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Julie Abbate pushes for prisoners to have more access to women’s hygiene products.

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

The ABA Judicial Division is leading an effort to increase the use of special masters.

Cartoon Caption Contest
See the winner from April’s contest.

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On June 18, 1923, activist Marcus Garvey, founder of the Universal Negro Improvement Association, is found guilty of mail fraud.
Our Civics IQ

ABA survey demonstrates people need better understanding of our democracy

Democracy is not a spectator sport, but to participate, you need to know the rules. The American Bar Association believes all people in the United States should understand their rights and responsibilities for the country to function properly.

This year, we commissioned a survey—the ABA Survey of Civic Literacy—that asked 1,000 adults in the United States 17 questions about the law, the U.S. Constitution and the rights of both citizens and noncitizens. Because the survey was done in conjunction with Law Day 2019, which has a theme of “Free Speech, Free Press, Free Society,” we also asked respondents their opinion about the First Amendment and how it applies to everyday life.

The survey results were telling. While a majority answered the basic multiple-choice questions correctly, their responses reveal troubling gaps.

For instance, less than half of the U.S. public knows that John Roberts is Chief Justice of the U.S. Supreme Court, while almost one-quarter think it is Ruth Bader Ginsburg and 16 percent believe it is Clarence Thomas.

One in 10 thinks the Declaration of Independence freed slaves in the Confederate states. Almost 1 in 5 believes the first 10 amendments of the U.S. Constitution are called the Declaration of Independence instead of the Bill of Rights.

The survey reveals significant confusion about the rights and responsibilities of citizens compared to noncitizens. Less than half know that only U.S. citizens can hold federal elective office, and 30 percent think that noncitizens are not entitled to the right of freedom of speech. More than 1 in 5 think only citizens must pay taxes, and 1 in 10 thinks only citizens must obey the law.

There is also confusion about the First Amendment. More than half of those surveyed—55 percent—know that the right to vote is not part of the First Amendment. But 18 percent think freedom of the press isn’t part of the amendment, and another 18 percent think the right to peaceably assemble isn’t covered by it.

The survey pulled 15 of its questions from the pool of 100 possible questions on the U.S. Naturalization test that can be asked of those seeking U.S. citizenship. Only 5 percent of respondents answered all 15 correctly. Nobody surveyed correctly answered all 17 knowledge questions.

Improving our nation’s efforts at civics education is especially important for the younger members of society, who did worse on the survey than their older counterparts. While 79 percent of those age 45 and older can identify the president as commander in chief, only two-thirds of those 18 to 44 can. And while 67 percent of those 45 and older know the speaker of the house would become president if the president and vice president could no longer serve, just over half of those 18 to 44 know this line of succession.

A bright spot in the survey was the strong support for the First Amendment. Despite our divisive arguments at times over government and its power, 81 percent agree that people should be able to publicly criticize the president or any other government leader; 80 percent believe individuals or groups should have the right to request government records or information; and 75 percent say government should not be able to prevent news media from reporting on political protests.

Go to ambar.org/civicsurvey to read the full survey and report.

Making sure that people living in America know their rights and responsibilities is too important to leave to chance. Moving forward, the ABA Division for Public Education will launch an educational program based on these survey results to reacquaint the public with the law and the Constitution.

We cannot be content to sit on the sidelines as democracy plays out in front of us. For the sake of our country, we all need to get in the game.
Changes You Deserve: A Historic Transformation

For more than 140 years, the American Bar Association has done business in essentially the same way. It has served us well for most of that time as we became the largest association of legal professionals in the world. Yet, while standing the test of time in many ways, the Association’s leaders saw the need to remake the ABA into an organization that can serve the current and future needs of our members at a time when the profession itself faces unprecedented change.

The first step in that transformation began May 1, when the ABA launched a number of historically significant changes to help America’s lawyers achieve success throughout their careers. The Association can now tailor the value we deliver to members, personalized to their areas of practice and interest. Our members have exclusive access to benefits that support them as they grow their practices, enhance their professional development, and engage on issues affecting the profession.

The Association has many positive attributes, including more than 400,000 members, a budget exceeding $200 million, and about $300 million in investments. We have reduced operating costs by more than $20 million over the past five years. But that’s only part of the story.

For the past decade, associations across the country have faced losses in membership and revenues. Young professionals are reluctant to spend their time and money joining organizations unless they see that affordable, valuable, and easy-to-access benefits come with membership.

The same trends affect the ABA. In 1977, about half of America’s lawyers were ABA members; today, fewer than one in five is a member. Over the past 10 years, we have lost an average of 5,600 attorney members annually, which contributed to almost $20 million less in yearly dues revenues by the end of that period.

It’s time for action. In last month’s issue of the ABA Journal, President Bob Carlson detailed the new benefits of membership, which include a CLE Member Benefit Library of more than 450 courses (and growing) included with membership, sensible dues rates, and access to exclusive, members-only content targeted to areas of interest. We have developed new tools to help legal professionals. For example, on May 1, the ABA Career Center initiated an automated process powered by artificial intelligence to help members hone their interview skills and improve their resumes.

These new member programs are just the beginning. Over the next year and into the future, we will unveil additional and upgraded benefits of ABA membership. The ABA will continue as the go-to resource for legal professionals, and that means keeping our content fresh and useful to members.

The Association has improved how we communicate with our members. We updated the ABA website so it’s easier to navigate and is readily accessible on mobile devices. We launched a new automated email system that will reduce the number of irrelevant and unwanted ABA emails members receive while delivering curated, valuable content. We’re expanding our use of social media and online networks to promote the value of membership, particularly to young attorneys and law students.

We have also introduced a new ABA logo. Our former logo was used for more than 45 years. The new logo encourages a forward vision and signals that we are a changing organization, seeking modern and contemporary solutions facing the legal community.

The ABA speaks on issues of importance to the entire legal profession. We are a part of the lives and livelihoods of every single lawyer, every single day—whether it’s through our Model Code of Professional Conduct, our accreditation of law schools, our governmental advocacy, and so many other aspects of our profession and the justice system. Every lawyer in America has a potential voice in the policies set by the ABA House of Delegates, through their representatives in state, local, and specialty bars. Our voice for the legal profession is a robust and indispensable part of the nation’s culture of justice.

The practice of law is the experience of a lifetime, and the American Bar Association has a critical role to help attorneys develop their careers and advance the profession. By enhancing our benefits and tailoring the member experience more to individual needs and preferences, the ABA will continue to serve a vital role for legal professionals. ■
Introducing the NEW and IMPROVED ABA

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Promote Justice

- Help protect children, elderly, immigrants, veterans, homeless and victims of sexual and domestic violence
- Advocate on issues important to the legal profession
- Preserve the attorney-client relationship and advocate for criminal justice improvements

⇒ ambar.org/PromoteJustice

Make a Positive Change

- Promote full and equal representation through the legal profession
- Get involved with groups like Women in the Profession; Disability Rights; Sexual Orientation and Gender Identity; and Racial and Ethnic Diversity
- Improve yourself and your workplace with toolkits, training and publications

⇒ ambar.org/InspireChange

Invest in Yourself

- Improve your resume building and interview skills with Career Forward powered by Korn Ferry Advance®
- Search the ABA’s national job board
- Explore the ABA Career Center for helpful podcasts, webinars and career resources

⇒ ambar.org/StayAhead
Thank you, Philip N. Meyer, for your wonderful article, “Dylan's Songs,” April, page 22. I had more than a passing interest in your fine piece, as I was essentially weaned on Bob Dylan's music. My dad went to see Dylan at the Gaslight Café in Greenwich Village with his then-girlfriend—now my mom—back in the early '60s, and Dylan's music and concerts have been part of our family since. I've been known to quote a few of the more famous Dylan one-liners in my courtroom: “You don't need a weatherman to know which way the wind blows” may be one of my favorites. Another favorite: “When you got nothing, you got nothing to lose,” which is, of course, from “Like a Rolling Stone.”

Hon. Timothy S. Driscoll
Mineola, New York

THE WISDOM OF DYLAN

Thank you, Philip N. Meyer, for your wonderful article, “Dylan's Songs,” April, page 22. I had more than a passing interest in your fine piece, as I was essentially weaned on Bob Dylan's music. My dad went to see Dylan at the Gaslight Café in Greenwich Village with his then-girlfriend—now my mom—back in the early '60s, and Dylan's music and concerts have been part of our family since. I've been known to quote a few of the more famous Dylan one-liners in my courtroom: “You don't need a weatherman to know which way the wind blows” may be one of my favorites. Another favorite: “When you got nothing, you got nothing to lose,” which is, of course, from “Like a Rolling Stone.”

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VOTING RIGHTS—AND WRONGS

The recent Georgia senator’s race was the backdrop for “Keeping It Fair,” March, page 9, on the role of lawyers to “get the vote right” through litigation on Election Day and in recounts. While there was no discussion of what lawsuits were brought or their results, the underlying theme was that “we put impediments in the way of seniors and the poor in registration and voting.”

I respectfully disagree, as this general statement about unidentified impediments questions the motivation behind provisions adopted to frustrate the commission of the crime of illegal voting. Not too long ago, provisions requiring the production of a valid picture ID at voting precincts were claimed to be aimed at suppressing the votes of seniors and minorities by creating a burdensome form of proof of identity and residency. However, after serving as a poll watcher in 2018, I can report that I did not see, and subsequently have not read of, voters being denied the opportunity to vote due to an inability to obtain and produce a valid picture ID. It is time to acknowledge that this and other successful protections against illegal voting are working to protect the integrity of the ballot box without placing a burden on lawful voters.

Warren Belmar
Palm Beach, Florida

CORRECTIONS

In “President’s Message,” May, page 8, the international lawyer rate should be $150.

In “Social Clashes,” April, page 40, Kate Klonick’s name was misspelled. The Journal regrets the errors.

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.
PRISON PREP
Ex-felon’s firm helps the wealthy sentenced in white-collar cases

AS WAVES OF high-profile celebrities, politicians and lawyers face indictments for fraud, extortion and bribery, consulting group White Collar Advice is ready to assist wealthy defendants who will soon leave their multi-million-dollar homes for the big house.

White Collar Advice, based in Calabasas, California, is led by convicted securities broker Justin Paperny, who says his team of former federal inmates offers more than tips on which prison camps have the most comfortable bunk beds or the best food.

"Rather than focus on the showers or the toilets or your job, focus on, 'At some point I'm going to be home, and I have a family to support. And I can no longer be a lawyer or dentist or real estate agent. I've got to build something new,'" Paperny explains.

As experts on the federal prison system, Paperny and his firm offer white-collar defendants insights that complement advice from their defense counsel, starting after indictment.

"We help clients do more than say 'I'm sorry.' We help them articulate to the judge..."
Opening Statements

how they identify with victims, the remorse they feel, what their plans are moving forward and, of course, why they’ll never return to a courtroom,” Paperny says. “So the more quickly we can begin that process, the better the outcome is going to be.”

The firm also can pick up where attorneys leave off if, when, despite everyone’s best efforts, the client is incarcerated.

“Oftentimes, this is their first and only offense,” says David Rosenfield, a criminal defense attorney with New York City-based Herrick Feinstein who has collaborated with White Collar Advice. “They’ll come in, and they help out in terms of telling the client what to expect in prison.”

The advice comes straight from Paperny’s own experience. Convicted in 2007 for securities fraud, he spent his 18-month sentence in a federal prison camp planning a new career as a consultant for those who enter the federal prison system.

“Rather than say, ‘I’ll work on things when I come home,’ and ‘there’s no opportunities because I’m a felon,’ and ‘you can’t do anything in prison,’ I avoided that noise and nonsense, wrote clearly defined goals, and I held myself accountable and I encouraged my network to hold me accountable,” Paperny says.

Often holding positions of privilege, influence and wealth, white-collar offenders worry most about resuming a professional life. And for good reason.

“They may lose their license once they are convicted of a felony, and so if that happens you can’t go back into your industry,” says Rosenfield, who is a past chair of the ABA’s White Collar Crime Committee. “Sometimes it’s not a permanent bar—you can reapply after a number of years, but usually you automatically lose your license in certain fields. Law, securities are two examples that come to mind.”

In addition to helping the educated, privileged or rich recover from a prison term, Paperny says he has worked with clients referred to him by federal public defenders. He and his colleagues, he says, have reached thousands of inmates during visits to federal prisons across the country where they have shared advice on how to move past their sentence and return to a productive life. The firm also has consulted with federal prisons in California on inmate re-entry programs aimed at changing behaviors, developing new values and setting goals.

