSOCIATION IS HEADED IN THE RIGHT DIRECTION, AND I’D LIKE TO HELP CONTINUE TO DIRECT IT THAT WAY. WE NEED TO STABILIZE OUR FINANCES AND MAKE SURE WE ARE OFFERING MEMBER BENEFITS THAT ARE APPRECIATED BY THE MEMBERS, MEANING THAT THEY UNDERSTAND THAT THEY ARE THERE AND UTILIZE THEM. I RAN FOR STATE BAR PRESIDENT TWO YEARS AGO, AND I LITERALLY MET 9,000 ATTORNEYS DURING A 2½-MONTH PERIOD. IT WAS AMAZING TO ME THE NUMBER OF ATTORNEYS WHO WERE ASKING FOR MEMBER BENEFITS.”

PATRICK G. GOETZINGER
DISTRICT 10


Reason to serve: “It’s my rural state perspective and bringing the lessons I learned from launching Project Rural Practice, a successful program in a rural area on access to justice. Having that proven experience on access-to-justice issues in rural areas is a good story to tell and to keep in front of our ABA leaders as we talk about the future of the organization and how we serve our members.”
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BEVERLY J. QUAIL
DISTRICT 11


Plans for term: “The biggest thing that I and probably everyone else would like to see is the ABA increase its membership so we represent more lawyers than we currently do. But I would also like to see the ABA increase its support for the Fund for Justice and Education and for ROLI. I think that young lawyers do want to feel that they are making a contribution and that they are making a difference. I don’t think they just want to bill hours. I think those two entities do great things and that young lawyers, if they knew what they were doing and could participate with what they’re doing, they would feel more enthusiastic about the ABA. There are a lot of things those organizations do that no one even knows about.”

CHARLES J. VIGIL
DISTRICT 13


Positive experience with the ABA: “It’s all been wonderful. It’s hard to tease out one particular experience, but I would say that serving on the Rules and Calendar Committee. I’m on my second round there, because I am chair of Drafting right now. Having served on Rules and Calendar the first time was just a fabulous experience. It gave me insight into the workings of the House of Delegates and how much work goes into making those meetings go smoothly, so that we have fabulous debate on important issues but also we don’t waste the time of our delegates. It was really one of the more challenging and more fascinating things that I’ve ever done.”

CHRISTINE HAYES HICKEY
DISTRICT 18


Positive experience with the ABA: “I look at the ABA as the entity that represents lawyers throughout the country in very important issues that one lawyer alone can’t tackle—truthfully, one local or state bar alone can’t tackle. It’s that collective voice. When attorneys run to the aid [of people], and I know we talk about the separation at the border... when they have the ABA standing behind them, people listen. There is a force and there is a voice. It gives power to the things that lawyers do throughout the country for the good of the people. Since I came out of law school, I’ve been a member of the ABA. It was something you do as a lawyer, and that’s the reason why in my mind. It’s that collective voice of lawyers throughout the country that have focused efforts and make a difference.”
BONNIE E. FOUGHT  
SECTION OF SCIENCE & TECHNOLOGY LAW  


Positive experience with the ABA: “I worked as an intern at the ABA when I was in college. Before I was in law school, I was an undergrad at the University of Michigan, and they had this summer program in D.C. I went and worked with the American Bar Association for two summers. It helped me understand the association but also fueled my interest in law. That was probably the most formative experience I had with the ABA.”

JAMES M. DURANT III  
SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION  

Senior Executive Service member serving as chief counsel for the U.S. Department of Energy, Office of Science, Chicago. Retired U.S. Air Force JAG colonel, served 22 years. Member of the House of Delegates since 2011. Chair of the Solo, Small Firm and General Practice Division (2009-2010) and Standing Committee on Armed Forces Law (2002-2004). Fellow and past director of the Young Lawyers Division (2000-2002). Member of the Standing Committee on Disaster Response and Preparedness. Member of the U.S. Senior Executives Association Board of Directors. Received JD in 1990 from Howard University School of Law.

Plans for term: “The main thing is to keep the ABA running, growing and achieving its goals. Ensuring entities can flourish and do the tasks that they have set for themselves, to move the law forward. In terms of our goal set, to sustain us with a high operation tempo. That’s what I hope to accomplish, so when it’s all said and done, I can say we grew. We have smarter operations. We’re not wasting time or money. We’ve increased our membership across the board—sustained and increased our membership.”