“It does no good to come home from prison if you are totally unprepared for the next phase of your life,” Paperny says. —Cassie Chew
Are civics classes a constitutional right for high school and elementary school students? That novel question is the basis of a lawsuit against Rhode Island, alleging the state has failed to prepare young people for the rigors of citizenship. The plaintiffs, made up of students and their parents, contend that the U.S. Constitution requires Rhode Island to educate students to “function properly as civic participants.”

“Students are not adequately educated in civics and how our government functions,” says Michael A. Rebell, lead lawyer for the plaintiffs. Rebell, a veteran litigator, is executive director of the Campaign for Educational Equity at Teachers College, Columbia University, and an adjunct professor at Columbia Law School. He brought the case on behalf of the plaintiffs based on his seminar for Columbia law students called Schools, Courts and Civic Participation.

During the course of the seminar, we identified a half-dozen states with the most potential to sue [for not providing a basic education in civics],” Rebell says. “We went to each of these states, talked to lots of people and determined that Rhode Island was the best place to bring suit,” he says. Many of those people became parties to the lawsuit.

Rebell conveys a sense of urgency when discussing what he hopes will be a test case for civic education in schools. “If the next generation of young people is not properly educated [in civics], our form of government will be imperiled,” he says.

Rebell, author of Flunking Democracy: Schools, Courts, and Civic Participation, says this includes education on voting, serving on juries, freedom of speech, peaceful assembly and the functions of the three branches of U.S. government. A new ABA Survey of Civic Literacy exposed confusion and gaps in the public’s knowledge of U.S. government, basic rights and constitutional protections (see more, page 3).

Constitutional law expert Steven D. Schwinn, professor of law at the John Marshall Law School in Chicago, says he believes that Rebell has a persuasive argument. “The case for civics education is one of the easiest cases to make in a democracy—right alongside the cases for the right to vote, the right to free speech and the right to access the judiciary,” Schwinn says.

Although Rebell’s argument may be effective, Schwinn notes there are problems with the case. “According to the Supreme Court, the rights in our Constitution are generally negative rights, meaning that they restrain the government and say what the government cannot do,” he says. “But a right to education is a positive claim on government, requiring government to do something. As a general matter, that kind of positive-rights claim cuts against the negative-rights tradition that the court has read into our Constitution.”

And there’s another challenge. “The court recognizes that education is primarily a function for the states, not the federal government,” Schwinn explains. “So the court will likely defer to the states in making judgments about how best to provide civics education.”

Undeterred, Rebell is relying on the 1973 San Antonio Independent School District v. Rodriguez case, in which the right to educational equality was at issue. The U.S. Supreme Court’s ruling noted that citizens need some “quantum of education” to knowledgably exercise their right to vote, but the court did not act on that matter. Rebell says he believes that “quantum” has not been achieved. “This is the door left open in the Rodriguez case that we hope to enter,” he says.

Rhode Island has filed a motion to dismiss the complaint, but if plaintiffs don’t prevail, Rebell plans to appeal all the way to the Supreme Court, if necessary.

—Marc Davis

“THE CASE FOR CIVICS EDUCATION IS ONE OF THE EASIEST CASES TO MAKE IN A DEMOCRACY.”

—STEVEN SCHWINN
IT’S EASY TO LIKEN LAW TO MAGIC. Talented lawyers always have tricks up their sleeves. Lucky lawyers pull rabbits out of hats. In trial, lawyers can hide the ball, conjure evidence and hold juries spellbound. Los Angeles lawyer Jeffrey W. Cowan can do all of these things—literally. That’s because Cowan isn’t just a lawyer. He’s also a former professional magician. A specialist in sleight of hand and stand-up magic, Cowan spent two years as a full-time magician after college before using his skills to help pay his way through law school. He was once a regular headliner at the legendary Magic Castle in Hollywood, and he’s performed at trade shows, corporate meetings, law firm retreats, private parties and even at the Playboy Mansion. Today, Cowan’s practice is built on business and employment trial law, but he also maintains a niche practice helping magicians and magic-related businesses make their legal problems disappear.

I imagine that magic-themed businesses encounter the same legal problems as other businesses, but can you give me an example of a magician-specific legal issue?

One magician-specific issue involves confidentiality agreements [nondisclosure agreements]. When a magician decides, for whatever reason, to share a technique or routine with other magicians for a price, the magician often holds workshops. They usually cost more than what you’d pay for a legal conference, and participating requires signing a confidentiality agreement. I draft NDAs that spell out not only what the attendees will learn and receive at the workshop and the price, but also how they must keep the information confidential and precisely where they may use the learned information. The magicians attending have to be able to use the tricks at least in some of their performances because otherwise, what’s the point? But there can be carve-outs—like you can’t post video on the internet, you cannot perform the material on television or in certain geographic regions. You also are forbidden from discussing the material on magician forums or websites.

What’s something you’ve done for magicians that you’re particularly proud of?

Back when I was a full-time magician, I had learned how to eat fire. The year after I took torts, I co-authored a book on the subject with a magician buddy. The magic community acclaimed it as the best treatise on the subject, although the bar was low. At the bottom
of every single page—every single page—we warned that “the reader tries or performs these stunts at his/her own risk.” Although there is a secret and a technique, you are really, truly putting a burning torch into your mouth. But unquestionably the most complicated and important magician solution I ever worked on was protecting the Fitch-Kohler Holdout System. It’s a device that magicians use in various tricks to create moments of pure trick-photography magic. I am being intentionally vague.

No, I get it. But why couldn’t you just patent it?

We could have, but we didn’t want to because then it’s public knowledge. If magic were not predicated on secrets, and if the only concern was keeping it from being knocked off, sure, you could patent it. But it wasn’t just a better mousetrap; it involved a secret. What I created was a combination of a nondisclosure agreement and a limited license. Buyers were licensees: They received trade secrets and physical objects but technically did not own the chattel. This legal strategy has been phenomenally successful, and the secret has never been exposed.

Do you know the secret?

Of course. I have to.

How did you make the leap from liking magic to actually performing in front of an audience?

I had always liked magic, and as a child, I had a couple of simple tricks and beginner books. One year, we attended a family Hanukkah party in the New York City area, and a cousin who was a few years older than me did a show. Cousin Fred had professional props and excellent stage presence—for 14, anyway—and I was captivated. I thought, this is my cousin—if he can do this, surely I can, too. By age 12, I had started doing shows for little kids.

What did you call yourself?

The Amazing Jeff.

I love it! How did you go about booking gigs?

I was an entrepreneur. I posted flyers on bulletin boards at the supermarket and at community centers and gave them to kids at my elementary school. At some point, I advertised in a local biweekly newspaper. In my early teens, I mostly did birthday parties. I kept records of my gigs, and then 11 months later, I would send a letter to parents reminding them how much their child liked my show and reporting that I’d added new tricks to my repertoire. But there were two things that really catapulted me forward. First, a woman who was either an intern or a young reporter for the Washington Post attended a magic show I did for some 5-year-olds. For some reason, she found me intriguing and wrote a feature story about me. It was a full-page article with a photo, and after that my phone rang nonstop. The second thing happened when I was 14. I was attending a club for youth magicians at the local magic shop, and the owner brought in an older teenager to do a guest performance. This guy—Tim Conover—was only 19 years old, but he already was one of the best magicians alive—like a Michael Jordan or LeBron of the magic world. He did 15 to 20 minutes of sleight-of-hand tricks, and I sat there with my jaw dropped and my eyes wider than they’d ever been, just in awe and blown away by what I was seeing a few feet away. It was an epiphany that inspired me—with Tim’s generous help—to seriously study sleight of hand.

Do you have a dream trick that you hope to one day be able to perform?

Several. One is a close-up masterpiece by one of the 20th-century greats named Albert Goshman. There’s a salt shaker and a pepper shaker on the table, and objects repeatedly vanish and reappear under the shakers. Two spectators are sitting next to you, and the shakers are mere inches away, right under their noses. It requires advanced sleight of hand, timing, misdirection—and guts.

Do you ever use the skills you learned as a magician as a lawyer?

Sure. When you’re a magician, you have to read people, or many tricks will fail either technically or theatrically. When you start a magic show—for a formal audience, a group at a cocktail party or at a table you’ve approached in a restaurant—you have to instantly connect with your audience and start forming a relationship. The same is true when you’re picking a jury in voir dire. In the courtroom, theatrical techniques also help, like eye contact, situational humor and modulating your voice. Varying tone and pacing are key. There should be a mix of dramatic highs and lows—just like in plays and movies.

Have you ever performed stereotypical magic tricks like cutting someone in half or pulling a rabbit out of a hat?

I have two classic bigger illusions: sawing through a person and a floating person, both of which use audience members and were popular with audiences, including law firms. I also had a rabbit in my teens and early 20s. Actually, I had several rabbits. I also had a rabbit in my early 20s. My first rabbit was Hocus; the last was Ralph. For kids and families, nothing beats producing a live rabbit.

“Hocus; the last was Ralph.”

—Jeffrey Cowan

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MY PATH TO LAW

Law Without Limits

By Randall M. Howe

#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.

I became a lawyer because I couldn’t dig a ditch—at least that’s what my mother told me.

Nobody—except my mother, perhaps—thought I could become a lawyer. I was born in 1963 with cerebral palsy, which, even after many surgeries and much physical therapy, left me with only one functioning arm and a severe speech impediment. I did not learn to walk on my own until I was 9 years old, and then only by using a forearm crutch with my good arm.

Although I had excellent medical care through my father’s insurance at work, I was not guaranteed any kind of public education. I doubt that very many even considered protecting the civil rights of people with disabilities in the 1960s. When I became school-age, my mother went to enroll me in our neighborhood public school, but school officials told her that I could not enroll until she proved that I was intellectually capable of learning. So she had me tested. The psychologist who tested me determined I had an IQ of 129 and said he was embarrassed to test me because I was obviously capable of learning and should be in school.

The school then relented and let me attend. On the fourth day, however, school officials told my mother that they were not equipped to handle a child with a disability and refused to let me continue. My 6-year-old heart was broken. My parents met with the local school board and other county officials and threatened legal action if I wasn’t allowed back in school. After much wrangling, the matter was settled when the principal of a school across town, which had experience with children with disabilities, agreed to let me attend his school. My parents

#MyPathToLaw

drove me back and forth across town daily for the next six years until I went to junior high school.

During those drives, my mom reminded me that I had to get good grades so I could get a job using my mind because—you guessed it—I couldn’t get one digging ditches.

One thing I could do better than most kids was reading, and I read everything. I read a lot of history, and I soon became enamored with Abraham Lincoln. I appreciated that he had a hard life growing up, as I thought I did, and nevertheless did great things, as I hoped to do one day, too. He was a lawyer, and I decided that I would be, too, even though I didn’t really know what being a lawyer meant.

Still, I had a speech impediment that made me hard to understand, and I was terrified of speaking in public or speaking to anyone I did not already know. I knew it would not stop me from being an attorney, but I thought I would be a researcher and writer, an adviser, rather than an Abraham Lincoln-type courtroom attorney. In high school, I had to take a communication class, and the teacher took me aside one day and insisted that I join the school’s speech-and-debate team. I didn’t think I was capable of doing that, but the force of his personality swept me up, and I joined. He worked with me daily, and I learned to speak more clearly and got over my fear of speaking in public.

When I graduated high school, my parents and I moved to Arizona so I could go to Arizona State University. I majored in business administration, even though I would have preferred to get a history degree. The guidance counselor thought my job prospects would be better with a business degree.

Although I was in the top 20 percent of my class, I had trouble finding a summer clerkship with a law firm. I looked good on paper, but one look at me walking with a crutch and hearing my speech impediment—albeit a much milder one than when I was younger—and firms decided that I didn’t fit their needs. Nevertheless, one firm heard good things about me and offered me a job. The attorneys at the firm liked my work, including my work in the litigation department, and they offered me a job in the banking department, drafting loan agreements and deeds of trust. They told me they were glad that I wanted to work in that department because even though I did good work in their litigation department, they “didn’t see me”—meaning they didn’t think I was capable of being—in the courtroom. It sounded demeaning to be told that, but I needed a job, so I didn’t protest.

I didn’t protest either when the partner I worked for told me that he would meet with prospective clients first to “prepare” them to meet me. Again, I didn’t say anything because I needed the job; I was prepared to accept the circumstances my life handed me and get on with my career. What I wasn’t prepared for, though, was the downturn in the real estate market in 1988. The firm saw their real estate work dry
up, and as the last hired, I was the first laid off. I thought my legal career had ended three months after it had begun.

Within the month, however, I found a job as an appellate prosecutor in the criminal appeals section of the Arizona Attorney General's Office. It was just like being on a permanent moot court team but getting paid for it. I wrote briefs and argued appeals in the Arizona Court of Appeals, the Arizona Supreme Court and the 9th U.S. Circuit Court of Appeals in San Francisco. Nobody ever told me they “didn’t see me” in the courtroom; my bosses handed me an appeal, told me to go do it, and I did.

After 12 years, I was promoted to be chief counsel of the criminal appeals section, and I supervised and directed 20 attorneys in drafting briefs and arguing appeals.

I even argued a case before the U.S. Supreme Court: Clark v. Arizona. I believe I am the only person with cerebral palsy to argue before the Supreme Court.

In 2012, Arizona Gov. Jan Brewer appointed me as a judge on the Arizona Court of Appeals, where I now sit. And all because I couldn’t dig ditches.

Randall M. Howe has been a judge on the Arizona Court of Appeals since 2012. He serves on the ABA’s Commission on Disability Rights and is a member of the Board of Directors of United Cerebral Palsy of Central Arizona.

Did You Know?
For the third year in a row, ABA data shows women comprise the majority of law school students enrolled in JD programs across the U.S. Since 1972, the numbers have been steadily climbing for female enrollment, and in 2016, women surpassed men for the first time. The top five law schools by female enrollment are North Carolina Central University (66.85%), Atlanta’s John Marshall Law School (66.21%), Northeastern University (65.76%), Howard University (65.7%) and the University of the District of Columbia (63.97%). Source: Enjuris

Hearsay
An appellate court has ruled that a Michigan woman’s First and Fourth Amendment rights were violated when a police officer issued her a speeding citation after she flipped him the bird. In June 2017, Officer Matthew Minard wrote Debra Cruise-Gulyas a ticket for a nonmoving violation when he stopped her in a known “speed trap” area near Detroit. But after Cruise-Gulyas pulled off and gave him the middle finger, Minard changed the ticket to a more serious speeding violation. After Cruise-Gulyas sued, a panel of the Cincinnati-based 6th U.S. Circuit Court of Appeals unanimously held that, while she may have been “ungrateful,” pulling the driver over for a second time—when he had no reason to believe she had broken the law—violated her right to be free of unreasonable search and seizure. And the middle finger was an exercise of her free speech rights.

Source: Washington Post

... is the number of times as of mid-March that federal judges had ruled against the Trump administration in the past two years. The rulings have thwarted Trump’s agenda on a variety of issues. In the adverse rulings, judges often rebuked the administration for circumventing basic rules of governance, failing to explain shifts in policy or obtain public input when required. A majority of the cases allege violations of the Administrative Procedure Act, which protects against arbitrary rule. Historically, the “win rate” for these cases in previous administrations has been about 70 percent, while Trump’s win rate hovered at about 6 percent. Source: Washington Post

Another law school ranking report—with a twist. The new U.S. News & World Report list will be sorting schools by the “scholarly impact” of their faculty. Among other things, the list will take into account the number of articles produced by tenured and tenure-track faculty members, as well as how often other works cite the scholarship that professors’ work generated over a five-year period. U.S. News says the goal is to measure the productivity and influence of each school’s faculty. The ranking is scheduled for release in 2019.

Source: Law.com
Drug crimes prosecutions could be taking a back seat as the DOJ focuses on unlawful entry

By Lorelei Laird

Former Attorney General Jeff Sessions positioned himself as a hardliner against crime during his 21 months in office. He called for more use of the death penalty, revoked a Department of Justice policy intended to avoid mandatory minimum sentences and revoked another against prosecuting marijuana businesses that are compliant with their states’ legal marijuana laws.

And perhaps most famously, in April 2018, Sessions instituted the “zero tolerance” policy for immigrants who cross the border without authorization, requiring federal prosecution for every offender caught. That policy got widespread attention last year after the Trump administration began citing it as a reason for separating immigrant children from their parents, a practice that was officially ended in June 2018 after widespread outrage.

But less noticed was the effect zero tolerance may have had on other kinds of prosecutions. Statistics compiled by the ABA Journal suggest that as misdemeanor unlawful entry prosecutions rose between 2017 and 2018 in the five federal districts along the southwest border, federal prosecutions for nonmarijuana drug offenses dropped. That’s while apprehensions of people crossing between official ports of entry reached a 17-year low in fiscal 2017, and U.S. Customs and Border Protection drug seizure statistics were largely up, suggesting no lack of referrals.

RESOURCE ISSUE

Thus, despite the Justice Department’s tough-on-crime stances, the increased demand on U.S. attorneys’ offices from zero tolerance may have hurt those offices’ ability to pursue other—likely more serious—prosecutions. That’s the core mission of federal prosecutors, and moving away from it could have a negative effect on public safety.

“It takes resources away from more serious crimes and spends a lot of resources in an area that there’s not going to be much deterrence on,” says Kara Hartzler, an appellate attorney for the Federal Defenders of San Diego.

The drop in federal prosecutions for nonmarijuana drug offenses may not necessarily be a result of DOJ policy. Former U.S. attorneys offered various nonpolicy explanations for the drug data. Because drug seizures are mostly up, however, the numbers can’t be explained by a lack of crimes or a lack of arrests.

But former U.S. attorneys also say a policy of prosecuting everyone caught crossing the border illegally would
have strained the resources of their offices—and, by necessity, diverted attention from other kinds of cases. “Just to give you an idea of scale, I think my peak year, we prosecuted a total of about 3,000 [misdemeanor unlawful entry] cases,” says David Iglesias, who served as U.S. attorney for the District of New Mexico from 2001 to 2007. “So [if] you get 100,000 people coming over, you cannot possibly physically prosecute that many people.”

‘ZERO TOLERANCE’ PROSECUTION RATES

Zero tolerance calls on the U.S. attorneys’ offices along the southwest border—the Southern District of California, the Western District of Texas, the Southern District of Texas and the districts of Arizona and New Mexico—to prosecute all referrals for misdemeanor unlawful entry, according to Sessions, “to the extent practicable.”

The caveat from Sessions might have been necessary, because even though immigration cases are the bulk of most border districts’ work, the volume of border crossers has historically made it difficult to prosecute all or even most people caught. U.S. attorneys’ offices have historically declined the bulk of the misdemeanor cases, although the potential defendants were still put into deportation. Multiple former U.S. attorneys described deliberately deciding to focus their resources on more serious immigration crimes.

“Because of the resources, we focused primarily on those involving felony convictions, those that illegally re-entered upon deportation,” says Kenneth Magidson, U.S. attorney for the Southern District of Texas from 2011 to 2017. “We had our plate full with just those cases.”

Indeed, a bipartisan group of 89 former U.S. attorneys signed a letter last June warning that prosecuting misdemeanor unlawful entry cases would divert attention from more serious matters, such as terrorism and human trafficking.

The Justice Department repeatedly declined to comment, but when announcing the zero tolerance policy, Sessions said, “There must be consequences for illegal actions” and that the policy would be a deterrent. Hartzler is not so sure.

“It’s just a waste of resources to go after what are, in most cases poor, undocumented asylum-seekers who frankly don’t even always understand what the criminal court process is,” she says. “And as a result of not understanding that, it doesn’t have any kind of deterrent effect on them.”

Sessions also expressed confidence that local prosecutors were up to the job. But Hartzler says some trade-off can’t be avoided.

That may be reflected in the prosecutions data now. Using statistics provided by the Administrative Office of the U.S. Courts, the ABA Journal found that misdemeanor unlawful entry prosecution rates in each of the five border districts did indeed pick up dramatically in fiscal year 2017 (which ran from Oct. 1, 2016, to Sept. 30, 2017) and continued to rise in fiscal 2018. In the Southern District of California, for instance, only 17% of its cases in 2017 were misdemeanor unlawful entry, but nearly 40% of them were in 2018.

NONMARIJUANA PROSECUTION RATES

During the same period, prosecution rates for nonmarijuana drug felonies dropped. This category of offenses created by the Administrative Office of the U.S. Courts includes all drugs other than marijuana—which the ABA Journal did not include separately because of the confounding effect of its legal status in some states—and offenses from simple possession to large-scale trafficking. Those rates dropped in every jurisdiction but the Southern District of Texas, where they rose from 11% of its cases in 2017 to just over 13% of them in 2018. In the Southern District of California, these prosecutions were 25% of its caseload in 2018 versus 32% in 2017.

The increase in unlawful entry cases is the expected result of zero tolerance—but it took place even though unlawful border crossings are at a historic low across the southwest border. CBP data shows that apprehensions declined from a peak of 1.6 million in fiscal 2000 to just under 304,000 in fiscal 2017, before rising to 396,579 in fiscal 2018.

Meanwhile, CBP statistics show that seizures of most drugs are up or steady, with fentanyl and heroin—both part of the opioid epidemic—growing slightly, a jump of just over 11,000 pounds of methamphetamine seized, and cocaine seizures returning to 2016 levels in 2018 after a 2017 spike.

CASELOADS

Messages to four of the five border U.S. attorneys’ offices were not returned. However, USA Today obtained a memo last June suggesting that at least one U.S. attorney’s office was diverting staff members from drug cases to immigration.

The memo, from Assistant U.S. Attorney Fred Sheppard of the Southern District of California, warned border law enforcement agencies that the U.S. attorney’s office would decline to prosecute drug cases that weren’t finalized by the next morning, expressly noting this was because immigration cases “will occupy substantially more of our resources.”

Johnny Sutton, who was the U.S. attorney for the Western District of Texas from 2001 to 2009, says zero
Are pets assets or part of the family?

States are passing laws that give judges a longer leash in divorce custody proceedings

By Pamela Babcock

**National Pulse**

Lawyers are supposed to be dispassionate about the cases they handle. But a California couple’s 2015 divorce fight over a dog named Sweet Pea nearly broke one attorney’s heart.

Erin Levine, a certified specialist in family law and owner of the Levine Family Law Group in Emeryville, California, recalls a husband who adopted a pit bull-type dog at a shelter. When he brought the dog home, he gave his wife a greeting card. She recalls it read: “This [dog] is your gift for Christmas. I love you.” Both parties were very attached to the pet and extremely anxious about the outcome. They had no children, so Sweet Pea was their child.

Levine, who represented the husband, says she always believed that, given the choice of who to run to for a treat, “the dog would come to him.” But the judge was miffed that the case went to trial. He awarded custody to the wife, saying the card implied the pooch was a gift.

Levine says she’ll never forget it: “It was more emotional than the majority of my child custody cases. I don’t ever want to do something like that again.”

Navigating emotionally draining divorce cases is never easy, but in California, trial judges will now have more leeway to determine who gets the family pet. In January, California became the third state in the U.S. to adopt a law that allows judges to consider what’s in the best interests of the animal rather than treating the pet like other inanimate property, such as a car. Alaska and Illinois have passed similar laws since 2016. The new laws are groundbreaking because they come amid growing interest in protecting pets and settling disputes over them.

As in a child custody case, according to attorney Barbara J. Gislason, a judge might take into account factors such as whether one person cares for, trains and takes the dog on walks every day while the other spouse not only ignores the dog but mistreats it.

Gislason, author of *Pet Law and Custody: Establishing a Worthy and Equitable Jurisprudence for the Evolving Family*, says she expects the remaining 47 states will pass similar laws addressing pet custody in the next decade. One big reason is shifting societal attitudes toward pets and the growing cultural view in the U.S. that companion animals are family members.

“This is the next significant wave of important laws that are going to affect companion animals in this country,” Gislason says, noting that other laws include the dramatic expansion of misdemeanor and felony laws related to animal cruelty, the fact that some states have provisions that allow pets to be included in domestic violence protection orders (33 states as well as Washington, D.C., and Puerto Rico have these protections), along with laws that allow pet trust funds to be set up.

According to the most recent figures from the American Pet Products Association, 67% of U.S. households — or about $4.9 million families — own a pet, according to the 2019-2020 National Pet Owners Survey. Americans spent a record-breaking $72.56 billion on their pets in 2018, compared with $69.51 billion in 2017, more than a 4% increase.

Bruce Wagman, who runs the animal law practice at Riley Safer Holmes & Cancila in San Francisco, says he has seen an uptick in pet custody disputes in general.

“There’s more in the casebooks,
there's more you read about, and there seems to be more in the courts," says Wagman, co-author of *Animal Law: Cases and Materials.*

In a 2014 survey by the American Academy of Matrimonial Lawyers, more than a quarter of attorneys said they’d seen increases in disputes about pets over the previous five years. Dogs and cats topped the list, which also included horses, an iguana, a python, an African grey parrot and a 130-pound turtle. Nearly a quarter of the attorneys surveyed reported that courts were more frequently allowing pet custody cases, and 20% cited an increase in courts deeming pets to be an asset during a divorce.