MICHAEL W. DRUMKE  
TORT TRIAL & INSURANCE PRACTICE SECTION  


Reason to serve: “I am a longtime ABA member who has been active in the sections, or my section at least, since 1995. I think at this point in time, it’s important that the sections be understood, that people with experience in the sections have a voice on the board so that the board can make informed decisions.”

Continued on page 70
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Meet the Candidates
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JAMES J.S. (JIM) HOLMES
GOAL III LGBT MEMBER-AT-LARGE

Senior equity partner at Clyde & Co in Los Angeles. Chair (2012-2015), commissioner (2009-2012) and liaison to the Tort Trial & Insurance Practice Section (2008-2009) for the Commission on Sexual Orientation and Gender Identity. Member of the TIPS Section Council and Standing Committee on Governmental Affairs since 2017. Member of the 2015-2016 Diversity & Inclusion 360 Commission. Sustaining life fellow of the American Bar Foundation. Member of the LGBT Bar Association of Los Angeles State Delegate to fill a vacancy due to the passing of John J. Bouma. The one-year term will commence at the end of the 2019 Annual Meeting and will expire at the conclusion of the 2022 Annual Meeting. The term for this state delegate position will become available due to the resignation of Charles J. Vigil to the Board of Governors. The Board of Elections will certify the election results, and the unexpired term will hold an election to fill the State Delegate position that will become available due to the resignation of Charles J. Vigil to the Board of Governors. The Board of Elections will certify the election results, and the unexpired term will expire at the conclusion of the 2022 Annual Meeting. The deadline for filing petitions is May 10. For instructions and procedures, go to ambar.org/statedel-vac. If you are interested in filing or have questions, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

LYNN M. ALLINGHAM
GOAL III WOMAN MEMBER-AT-LARGE


Reason to serve: “I have been active in the ABA since law school. I’ve always felt that I wanted to give back to the profession for everything that I’ve been able to benefit from. I really believe in the mission of the ABA, and I want to help in any way I can for the organization to fulfill that mission. I feel that in my service on the Board of Governors, I will be able to help contribute to that mission.”

ABA Notices

DELEGATE-AT-LARGE ELECTION
Pursuant to Section 6.5 of the ABA’s Constitution, six Delegates-at-Large to the House of Delegates will be elected at the 2019 Annual Meeting for three-year terms beginning with the adjournment of that meeting and ending with the adjournment of the 2022 Annual Meeting. Candidates are to be nominated by written petition. The deadline for petitions for the 2019 election in San Francisco, California, is May 15. For rules and procedures, go to ambar.org/delegate-at-large.

ARIZONA STATE DELEGATE VACANCY ELECTION
Pursuant to Section 6.3(e) of the ABA’s Constitution, the state of Arizona will elect a State Delegate to fill a vacancy due to the passing of John J. Bouma. The one-year term will commence immediately upon certification by the Board of Elections and will expire at the conclusion of the 2020 Annual Meeting. The deadline for filing petitions is May 10. For instructions and procedures, go to ambar.org/statatedel-vac. If you are interested in filing or have questions, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

NEW MEXICO STATE DELEGATE VACANCY ELECTION
Pursuant to Section 6.3(e) of the ABA’s Constitution, the state of New Mexico will hold an election to fill the State Delegate position that will become available due to the resignation of Charles J. Vigil to the Board of Governors. The Board of Elections will certify the election results, and the unexpired term will commence at the end of the 2019 Annual meeting and will expire at the conclusion of the 2022 Annual Meeting. The deadline for filing petitions is May 10. For instructions and procedures, go to ambar.org/statatedel-vac. If you are interested in filing or have questions, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