But the next time the AAML conducted the survey in 2017, 30% of attorneys said they’d seen a decrease in pet disputes over the previous three years. In a statement, then-AAML President John Slowiaczek said one reason may be that more couples are planning ahead to avoid potential catfights and that often, if children are involved, the animal typically stays with them, “overriding any claims made by the noncustodial parent.”

The state laws are similar in that they “grant or direct or allow courts the authority to give a little bit more consideration to the animals or to the interest of the individuals in their animal separate from other inanimate property” that a couple might have, Wagman explains, adding that they defer to the judges to “really do the right thing.”

The new laws may also provide additional protections for pets. If one party is concerned something untoward might happen to an animal while the divorce is pending, the California law allows the court to issue an order to require one member of the couple to care for the pet, Wagman says.

That’s important, particularly in domestic violence cases. “Unfortunately, sometimes things do happen to the pet—they disappear, and one spouse might say, ‘I don’t know what happened with Fluffy; he’s gone,’” Wagman says.

The laws also may lessen the likelihood of someone using a pet as a pawn. Wagman worked on a Bay Area case in which the husband tried to leverage the couple’s dogs to extort money from the wife because he knew she “wanted the dogs more than anything.” As Wagman recalls, the man said, “‘I’m going to go after those dogs unless you let me have the $3 million house.’ He was just so evil, this guy.”

The new laws don’t apply to situations involving roommates but are expected to apply to domestic partnerships since these partnerships are typically covered by the same laws as marriage. The states with pet custody laws—Alaska, Illinois and California—don’t recognize com-mon-law marriages unless a couple has a valid common-law marriage in another state and the parties move to one of those states and courts there gain jurisdiction. In that case, the new pet custody laws likely also would be applicable.

While the AAML does not have statistics on how many divorce cases settle and how many go to court, Peter M. Walzer, the organization’s current president and a partner in the law firm of Walzer Melcher in Los Angeles, estimates that 5% will litigate at least one part of their case, while the balance of the cases are negotiated and settled out of court.

Deborah J. Marx, a family law attorney in Oakland, California, says she generally supports the new law because it could give judges more options for resolving difficult pet custody disagreements when two partners can’t reach a resolution through processes like mediation.

Several attorneys say one scenario that often works well and provides stability for kids is when clients agree to share time with a dog after the divorce. “Sometimes the dog goes back and forth between the two parents’ homes on the same schedule as the children,” Marx says.

Although the new California law includes provisions for joint custody, Levine says she doubts many judges will help craft and sign off on such plans.

“The court is interested in providing finality,” Levine says. “I don’t think they want to be in the business of managing ongoing custody matters for dogs.”

Marie Sarantakis, a family law attorney at Sarantakis Law Group in Chicago, notes that the Illinois statute says a pet is considered a marital asset if it was acquired during the marriage as long as it’s not subject to an exception, such as the animal being a gift, received as part of an inheritance when a family member passed away or excluded by a prenuptial agreement. If a judge makes that preliminary finding, presumably best interests could be considered. But until case law develops further, Sarantakis says she thinks there’s “a great deal of discretion.”

Sarantakis adds it’s not clear how far the courts should go to reach an agreement. When deciding children’s issues, courts opine on decision-making authority and parenting time. Would it be the same for pets? Could owners have joint decision-making rights regarding medical decisions? Is there such a thing as doggie support?

“Essentially we could have pet parents who are ordered to contribute to the responsibility of pet ownership,” Sarantakis says. “Are we going to be splitting medical bills? Really, it’s up to that particular judge just how far they want to go with their ruling.”

In the end, animal cognition may be up for debate, but attorneys fighting for what’s best for pets say they welcome the growing trend of keeping animals’ interests in mind.

“It actually matters to animals as vibrant beings that their needs are met,” Gislason says. “And wouldn’t it be nice if a dog got to live where the dog was happy?”
As the U.S. Supreme Court enters the busy month of June, when it releases the final block of its decisions, there is a sense that the justices have succeeded in keeping their merits docket relatively low-key this term.

Sure, there are a few big cases, such as a pair about partisan gerrymandering and the case that will determine whether there will be a citizenship question added to the 2020 U.S. Census. The high court had little discretion to avoid those.

But after last fall’s contentious Senate confirmation fight over Brett M. Kavanaugh, the justices have been otherwise perfectly happy to fade into the woodwork of their mahogany bench. Several appeals involving such divisive issues as gun control and gay and transgender rights in the workplace were granted review, but only after the point when they would be pushed into the next term for arguments and decision. Other hot-button cases involving abortion restrictions, immigration and religious exceptions to same-sex marriage were awaiting resolution as of mid-May on whether the justices would grant review.

“This has been a relatively quiet term,” says Brianne J. Gorod, the chief counsel of the Constitutional Accountability Center, a liberal-leaning legal group in Washington, D.C. “It wouldn’t be at all surprising if that were intentional on the part of the justices.”

LATE-NIGHT DRAMA

On the bench this term, the justices have often gone out of their way to appear respectful and deferential to each other. When two justices both sought to ask a question at the same time, a frequent occurrence during oral arguments, one will sometimes insist that the other take the floor. (This is hardly the norm, however.)

During testimony before a House appropriations subcommittee on the court’s budget in March, two members of the court sought to paint a picture of the justices getting along swimmingly.

“We are a very collegial institution,” Justice Elena Kagan said. “We like each other quite a lot.”

Justice Samuel A. Alito Jr. said, “I think sometimes people who read what we write get the wrong impression that we’re at each other’s throats in a personal sense. And that is certainly not true. And this is not something we just say for public consumption. This is the complete truth.”

Although the justices are sincere when they make such statements—which is not infrequently—they are perhaps unconsciously blocking out those times when collegiality is in shorter supply.

“They don’t want to look like they are as divided as the other two branches of government, but the reality is some of these cases test them,” says Joan Biskupic, a veteran Supreme Court reporter and the author of a new book about Chief Justice John G. Roberts Jr. “This is the season that belies those assertions.”

While the justices have been able to keep their merits docket relatively dull this term, the court is not always in complete control of the cases that come before it. The so-called shadow docket, involving emergency applications and other matters outside the merits docket, requires the justices’ attention on a frequent basis and in sometimes unpredictable ways.

One issue that has tested comity on the court this term is the death penalty.

In April, in a case involving an Alabama death row inmate, the court vacated a stay of execution that had been issued by a federal district court and upheld by the Atlanta-based 11th U.S. Circuit Court of Appeals. Christopher Lee Price was convicted with an accomplice of wielding a sword and knife to kill Bill Lynn, a minister, shortly before Christmas in 1991. Price won a stay from the lower courts after arguing Alabama’s three-drug protocol for lethal injection would likely cause him severe pain and needless suffering.

In an unsigned opinion in Dunn v. Price, issued in the early morning hours on April 12, the majority on the Supreme Court granted the state’s request to vacate the stay. It said Price had failed to timely fill out a form to...
elect to be executed by nitrogen hypoxia, a potentially less painful form of lethal injection than Alabama’s three-drug protocol.

The majority said Price “waited until February 2019 to file this action and submitted additional evidence today, a few hours before his scheduled execution time.”

Justice Stephen G. Breyer wrote a dissent that was signed by Justices Ruth Bader Ginsburg, Kagan and Sonia Sotomayor. Breyer, who in recent years has expressed grave doubts about the constitutionality of the death penalty, wrote that Price’s circumstance was one more example of the arbitrary nature of capital punishment as it is carried out today.

Peeling back the curtain a bit on the justices’ handling of last-minute death penalty appeals, Breyer detailed the procedural posture of the case and said he had requested that the court not act on Alabama’s request to remove the stay of execution, which had been filed at 9 p.m. on Price’s scheduled execution date.

“I requested that the court take no action until tomorrow, when the matter could be discussed at conference,” Breyer wrote, referring to one of the court’s regular private sessions to discuss cases.

“To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system,” Breyer wrote. “To proceed in this matter in the middle of the night without giving all members of the court the opportunity for discussion tomorrow morning is, I believe, unfortunate.”

Despite the high court’s reversal of Price’s stay, his death warrant had expired at midnight April 11, and Alabama rescheduled his execution for May 30.

‘NO WAY TO RUN A RAILROAD’

The late-night drama in the Price case came after the justices were at odds earlier this year in two cases involving whether death row inmates could have clerics of their faith present with them in the execution chamber. In a February decision from the shadow docket involving a Muslim inmate in Alabama who sought to have his imam present, the court sided with state officials who had denied the inmate’s request. On March 28, the court granted a stay of execution to a Texas death row inmate who was seeking to have his Buddhist spiritual adviser present.

Just days later, the court issued a 5-4 decision in an argued death penalty case, Bucklew v. Precythe, rejecting a challenge to Missouri’s lethal-injection protocol from an inmate who said it would be particularly painful for him because of a harsh medical condition. Writing for the majority, Justice Neil M. Gorsuch included a two-page section at the end of his opinion that complained of long litigation delays in carrying out the death penalty.

That section prompted a fiery, separate dissent from Sotomayor, who wrote, “There are higher values than ensuring that executions run on time. If a death sentence or the manner in which it is carried out violates the Constitution, that stain can never come out.”

The court’s handling of death penalty cases this term prompted considerable commentary in the legal academy. Will Baude, a law professor at the University of Chicago, wrote on the Volokh Conspiracy blog: “I say this as somebody with a great deal of sympathy for the court, who thinks that the death penalty is justifiable and constitutional, but: This is no way to run a railroad.”

Baude, a former law clerk for Roberts, said in an interview that certain cases on the shadow docket, particularly those involving the death penalty, exacerbate pressure on the justices.

“We’re seeing the bubbling of these tensions in the death penalty cases,” he says. “The court is doing this with no oral argument, minimal briefing, and often in the middle of the night, when the justices aren’t in the building. They’re communicating by telephone and trying to work out these difficult principles.”

KNOWING THE OUTCOMES

Biskupic’s book, The Chief: The Life and Turbulent Times of Chief Justice John Roberts, stops short of the current term but is an illuminating look at Roberts’ 14-year tenure. Among other revelations, the book depicts a degree of dissatisfaction among some members of the court with the chief justice’s management style.

“Colleagues portray him as strategizing more than sublimating, always with an eye toward what he wants in the ultimate ruling and how he will appear,” she writes.

Biskupic, a legal commentator for CNN who has written biographies on three other justices, says that from the last round of oral arguments in April through the end of the term in June, tensions among the justices sometimes boil up for a key reason. They have taken their tentative votes on argued cases in their private conferences, and they are still working on draft opinions in many cases.

“They know more than we do. That’s why you can sometimes see those tensions emerge” even in unrelated cases, she says. “It has to do with disagreements in cases they are debating and which won’t be public until June.”

Illustration by Sara Wadford/SHUTTERSTOCK

Illustration by Sara Wadford/SHUTTERSTOCK
Practice

Removing the judicial mask
Judges tell the stories behind their most trying decisions
By Philip N. Meyer

This is my best recollection of events from some years ago. It is a story nevertheless—the memories are shaped by the telling.

A friend whom I had known since college, previously a young public defender, was appointed as a trial court judge in Connecticut. She was sitting on her initial rotation in criminal court when I met her for lunch. I came early and observed her on the bench, presiding at a sentencing hearing.

A tough case. The defendant had been convicted of vehicular manslaughter; he had been intoxicated while driving, and his car struck and killed a young mother who had been crossing the street after shopping.

The defendant’s attorney argued that this was an exceptional case, and the defendant should receive probation and be placed in a private treatment program as an alternative to incarceration. The defendant was a combat veteran whose ways, a tragic figure: a combat veteran who had recently returned from multiple deployments overseas, the defendant suffered from severe post-traumatic stress disorder and self-medicated with alcohol. His attorney evoked profound sympathy for his client, who was, in many ways, a tragic figure: a combat veteran whose sadness and remorse were compounded by his guilt over “the accident.”

I do not recall what the prosecutor said or whether he proposed a recommended sentence. I do remember that the victim’s sister spoke eloquently of her sister’s beauty, kindness and generosity of spirit, and how the victim’s young daughter would now grow up without a mother. The victim’s extended family wept throughout the proceedings.

There were many attorneys from the local criminal defense bar in the courtroom, apparently interested in evaluating the new judge and the sentence she would hand down in this difficult case.

She looked directly at the defendant and spoke with great strength and authority, without revealing any hesitation or self-doubt about the multiple factors that had informed her sentencing decision. As I recall, she imposed a tough sentence of incarceration—in the middle-to-upper range of the sentencing guidelines—and required the defendant to successfully complete an in-facilities treatment program.

At lunch, the young judge and her words were heartfelt, I believed they were incomplete; her newfound mask of judicial authority covered any of her doubts or reservations as she delivered her sentence.

At lunch, the young judge, typically extroverted and ebullient, seemed unusually circumspect. We did not talk about the case. She apparently did not want to revisit what had transpired in the courtroom. I wondered whether it had mattered that so many attorneys were in the courtroom. As a young woman and a former public defender, did she shoulder a burden to prove her toughness and authority? She was a young mother herself. Did she identify unconsciously with the victim and the plight of the victim’s daughter? Did these unacknowledged cultural factors somehow influence her sentencing decision?

After lunch, the judge returned to her courtroom and to other cases on her docket. I’ve often thought since then about how difficult it is to be a “good” (i.e., fair-minded, ethical, legally rigorous) trial judge. It must be lonely and emotionally excruciating work at times.

What private stories must judges tell themselves so that they are not haunted by and can live with their often discretionary and godlike decisions?

MORE ‘TOUGH CASES’

In a remarkable new book, Tough Cases: Judges Tell the Stories of Some of the Hardest Decisions They’ve Ever Made, 13 trial judges (from criminal, civil, probate and family courts) remove their judicial masks and look back, retelling complex stories of their most difficult cases. All 13 judges speak with candor and sometimes write with the intimacy of a confessional memoir.

These are, of course, factually meticulous stories. But they are stories nevertheless—tales that are filled with vivid characters, high stakes, legal dramas, strong plots, and often deep internal conflict within the characters of protagonists as they seek to find and deliver justice.

Fundamentally, there are two types of cases. One type consists of several
high-profile cases, in which the judges cast themselves in the role of heroic protagonist. The right legal decision is apparent, and the hero judge must courageously stand up to external pressures to preserve judicial integrity and the rule of law.

For example, Florida Circuit Judge Jennifer Bailey recounts how she had no choice but to return young Elian Gonzalez to his father’s custody in Cuba after his mother drowned at sea, despite the public furor and political outcry to keep Elian in Florida. Likewise, in accordance with his understanding of Terri Schiavo’s desires, now-retired Florida Circuit Judge George Greer finds that he had to allow Schiavo—comatose and in a persistent vegetative state—to die, despite overwhelming political, religious and popular pressures to do otherwise. In making their decisions, these judges placed their professional lives, and sometimes their personal safety, at risk.

But the more compelling stories in the book are the second type: the complex, character-driven narratives in many lower-profile cases where the character of the judge is tested when faced with making excruciating, difficult and discretionary choices.

For example, D.C. Superior Court Judge Russell Canan admits to making the wrong decision in one of his most difficult cases. Canan begins his story this way:

“What the hell, I thought: I reread the note from the jury in chambers. ‘If we find the defendant not guilty of Assault with Intent to Kill While Armed, can we still find him guilty of Assault with a Dangerous Weapon?’”

The story turns on Canan’s misunderstanding of the implications of the jury’s question during deliberations in a criminal case. After reading the note, he believes that the jury will convict the defendant of the charge of assault with a dangerous weapon and, more importantly, of a third charge, possession of a firearm during a crime of violence.

The latter charge carries a mandatory five-year sentence. Canan does not believe the defendant is guilty of any crime whatsoever and fears that he will be compelled to send the 40-year-old father of young daughters to prison for a crime that he did not commit and that the prosecutor has not proved. Perhaps Canan even carries some personal responsibility for the defendant’s predicament, since he could have granted the defendant’s motion for a judgment of acquittal at the end of the state’s case. But he did not do so, allowing the case to go to the jury.

To prevent the defendant’s incarceration, Canan pushes for a last-minute plea bargain before the jury returns with its verdict, although local rules prohibit judicial intervention in plea-bargaining negotiations. Pursuant to a last-minute deal, the defendant would plead guilty to one charge that carries no mandatory minimum sentence, and Canan would then exercise sentencing discretion and place him on probation.

After the defendant grudgingly changes his plea to guilty—and after Canan accepts his plea—the judge learns from an abandoned verdict form discovered in the jury room that the jury was going to find the defendant not guilty of all charges. “I had orchestrated a turn of events that scared Sam [the defendant]—at the threat of five years of hard time, and with the unsaid promise from me that he would not go to prison—into pleading guilty to something I felt he did not do,” Canan writes. “I had crossed a line to do the right thing under severe pressure in exceptional circumstances.”

The opportunity for storytelling enables Canan to look back and recover a painful lesson from his mistaken judgment. The implicit coda of his cautionary tale: The well-meaning judge comes to a wrong decision when he values a just outcome over adhering rigorously to procedural rules and learns about the dangers of trying to achieve rough justice in a difficult case.

WHY THESE STORIES MATTER

The introduction to Tough Cases states that the book’s purpose is “to demystify judicial decision-making and to make the process accessible to ordinary people, who would not otherwise get a ringside seat.” And here the book succeeds magnificently.

These judges do what my friend, then a recently appointed judge, would not do: remove their professional masks and speak honestly in their own first-person storytelling voices. In doing so, Tough Cases provides 13 eye-opening looks into what it truly means to be a trial judge and reveals how we all find meaning in our professional lives through the stories that we subsequently tell about the work that we do.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.
Even If It Hurts Your Case

Lawyers have a duty to disclose adverse legal authority

By David L. Hudson Jr.

An attorney researches a legal question and finds a controlling case that is adverse to her client’s position. Surprisingly, the opposing counsel neglects to cite the case to the court in her pleadings.

What is the attorney to do? After all, attorneys are supposed to be a zealous advocates for their clients and win their cases. Should she mention the case and distinguish it, or just ignore the case and cite other authorities?

The answer may seem counterintuitive to some, but the ABA Model Rules of Professional Conduct provides a clear requirement: Attorneys must cite directly adverse legal authority controlling in the court’s jurisdiction. The duty applies even when the attorney on the other side fails to cite such authority. Labeled under the title “Candor Toward the Tribunal,” Model Rule 3.3(a) (2) reads that “a lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”

Comment 4 to the rule explains that it’s based on the premise that lawyers are engaged in legal argument, which is a discussion: “The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.”

Central to the underpinnings of the rule is that lawyers play different roles in the legal system. Lawyers are often viewed primarily as advocates unilaterally pursuing their client’s positions in court, but they are also officers of the court.

“As an officer of the court, the attorney has the duty of candor,” says Susan Saab Fortney, a professor and director of the Program for the Advancement of Legal Ethics at Texas A&M University School of Law. “If the duty of candor is triggered, it trumps or tempers duties to clients. The duty to disclose adverse authority is considered an important one to help judges decide on cases based on precedent—serving the principle of stare decisis.”

The rule is part of the profession’s commitment that attorneys must follow the duty of candor to help the system find the truth. “The ultimate goal of the legal system is to obtain justice,” says Jan L. Jacobowitz, director of the Professional Responsibility and Ethics Program at the University of Miami School of Law. “We do this through an adversarial system of justice designed to bring out the truth. The rule about disclosing directly adverse legal authority is designed not so much to help the other side but to provide an accurate picture for the court.”

HISTORY OF THE RULE

The rule is not new for the ABA. The ABA’s original ethics rules, the 1908 Canons of Ethics, included Canon 22, which said: “The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.”

Fourteen years later, the ABA Committee on Professional Ethics and Grievances issued Formal Opinion 280 after one of its members asked the committee to reconsider and clarify Opinion 146. The committee reiterated that the duty of candor included the duty to cite to the court directly adverse legal authority. However, the opinion also took a broad view of what type of authorities fall within this ambit: “The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case?”

The current rule to cite directly adverse legal authority is directly tied to the duties of competence and diligence found in Rules 1.1 and 1.3, respectively. “It is a matter of competence to be aware of adverse legal authority,”

PHOTO ILLUSTRATION BY BRENNAN SHARP/SHUTTERSTOCK
Jacobowitz notes. “It also is a fundamental requirement in the duty of diligence to be knowledgeable and prepared,” which should include familiarity with adverse legal authority.

**INTERPRETING THE RULE**

The rule prohibits attorneys from “knowingly” failing to cite directly adverse legal authority. Ostensibly, the rule would not apply to lawyers who fail to find the applicable case law because they are negligent. That raises the question as to whether the rule goes far enough. Should it also apply to lawyers who didn't knowingly fail to cite the directly adverse legal authority?

“I think that the rule should be limited to ‘knowing,'” Fortney says. “Otherwise you will have issues of mens rea and proof. As it is, the duty only kicks in when the other side fails to disclose. In some ways, the rule already accounts for the possibility that one lawyer (the adversary) fails to do his/her job.”

It can be difficult to prove that a lawyer knowingly failed to cite directly adverse legal authority.

“I think that it is hard to enforce the rule because the regulator would have to offer proof of knowledge,” Fortney says. “If the other side did not know about the authority, it may be difficult to prove that the respondent lawyer had knowledge of the directly adverse controlling authority.”

Some of the published cases involving the rule apply where the lawyer who failed to cite the prior case was actually the attorney of record in the prior case. Consider *State v. Tyler* (2001) from the Court of Appeals of Alaska. The defense attorney, Eugene Cyrus, failed to cite a leading case on the impact of prior driving while intoxicated convictions on another charge—an Alaska case called *McGhee v. State* (1998). There was a problem, as the court explained, because Cyrus was the attorney of record in *McGhee*.

Another part of the rule is that on its face it applies to those cases that are “directly adverse.” There could be cases that are only tangentially adverse. “There could always be gradations of what is clearly adverse,” Jacobowitz acknowledges.

However, courts look suspiciously at lawyers who claim that they didn’t cite a case because it is merely tangentially adverse. A federal district court in Maryland referred to this position as a “bold and risky gambit” in *Prince George’s County v. Massey* (1996), a case in Maryland federal district court. The better practice for attorneys is to cite cases that seem to be adverse and then distinguish them. It is far better to do that than to raise the court’s ire or suspicion that the lawyer is being less than candid.

The key is that attorneys need to realize their different roles when considering candor toward courts. “Lawyers serve not only as zealous advocates for their clients but also as officers of the court,” Jacobowitz says.
Lawyers tend to be very analytical, and we like to "logic" our way through life. When it comes to practicing mindfulness and meditation, it's not enough to simply understand the theory behind it. One must actually practice it to gain its many benefits. I often find the lawyer's brain gets in the way of simply starting the practice. A lot of lawyers get stuck on practicing meditation "correctly," or they spend too much time studying the subject rather than doing the practice. This to me is akin to understanding all the nuances of training for a marathon when you've never had the experience of running. It's much more productive to put on sneakers, go outside and start with an easy walk, then acquire additional knowledge as your physical ability increases.

There are many different types of meditation, philosophies, props and techniques. However, at its essence, meditation is about bringing one's attention to some type of object—for example, the breath, sounds, mantra—and training the mind to rest its attention on the object. It's a tool we can use to train the mind to be in the present moment. Over time, you may naturally notice that the mind spends less time ruminating, regretting the past or worrying about the future.

Here's a simple practice to get you started:

First, start by finding a space where it's relatively quiet and free from distractions. It's important not to get too focused on finding the "perfect" condition for practice. Aim for good enough. Many lawyers enjoy doing the meditation practice in the car, for example, in the morning before walking into the office or at the end of the day before driving home. It's generally best to choose a time and a space where you can practice every day to create a habit.

Second, find something to sit on—any chair will do. While you certainly can purchase meditation cushions, benches and other props, it's best to keep things simple in the beginning and sit on something that's comfortable. It's also helpful to set a timer. Start with five minutes.

Third, close your eyes. You can also choose to keep your eyes slightly open and find a spot to focus on 3 to 4 feet in front of you. But generally, it's easiest to simply close the eyes.

Fourth, bring your attention to the breath. Choose the part of the body where you can most notice the sensations of the breath. This may be in the nostrils, chest, stomach or elsewhere.

Fifth, continue to rest your attention on the breath. Inevitably, the mind will wander. This is natural. Do not get upset with yourself or judge yourself. Thinking is very natural during meditation. With a sense of friendliness, gently guide your attention back to the breath.

Sixth, continue to follow the breath until your timer goes off.

There are many meditation apps, YouTube videos and other resources that you can use. In the beginning, you may find it helpful to use a guided meditation. Again, be mindful about spending too much time trying to find the perfect app or guided meditations. Some apps I personally enjoy are Calm, Headspace and Insight Timer. You may find that you approach your meditation practice in the same way as you do law practice. If you find that you're striving to do meditation perfectly, without error, or trying to force your way through it, give yourself the permission to relax your efforts and commit what you can.