NORTH CAROLINA STATE DELEGATE VACANCY ELECTION
Pursuant to Section 6.3(e) of the ABA’s Constitution, the state of North Carolina will hold an election to fill the State Delegate position that will become available at the end of the 2019 Annual Meeting. The Board of Elections will certify the results of this election. The term for this state delegate position will commence at the end of the 2019 Annual Meeting and will expire at the conclusion of the 2022 Annual Meeting. The petition filing deadline is May 10. For instructions and procedures, go to ambar.org/statatedel-vac. If you are interested in filing or have questions, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE
The ABA President will appoint one Goal III Minority Member-at-Large and one Goal III Woman Member-at-Large to the Nominating Committee for the 2019-2022 term. These appointments will be made from broadly solicited nominations from the diversity commissions, sections, divisions and forums, state and local bar associations, and the membership at large. If you are interested in submitting a nomination or have questions, contact Leticia Spencer (leticia.spencer@americanbar.org, 312-988-5160) c/o Office of the Secretary, by May 3.
CONGRATULATIONS to Kathy Cornell of East Hartland, Connecticut, for garnering the most online votes for her cartoon caption. Cornell’s caption, below, was among about 130 entries submitted in the Journal’s March cartoon caption-writing contest.

“Who called a caricature witness?”
—Kathy Cornell of East Hartland, Connecticut

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, May 12, with “May Caption Contest” in the subject line.

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

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When a woman becomes pregnant. By intercedes in the female reproductive cycle of progesterone, a natural hormone that would impede conception without other forms of intervention—something safe, inexpensive and unobtrusive that women could control.

Sanger, of course, was the legendary feminist and founder of what became Planned Parenthood Federation of America. Sanger, then 71, had endured more than her share of ostracism and arrests in her pursuit of gender equality, sexual freedom and what she referred to as “voluntary motherhood.” From her earliest years, Sanger had advocated for a wide variety of social issues. But on this particular evening, she urged Pincus to begin research into one of her own lifelong quests: an oral medication that would allow any woman—in the angry words of a judge who had once sentenced her—“the right to copulate with a feeling of security that there will be no resulting conception.”

What she proposed to Pincus bore considerable risk. In 1917, Sanger was imprisoned for distributing family planning information. At least 30 states still carried criminal restrictions against selling or distributing contraceptive devices, and some still made it illegal to counsel couples, even married couples, on family planning and birth control. In Massachusetts, where Pincus conducted his laboratory research, his work on a contraceptive might well have been a felony.

Contraception, particularly for women, varied from the mythical to the crude. Sanger was insisting that Pincus develop something for women that didn’t depend on the vagaries of the menstrual cycle or internal methods such as the diaphragm or cervical caps.

What Sanger had dreamed of was a pill that would impede conception without other forms of intervention—something safe, inexpensive and unobtrusive that women could control.

Pincus believed that was possible. His theory was elegant, and in its own way, natural. He pinned his research on the use of progesterone, a natural hormone that intercedes in the female reproductive cycle when a woman becomes pregnant. By introducing progesterone into the body before pregnancy, Pincus believed a woman’s reproductive system would respond by keeping her from becoming pregnant.

Pincus tested his theory first on rabbits and rats, reporting a 90 percent success in suppressing conception using progestin, a chemically produced progesterone. But that fell far short of what Pincus believed or expected. In his search for a more effective progesterone, he began to use norethynodrel, a synthetic progesterone produced by a small pharmaceutical company outside Chicago, G.D. Searle. Concerned with potential liabilities attached to the project, the company provided the progestin to Pincus and his colleagues—but in unmarked containers.

In early 1957, after several trials at birth control clinics in Puerto Rico, as well as smaller trials among patients in the U.S., Searle first submitted the new pill, a combination of estrogen and progesterone labeled Enovid, to the U.S. Food and Drug Administration for its approval. In June, the FDA approved Enovid—though not for birth control but for menstrual disorders.

By 1960, when the FDA was asked to approve Enovid for contraception, the “birth control pill” had already proved highly effective. But with a regulatory storm gathering over birth defects attributed to the popular sedative thalidomide, legal and moral objections were yielding to concerns that the hormonal compound would have dangerous side effects or long-term consequences to fertility.

A survey of 60 physicians who had prescribed Enovid produced tepid support for approval, but none reported safety concerns. And on May 9, 1960, the FDA announced with absolutely no fanfare that it would approve the medication for contraception. “We had no choice as to the morality that might be involved,” the FDA noted its official press release.

In its 1965 decision Griswold v. Connecticut, the Supreme Court eviscerated state laws against the dissemination of contraception. And by the time of their deaths—Sanger in 1966, Pincus in 1967—the sexual revolution was in full fury, exactly as the two had envisioned.
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