It may be counter to your present state of constant deadlines and goals, but the practice of meditation is about nonstriving and nondoing. It's the opposite to how we approach law practice, which generally involves effort and, of course, a lot of doing. Over time, you may notice what you practice in meditation will likely spill over into your life, allowing you to better enjoy both your personal life as well as your law practice. Trust your intuition, and find more ease.

For a basic guided meditation, go to jeenacho.com/wellbeing.

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.
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Language to Live By
19th-century author’s posthumous advice on use of words and meaning
By Bryan A. Garner

Our series of interviews with long-gone authors continues with Richard Grant White (1822–1885), a lifelong New Yorker primarily known as a critic of music and theater. He achieved renown as an erudite editor of the complete works of William Shakespeare. In mid-April, I sat down to "interview" two of his books: Words and Their Uses, Past and Present (1870) and Every-day English (1880). Except for slight edits, such as changing men to people, his answers come verbatim from those books.

BAG: Your most popular book was Words and Their Uses. Why did you write it?
RGW: I have discovered that there are people all around me, of intelligence and character, who, although they cannot be called illiterate—as peasants are illiterate—know so very little of the right use of English that, without venturing beyond the limits of my own yet imperfect knowledge of my mother tongue, I might undertake to give the instruction that I find many of them not only need, but desire.

BAG: Why does good usage matter?
RGW: The influence of people upon language is reciprocated by the influence of language upon people; and the mental tone of a community may be vitiated by a yielding to the use of loose, coarse, low and frivolous phraseology. Into this people fall by the thoughtless imitation of slovenly exemplars.

BAG: Who is your target here?
RGW: Language is rarely corrupted, and is often enriched, by the simple, unpretending, ignorant person, who takes no thought of his parts of speech. It is from the person who knows just enough to be anxious to square his sentences by the line and plummet of grammar and dictionary that his mother tongue suffers most grievous injury. It is his influence chiefly which is resisted in this book.

BAG: Although you're a teacher, and you write a great deal in opposition to ignorance, your real enemies are the manipulators of language, aren't they?
RGW: Simple and unpretending ignorance is always respectable, and sometimes charming; but there is little that more deserves contempt than the pretense of ignorance to knowledge. The curse and the peril of language in this day, and particularly in this country, is that it is at the mercy of people who, instead of being content to use it well according to their honest ignorance, use it ill, according to their affected knowledge; who, being vulgar, would seem elegant; who, being empty, would seem full; who make up in pretense what they lack in reality; and whose little thoughts, let off in enormous phrases, sound like firecrackers in an empty barrel.

BAG: It seems to me that what you're saying has strong practical implications for lawyers.
RGW: How many lawsuits have ruined both plaintiff and defendant, how many business connections have been severed, how many friendships broken, because two people gave to one word different meanings! The power of language to convey one person's thoughts and purposes to another is in direct proportion to a common consent as to the meaning of words. The moment divergence begins, the value of language is impaired.

BAG: Let's talk about some particular words and phrases. You object to the common use of the exception proves the rule.
RGW: This pretentious maxim infests discussion and pervades the everyday talk of men, women and children. A mere exception never proved a rule; and that it should do so is, in the very nature of things, and according to the laws of right reason, impossible.

BAG: What sense do you make of the phrase?
RGW: The maxim, as we have it, is merely a misleading translation of the old law maxim Exceptio probat regulam, which does not mean that the thing excepted proves the rule, but that the excepting proves the rule. It is the act of excepting or excluding from a number designated, or from a description. We receive the maxim as meaning not that the excepting proves the rule, but the person or thing excepted; and upon this confusion of words we graft a corresponding confusion

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of thought. The maxim, in its proper signification, is as true as it is untrue in the sense in which it is now almost universally used.

BAG: That's true even today. Although you're well-known as a Shakespearean scholar and critic of the arts, you studied law and passed the bar in 1845. You often invoke legal maxims. What's another favorite?

RGW: The child and the statesman both act in accordance with the maxim *Expressio unius, exclusio alterius*. Both this maxim and *[Exceptio probat regulam]* are founded upon the intuitive perception common to people of all times and races, and which is developed in the very earliest exercise of reasoning powers, that an exclusive affirmation implies a corresponding negation.

BAG: Are you strict in matters of grammar?

RGW: English grammar is to all intents and purposes dead. The little life it had was so purely fictitious that one smart assault extinguished it forever. The time is coming, and it will be here erelong, when there will be no more thought of teaching an English-speaking child to use his mother tongue by grammar rules than of teaching him astrology. I am often asked why I do not write an English grammar as a textbook according to my own principles. How can I do so, when the very first of my principles, if I have any in regard to English, is that it has no appreciable grammar; that all English grammar books, even the best of them, should be burned; and that the study of language, as one that requires trained faculties, a cultivated judgment and no little knowledge of literature, should be postponed until a late period of the time passed by young people in study—a notion horrible to many teachers of schools, and utterly abominable to all publishers of schoolbooks.

BAG: Linguists would be most astonished by your pronouncement that English has no grammar. I take it you mean it has few case endings, compared with Latin and Greek. What you're really arguing for is care with

*English usage, as opposed to English grammar—right?*

RGW: The most important part of our everyday English has not to do with grammar, or with spelling, or with pronunciation. It has to do with the right use of words as to their meaning and their logical connection; and this may be learned by study and by care at almost any time of life.

BAG: Let's talk about linguistic evolution. Almost everyone accepts that language is constantly changing.

RGW: Although most words are more immutable, as well as more enduring, than people are, some of them within the memory of one generation vary both in their forms and in the uses which they serve, doing so according to the needs and even the neglect of the users. And thus it is that living languages are always changing. This [point] is recognized so submissively by some philologists that Dr. [Robert Gordon] Latham has pronounced the dogma that in language whatever is, is right.

BAG: I take it you strongly disagree. You seem opposed to changes in the language.

RGW: Unless the meaning of words is fixed during a generation, language will fail to impart ideas, and even to communicate facts. Unless it is traceable through the writings of many generations in a connected course of normal development, language becomes a mere temporary and arbitrary mode of intercourse; it fails to be an exponent of a people's intellectual growth; and the speech of our immediate forefathers dies upon their lips, and is forgotten. Of such misfortune there is, however, not the remotest probability.

BAG: Thank you for the time. You're a most fascinating author.
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More law firms are launching tech-focused subsidiaries or affiliates to build tools and software to help their lawyers better serve clients  

In 2019, law firms face a choice: Continue with the old-school model of providing clients with traditional legal services, or jump into the digital age. Clients, legal technology experts say, want cheaper, more streamlined ways to get their legal advice and ensure their compliance with the law. Whenever possible, they want technology-based solutions.

“We are at the heart of an information business in the greatest online information age the world has ever seen,” says Scott Rechtschaffen, chief knowledge officer at Littler Mendelson. “How can we be oblivious to that? How can we not recognize that we need to provide services online?”

Technology companies have seized the opportunity to create products to assist with legal compliance, law practice and related matters. Companies unaffiliated with law firms have in recent years begun providing online legal services, practice management software and litigation finance tools, to name a few. But, as Rechtschaffen points out, who knows legal issues better than lawyers?

In the last couple of years, BigLaw firms and boutique practices have increasingly shown an eagerness to enter into the technology products and services market. To further these goals, law firms are creating subsidiaries and joint ventures specifically focused on creating and selling a variety of technology-based legal products and services.

“Law firms that want to get into the business of building and selling technology products need to get out of
Business of Law

the old business model and become more nimble,” Rechtschaffen says. “By creating a stand-alone technology-based company, a law firm can maximize its expertise while also creating an enterprise where sales and marketing professionals can be motivated. In addition, a separate company can entice top talent by creating an equity opportunity that would not be available in a traditional law firm setting.”

Rechtschaffen adds that risk-averse law firm partners may not want to invest their own money in a technology venture.

“When you create or partner to create a stand-alone technology company, you can seek outside investment to help with building products to market,” Rechtschaffen says.

WHAT CLIENTS WANT

Rechtschaffen’s firm, Littler, was among the first to try to capture the technology needs of clients. In 2015, Littler launched ComplianceHR, a joint venture with Neota Logic, a technology provider, to offer a suite of technology-based products and services relating to employment law compliance. Since then, ComplianceHR has provided services for more than 100 Littler clients, says Lori Brown, CEO of ComplianceHR.

“Providing self-service, on-demand tools is good business,” Brown says. “More so than ever before, clients expect law firms to provide sophisticated technology solutions, allowing them to preserve their dollars for more strategic matters.”

There are several examples of law firms creating technology-based subsidiaries. Earlier this year, Actuate Law, a Chicago-based boutique technology firm formed by a team of ex-BigLaw partners, announced the launch of Quointec, a subsidiary dedicated to developing technology and services for corporate clients. The law firm maintains a substantial ownership stake in Quointec, which is focused on resolving legal and compliance issues facing corporations. And last year, Reed Smith announced the launch of GravityStack, its legal technology spinoff.

GravityStack creates and licenses technology products and manages services for law firm and legal department clients.

“Clients like knowing that lawyers have had input into the products,” says Bryon Bratcher, managing director of GravityStack and director of practice support at Reed Smith. “And lawyers can see the trends in the industries in which they work and say, ‘This is something we need to build.’”

GravityStack sells and provides services for Periscope, a software platform that streamlines and brings transparency to the e-discovery life cycle. Periscope organizes data and allows clients to have real-time views of costs, productivity and quality of document reviews. Currently, GravityStack has about 40 employees, including sales and technology staff.

GravityStack’s products are always used by Reed Smith attorneys before being released to clients, Bratcher says. “We’ve heard that part of the reason our law firm clients go with us is that our solutions are battle-tested already,” Bratcher says. “In addition, we know their business better than a tech company does because we live it with our parent company.”

In February, Wilson Sonsini Goodrich & Rosati launched SixFifty, a wholly owned software subsidiary created to develop automated legal process tools.

The company’s first product will be SixFifty Privacy, a tool for businesses to assess and plan their compliance with the California Consumer Privacy Act. SixFifty’s software developers worked closely with Wilson Sonsini’s privacy law experts to ensure its quality and applicability, says Kimball Parker, president of SixFifty.

BUILT-IN ACCESS

Law firms that have created technology subsidiaries can leverage the expertise of their lawyers for marketing purposes. In addition, subsidiaries can have built-in access to a law firm’s clients.

Clients using SixFifty Privacy are happy, Parker says, because they gain access to the wealth of knowledge of Wilson Sonsini’s expert attorneys without paying their normal client fees.

“Companies that have to comply with [the CCPA] may think they will have to spend hundreds of thousands of dollars,” Parker says. “Our tool will help companies fulfill some of the main obligations under the law for considerably less than companies probably expect to pay.”

Parker says SixFifty is now moving on to create other products related to access to justice, such as tools for tenants involved in disputes with their landlords and attorneys handling asylum cases.

Dara Tarkowski, founding partner of Actuate Law and chief innovation strategist of Quointec, the firm’s technology arm, warns that law firms too entrenched in the old way of providing legal services probably will miss out on the opportunities available by creating tech-based subsidiaries.

“Creating a technology-based subsidiary is not part of the traditional way that law firms conduct business,” Tarkowski says. “There are forward-thinking law firms that get it, and there will be more that will ultimately embrace this new model so they can leverage technology in the way that clients need. But there will also be some firms, particularly BigLaw firms, who will just drag their heels because this model does not fit in with their traditional mindset.”
Unhappy clients are hurting your business
By Jack Newton

How satisfied are your clients? The data indicates most lawyers don't know. When we surveyed nearly 2,000 lawyers in the US, we discovered 37% don't collect client feedback at all—and for the 42% that collect feedback only casually, courtesy biases suggest they likely receive only the type of positive feedback they want to hear.

The implication of this is that poor client satisfaction could be the most critical blind spot for any law firm. Why? Poor satisfaction is what ruins businesses. If your clients aren't satisfied, there's little chance they'll hire you again or recommend you to someone else—and they may even deter others through word of mouth or slanderous online reviews. It's a poor prospect for any law firm that wants to succeed.

On the other hand, the types of businesses that thrive in today's digital economy are the ones that are obsessed with customer satisfaction. The internet has made the competition so readily available, your clients need a reason to hire you over another firm.

To better understand the state of legal services in the 21st century, we set out to answer this question of client satisfaction on an industry-wide scale by using a metric known as a Net Promoter Score (NPS).

Research has shown that NPS is one of the most reliable predictors for business growth, and it's based on more than just satisfaction or loyalty—it's based on the likelihood to recommend. Given that typical lawyers typically rely heavily on referrals, NPS should be considered especially salient for law firms.

Calculating NPS starts with asking a cohort of clients a standardized question: On a scale of 0 to 10, how likely are you to recommend your lawyer to a friend or colleague? You then calculate the percentage of respondents who answered within the 0 to 6 range (known as "Detractors") and subtract that from the percentage that responded with a 9 or 10 (known as "Promoters"). Those responding with 7 or 8 (known as "Passives") neither subtract nor add to an NPS. What you’re left with is a minimum score of -100 (100% Detractors) and a maximum score of 100 (100% Promoters).

For perspective, some of the most successful businesses in the 21st century have achieved incredible growth based significantly on highly favorable NPS. These companies (and scores) include Amazon (62), Netflix (68), Apple (76), Starbucks (77), and Costco (79).

Where does NPS net out for the legal profession? After collecting data from a cohort of over 1,300 American consumers on their experiences working with a lawyer, we calculated a benchmark NPS of 25 for the legal profession as a whole. This is based on a breakdown of 48% Promoters, 30% Passives, and 23% Detractors. While nearly half of clients would highly recommend their lawyer, nearly a quarter of all clients would actually dissuade others from their lawyer.

While an NPS of 25 isn't entirely bad, it's nothing to celebrate. Other industry benchmarking studies put this number at the same level as airlines (26), banks (26), wireless carriers (25), and credit card companies (23)—none of which are known for exceptional service. The deeper implications imply that poor client satisfaction is hindering growth in the average law firm.

In our study, we also examined what factors influenced positive client responses. What clients cared most about—which included the ease in understanding case expectations, bedside manner, and overall responsiveness to communications—are all intrinsically related to the ease or difficulty of working with a law firm. Since the growth prospects of any law firm rely so heavily on client satisfaction (as measured by NPS), focusing on client experiences should be how lawyers think about their future success.

This is the first of several columns for the ABA Journal in which I'll be discussing the nature of client experience in more depth. You can also read more about Clio's research on today’s legal clients in the 2018 Legal Trends Report.
The Coworking Frontier

Flexible office space gains a foothold in the legal industry, thanks to attorney-exclusive services

By Angela Morris

When business lawyer Mark Spitz resumed practicing law after a stint in teaching, he knew he would need to make connections to the Denver legal community.

Although he did have a home office for his solo practice, that wasn’t going to meet his need for community. Instead, he turned to a new trend that’s spread across the nation in recent years: lawyer-exclusive coworking offices.

“It was a way to meet attorneys in different practice areas and build referral relationships, which you can’t do from your basement,” says Spitz, who has been coworking since 2015. During his first few years, 40% of Spitz’s revenue came from referrals from other attorneys at LawBank, a coworking company with three Denver locations.

“I’m also able to refer people to an attorney I know, if it’s an area I don’t have expertise in,” he adds.

Emerging around 2010, the coworking industry was estimated to have grown to over 5,000 coworking spaces this year that serve an estimated 754,000 U.S. workers, according to a study by the Global Coworking Unconference Conference and Emergent Research. Commercial real estate services firm Jones Lang LaSalle found that flexible office space has been the primary driver of growth in the U.S. corporate real estate sector since 2010, growing an average of 23% each year, and projects that coworking will account for 30% of the domestic corporate real estate market by 2030. Many coworkers are part-timers, freelancers and small-business people.

Lawyers are starting to get in on the trend. “Coworking is the wave of the future, and I see it’s something breaking into the legal industry,” says Aaron Poznanski, co-founder and CEO of FirmVO in Pearl River, New York, a virtual office provider exclusively for attorneys. “It’s a quickly growing sector. It’s not as big as in other industries—because it needs to be exclusive to attorneys—but it’s definitely a growing sector, especially with millennials.”

A lawyer’s professional responsibilities and ethical rules may spook him or her away from general coworking spaces, but that’s a problem that lawyer-exclusive coworking companies aim to solve.

FirmVO is one of the larger players with three California locations, two in New York and one each in Boston and Washington, D.C. Two other locations, one in midtown Manhattan and another in Chicago, were expected to open by June, FirmVO’s website said. Another is Law Firm Suites, which has three locations in New York City, another in upstate New York and offices in Boston and Annapolis, Maryland. Smaller, single-city lawyer coworking spaces include Engage in Dallas, Enrich Coworking in San Diego, Chisel Space in Tysons, Virginia, and DOCKIT in Springfield, Massachusetts.

“It was a way to meet attorneys in different practice areas and build referral relationships, which you can’t do from your basement.”

—Mark Spitz
DOCKIT owner and founder Lauran Thompson says a wide range of lawyers use her space, but often they may also maintain a home office or have an office in another city. “Most people like to come here to meet clients in a space and meeting room that’s just for that,” she says.

Coworking is different from renting an office in a commercial building or from another law firm. Rather than signing a lease, a lawyer pays a monthly membership fee. The lowest membership level provides a “virtual office” where an attorney uses the address on letterhead, gets mail and receives limited time each month for working or meeting clients. At the next level—ranging from $250 to $350 per month—a lawyer can work full time, sitting in an open area at a different desk each day. For a higher fee, a lawyer can receive a dedicated desk or even a private office.

Compared with general coworking companies, the spaces for lawyers are marketed as primed to fill attorneys’ needs for professionalism and confidentiality. There are phone booths or rooms for making confidential phone calls; and conference rooms for client meetings, depositions or mediations. Lawyers can secure files and computers in lockers while they run out for a court hearing, or they can keep things overnight in locking desk drawers. Some spaces require new members to sign nondisclosure agreements promising if they overhear another attorney or see confidential documents on the printer, their lips will stay sealed. There are also events like seminars on business topics, continuing legal education for credit and simple networking.

“Lawyers have specialized needs that an ordinary coworking space doesn’t meet, especially when it comes to client confidentiality and the type of atmosphere lawyers like to work in,” says France Hoang, co-founder of Chisel Space. “When you’re handling sensitive documents or taking private meetings, it’s comforting to know the people around you understand and respect that confidentiality.”

When estate planning, wills and probate attorney Alison Mathey Lambeth left a partnership at a small firm last year to launch her own practice so she could control her schedule and care for her young baby, she turned to coworking at Chisel Space.

Lambeth adds that her clients love the cost savings they get from her low overhead. “It’s a professional workspace,” she says. “I love bringing clients there.”
Sunlight in Vermont

State’s new consumer protection law regulating companies that buy or sell data could be a harbinger for tech industry

By Jason Tashea

State attorneys general are a major line of defense for consumers. However, as commerce has gone digital, many AGs find themselves playing catch-up.

“The future of consumer protection is online,” says Christopher Curtis, chief of the public protection division at the Vermont Attorney General’s Office.

In Vermont, prioritizing online consumer protection means shining a light on the shadowy world of third-party data brokers. On Jan. 1, a new state law went into effect that requires increased standards and transparency of these companies that collect, buy or resell consumer data without having a direct relationship with the consumer.

Curtis notes that while many people understand they are giving up personal data when making a purchase, for example, they don’t know how that same data is then bought and sold.

“People are alarmed,” he says, “and the good news is that Vermont is doing something about it.”

To many, this landmark legislation is a strong next step forward as America tries to grapple with online privacy and internet regulation. Data brokers and internet companies, however, feel the law is an unworkable burden.

Whether aware of it or not, most Americans have heard of at least one third-party data broker. The recent controversies around Facebook’s lax relationship with brokers such as Cambridge Analytica and the breach of 145 million Americans’ records by Experian in 2017 have brought the industry to the fore. However, the need for broker transparency has been discussed for years.

In 2012, the Federal Trade Commission released a report that found data brokers fall into three categories: those subject to the Fair Credit Reporting Act, a 1970 law that supported accuracy, fairness and privacy of consumer data used by consumer reporting agencies; those that maintain data for marketing; and those that collect data outside of FCRA regulation and marketing purposes, such as people-locating services.

Characterizing its own report in 2014, the FTC noted that the latter two categories “remain opaque” and called for the transparency and accountability of these companies, which has not yet occurred at the federal level.

CONTAINING A ‘FREE-FOR-ALL’

In Vermont, policymakers took a “light touch” approach that focused on “sunlight and transparency,” according to Curtis.

The law requires brokers dealing with Vermonters’ data to register annually with the attorney general’s office; creates a prohibition on using data for discriminatory purposes and using fraudulently attained data, such as through phishing; sets a minimum data security requirement for data brokers; and eliminates fees for credit freezes, which is now reflected by federal law.
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As of late April, 134 third-party data brokers had registered with the attorney general’s office, according to Curtis. This information includes whether the company allows for consumers to opt out of the broker’s collection, how many data breaches the broker experienced in the previous year, and whether the broker possesses data from minors.

Praising the final product, Pam Dixon, executive director of the World Privacy Forum, says the law strikes a good balance.

“You can’t just lock data away; that’s not how the digital economies are working globally,” she says. “But, on the other hand, you can’t just have a free-for-all.” She says this law takes a step toward containing that free-for-all.

While there is general agreement that something needs to be done regarding data brokers, the bill wasn’t without opposition. A coalition of 14 data brokers and internet industry interest groups, such as Experian, the Internet Association—which counts Amazon, Facebook and Google as members—and the National Association of Professional Background Screeners, petitioned Vermont Gov. Phil Scott to veto the bill.

“This bill, if enacted, would create serious unintended consequences and negatively impact consumers, business and the internet,” the coalition wrote. The bill “would make Vermont a far more difficult place to innovate on the internet, ultimately hurting consumers and the information economy that has become an important part of the state’s economy.”

The ABA Journal contacted numerous signatories to the letter, but representatives from these organizations either declined to be interviewed or did not respond.

After the law took effect, Apple CEO Tim Cook published an essay in *Time* calling for a federal registration run by the FTC, which would give consumers more control to delete and track their data as it is bought and sold.

In February, U.S. Rep. Bobby Rush, D-Ill., introduced the Data Accountability and Trust Act, which, among other things, would accomplish what Cook wrote about. As of publication, the bill had not received a hearing.

Back in Vermont, people are waiting to see what the new law brings to light.

Zach Tomanelli, communications and technology director at Vermont Public Interest Research Group, expects that the law “will provide a base level of understanding” that will inform policymakers whether greater consumer protections are needed.

“It’s a good first step,” he says.
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A NEW WAVE OF REFORM PROSECUTORS UPENDS THE STATUS QUO

BY LIANE JACKSON
athan Myers’ letter had the same plea as hundreds of others mailed to the state attorney’s Conviction Integrity Review unit: I’m innocent, please investigate my case. It was 2017, and incoming Fourth Judicial Circuit State Attorney Melissa Nelson had announced plans to form the first prosecutorial review panel in Florida, with the goal of digging into claims of actual innocence in Duval, Clay and Nassau counties.

Myers was 18 when he was imprisoned for a 1976 homicide and attempted murder, and as prosecutors reviewed the case, it became clear the evidence did not support a conviction and that Myers had ineffective counsel. On March 28, Nelson signed off on a defense motion to vacate Myers’ conviction, and 43 years after his imprisonment, Myers was the first incarcerated man released in Florida after a prosecutorial review.

“I feel blessed to feel like someone was listening to me,” Myers said in a statement after his release. “I lost almost 43 years of my life that I can never get back, but I am looking ahead and will focus on enjoying my freedom with my family.”

THE GATEKEEPERS

The fact that Myers is free at all is an example of the tremendous power prosecutors wield within the criminal justice system.

There are an estimated 2,400 prosecutors’ offices across the country. Within those offices, a single prosecutor has the ability to keep more people out of prison than an entire department of public defenders—through their ability to control outcomes.

Of all the cogs in the wheel, prosecutors are uniquely empowered to put the brakes on any case by making a critical decision: Do I release? Do I divert? Charge? Offer a plea?

“Prosecutors shouldn’t just accept the old model of auto-filing everything that comes to their doorstep and seeking the maximum penalty the law allows,” says Miriam Krinsky, a former federal prosecutor and founder of the Los Angeles-based nonprofit Fair and Just Prosecution. “That’s where we were in the ‘80s and ‘90s, and it simply didn’t work.”

To put this in perspective: About 95 percent of felony convictions are the result of a plea deal, with a prosecutor determining what to charge, sentence length and terms of supervision. Prosecutors also decide when and what evidence to turn over to the defense in a criminal case. Defendants have no right to discovery in plea bargaining. So in order to avoid harsher sentences, they often take deals that result in criminal records without ever seeing the evidence against them.

Because so many decisions are made outside of the public eye, the prosecutor’s office is often referred to as the “black box” of America’s criminal justice system. But a wave of new reformers are intent on letting in the light—through transparency, community engagement, and most important, regime change.

“We are seeing a generational change for sure,” says Besiki Kutateladze, a professor at Florida International University who conducts on-site research at prosecutor’s offices across the country. “There is greater pressure for transparency and accountability and to do something about racial and ethnic disparities and the burgeoning prison industry.”

A growing coalition working to end mass incarceration has begun targeting district attorney races—typically low-key affairs that heavily favor incumbents, with 85 percent of candidates running unopposed. When there are challengers, outcomes are often predictable—the tough-on-crime candidate, usually with the endorsement of the police union, takes over the office. But in recent years, activists realized that replacing the old guard could redefine criminal justice from the inside, and a concerted effort to flip DA’s offices around the country began. Since then, voters have elected dozens of progressive prosecutors, from Boston to Salt Lake City to Corpus Christi, Texas.

With public sentiment on their side, unlikely allies have poured tactical and financial support into the campaigns of reform-minded prosecutors who are focused on issues like ending cash bail, addressing
sentencing disparities and engaging the community.

The Charles Koch Foundation is using data-driven policies to promote criminal justice reform, targeting it as a “holistic process” at every touchpoint of the system.

“We’re very focused on prosecutor issues as far as prosecutorial reform and the power of prosecutors, which has gone way too far one way,” says Mark Holden, senior vice president and general counsel of Koch Industries. “It’s a two-tiered system. If you’re wealthy, it goes one way, or it becomes a poverty trap.”

The conservative Koch brothers and liberal George Soros may make strange bedfellows, but the billionaires share a common philanthropic goal: dialing back America’s carceral state and instituting real criminal justice reform.

“There’s a unique alignment of the swords,” Krinsky observes. “People see we’ve wasted billions of dollars on prisons and jails and that prisons are exacerbating recidivism. I think we’re also in a moment in time where more and more parts of our community have been touched by the criminal justice system.”

Despite falling crime rates in recent years, communities of color continue to be overpoliced and overprosecuted, with well-documented racial disparities in arrests, charges and sentencing. Nationally, African Americans are incarcerated at nearly six times the rate of whites. One in three adults in the U.S. has a criminal record, a label with repercussions that will affect every aspect of their lives, including the ability to get housing and work.

“We look at the moral case, the constitutional case and the fiscal case,” Holden explains. “Before anyone is allowed in the state legislature or Congress to pass another punitive bill, they should go to prison and meet people in prison and talk to them. Most of the people in prison have been punished their whole lives up until going to prison. If all [a prosecutor] is going to measure is long sentences and how many people are locked up, does that make your community better?”

“THERE’S A PROSECUTORIAL POWER AND A DISCRETION, AND THIS WAS AN INSTANCE WHERE IT WASN’T APPLIED PROPERLY.”

—MARISSA ALEXANDER

**SEVERAL POINTS OF FAILURE**

Jacksonville, Fla.—Marissa Alexander’s baby was eight days old when police came to the house she shared with her estranged husband, Rico Gray, and arrested her.

“THERE WERE SEVERAL POINTS OF FAILURE.’”

Alexander’s case was one of many out of Corey’s office that galvanized the public and made the state attorney a target. Jacksonville and the surrounding area is historically steeped in racial inequities and slash-and-burn “justice.” Among other notorious accomplishments, Corey regularly charged children as adults, led the state in incarcerations and had one of the highest rates of death sentences in the country.

But Alexander’s case was a tipping point, and in 2016, with the support of activists, Corey’s former employee Melissa Nelson swept the two-term prosecutor from office, marking the first time in modern history that a sitting state attorney in Florida’s Fourth Judicial Circuit lost a contested election.
I TOOK A LEAP OF FAITH

At the Duval County Law Library, Nelson details the diversion programs her office is implementing to avoid the vicious cycle of fines and fees that can cripple poor defendants, and she talks about the new safeguards for juvenile offenders that allow children to avoid being processed through the system and incarcerated.

Nelson, a Republican who campaigned on reform, says she wants to increase transparency and let the public see the methodology and decision-making “even if they disagree.” Nelson says she encourages her lawyers to determine at the first decision point whether there are alternatives to incarceration that would be appropriate for any case. Nelson references evidence showing that every extra month in prison increases the risk of recidivism.

“We’re trying to bring broader thinking about what public health and public safety look like,” Nelson says. “Because every single decision has ancillary consequences. It’s not just, we’re going to decide if this person deserves five years in prison. Why do we think that? Is it because that’s what the guidelines tell us? Is it solely for punishment? Is it to incapacitate? What is the goal of the resolution we seek?”

Nelson worked as an assistant state attorney for years before leaving to enter private practice because she was “uncomfortable with the direction things were going.” She worked in the Jacksonville office of McGuireWoods and says she never intended on returning to public service.

“But there was a reputation the office was earning that really concerned me,” Nelson says. “I took a leap of faith, ran a really quick campaign. I cared very deeply about the office, I cared very deeply about the justice system, and I wanted to restore the confidence in the work of this office.”

One of Nelson’s first steps was to create the conviction integrity unit that reviewed Nathan Myers’ case. Nelson says she knows her office has a long way to go to build confidence in the community and deliver measurable reform.

“We did this because one of the things I ran on was restoring trust in the work that we do,” Nelson says. “If nothing else, we’re willing to take a look at our mistakes to ensure they don’t happen again.”
“IF YOU HAVE AUTHORITY TO SEND PEOPLE TO DEATH, YOU NEED TO VISIT DEATH ROW.”

—ARAMIS AYALA
‘YOUR CLIENT IS JUSTICE’

Orlando, Fla.—Just a two-hour drive from Jacksonville, in Orange County, Aramis Ayala represents one of the 1% of district attorneys across the country who are women of color. Her upset victory over the Democratic incumbent makes her the first African American state attorney in Florida’s history.

Ayala says she’s wanted to be a prosecutor for as long as she can remember. “It’s just something you’re born with. I don’t believe it’s something you’re taught,” Ayala says. “You believe in equality, you believe in level playing fields, and that was the one job I knew of at that time of my life—and quite frankly, at 44—still believe now is your only job. Your client is justice, your client is the community.”

After graduating from the University of Detroit Mercy School of Law, Ayala began her career as an assistant state attorney in Polk County, Florida. She left to work for the public defender’s office in Orlando, where she says she learned the human side of criminal cases—that they weren’t just files but about entire lives.

Ayala left government and worked briefly in the civil arena but says criminal justice was her calling. She returned to Orange County and worked for two years as an assistant state attorney. It was during this time Ayala realized the tremendous power prosecutors have to change lives through discretion, and in 2016 she launched her campaign.

“I needed to stand up and speak for the change,” Ayala says. “I ran for it—I put it all on the line.”

Just two months after taking office, Ayala made a bold announcement: Her office would no longer seek the death penalty, arguing it was costly, inhumane and did not deter violent crime or promote public safety. Reaction by the state’s Republican governor at the time, Rick Scott, was swift. In an unprecedented challenge to prosecutorial discretion, he issued a series of executive orders removing all death penalty-eligible cases from Ayala’s office, reassigning them to another county. Ayala sued, challenging Scott’s authority to remove cases from her jurisdiction, but she lost in the Florida Supreme Court. After the court’s decision, her office instituted a seven-attorney panel to review all first-degree murder cases to determine whether the death penalty would be appropriate.

“It’s just my hope at some point the facts and the research align with the law,” Ayala says about the court cases, noting the death penalty is a “failed system.” And despite a $1.3 million budget cut imposed on Ayala’s office after her battle with the governor, she continues to move forward with reforms, including units focused on domestic violence and human trafficking prosecutions, and Project No No, which diverts young offenders before arrest to avoid criminal records. Ayala says she’s focusing on data-driven policies, teaming up with the University of Central Florida and Harvard University to assess the impact of new programs and determine best practices.

Ayala, who wrote a chapter on the death penalty for an upcoming ABA book on prosecutorial discretion, has also instituted training for new prosecutors to give them court experience and real-life exposure: “If you have authority to send people to jail, you need to visit the prison. If you have authority to send people to death, you need to visit death row,” Ayala says.

Ayala is a cancer survivor—she nearly died from lymphoma while in law school. That experience is one basis for the fortitude and optimism that keep her fighting for what she believes in—justice, equality, progress—which she acknowledges won’t happen overnight. “I think we always have to be mindful that change is a challenge in and of itself, and change takes time.”

‘I EXPECTED TO LOSE’

Philadelphia—Larry Krasner’s campaign started as a long shot. Krasner likes to recall how the local head of the Fraternal Order of Police called him a “liberal unicorn” and called his candidacy “hilarious.”

When Krasner decided to run, he already had a prolific 30-year career: He’d been a public defender, he was a civil rights attorney, and he had sued the police 75 times. Krasner was intimately familiar with Philadelphia’s justice system, and says he “knew it was a mess.”

“I expected to lose, but I did my due diligence and I thought I had a chance of winning in a field of six or seven, which isn’t bad,” Krasner says. “So, I expected to lose, but I thought it was worth the fight.”

With the backing of the activist community and grassroots volunteers, Krasner won 75 percent of the vote. When he got into office, Krasner instituted immediate reforms. He announced the office would no longer prosecute sex workers with fewer than
“IT’S THE KIND OF THING THAT HAPPENS WHEN THE PEOPLE GET IGNORED, AND THEY GET SICK OF IT, AND THEY TAKE BACK THEIR POWER.”

—LARRY KRASNER
three prior offenses; would not prosecute marijuana possession cases; and would not seek cash bail for low-level offenses. Krasner is also pushing to reduce supervision, which he says costs too much, stretches for too long and sets people up for failure. In Philadelphia, around half of the jail population is being held on a detainer for violation of probation or parole.

Supporters have applauded the moves and encouraged his office to go further. But Krasner faced pushback from the police. ‘At first I thought it was ideological—they’d endorsed Donald Trump in a city that’s 85 percent Democratic,’ Krasner says. ‘But the more we looked at it, the more we realized it was about overtime. Police are paid a lot of money to go to court to testify. A senior member of the Philadelphia Police Department told me, ‘You have to take the profit out of policing.’ I think he got it right.’

Krasner’s office was part of an ongoing reform effort to close one of its county jails and reduce Philadelphia’s jail population from 6,500 to 4,700 in one year. Corrections officers weren’t happy. And when Krasner tried to reduce the misdemeanor caseloads of probation and parole officers so they could focus on violent offenses, he says there was reticence toward cooperation and reform—something he’s witnessed across the system.

‘Once you build the monster, you have the monster, and the monster doesn’t want to shrink,’ Krasner observes. ‘And the monster doesn’t want to diminish its power.’

Krasner calls it a potent “alchemy” of money, jobs and political power, mixed with patronage. ‘I think there’s a fear … of anything that would separate them from the valuable commodity of human bodies in their jail cells. ‘To the extent we do things to shift resources into public education, economic development and treatment, we are affecting profit, and we are affecting money and what that money buys. And that is where we’re really starting to see a common thread of resistance.’

Despite this, Krasner has significant support for his agenda and has plowed ahead with plans in a manner some other elected prosecutors can’t.

‘I do think part of the Philadelphia story is, yes, it’s a progressive town at this moment in its history, but I also think, as with some of these other jurisdictions where there’ve been victories, like St. Louis County with [prosecutor] Wesley Bell—there is a history of oppression that is real and that has its consequences.’

Neither Krasner nor Bell was expected to win, but: ‘It’s the kind of thing that happens when the people get ignored, and they get sick of it, and they take back their power, and that’s what’s happened,’ Krasner says.

‘WE’RE NOT GOING TO FAIL’

St. Louis—In August 2014, weeks of protests followed the shooting death of 18-year-old Michael Brown by a white police officer in Ferguson, Missouri, after video of the unarmed black teen face down in the street went viral.

Three months later, prosecutor Bob McCulloch announced the grand jury had declined to indict officer Darren Wilson in Brown’s death. The decision was met with more demonstrations, but those familiar with justice in St. Louis County weren’t surprised by the report from the prosecutor, who had just been elected to his seventh term.

A Department of Justice investigation under President Barack Obama declined to find civil rights violations but issued a scathing report that held the Ferguson Police Department accountable for a sustained and egregious pattern of racial profiling and abuse. Wesley Bell, a Ferguson city councilman, worked with the DOJ on the federal consent decree to reform the police department. That’s when he began thinking seriously about running for prosecuting attorney of St. Louis County.

‘I always thought, I would never want to work in this office. I want to run this office,’” Bell says.

Bell—who had worked as a public defender, a municipal court prosecutor and a municipal judge—launched an underdog campaign that quickly captured public support.

‘What we saw when we knocked on thousands of doors, what we saw in every corner of this county, was people who just wanted to be treated fairly—people who just wanted a fair shake,” Bell says.

Bell’s campaign steadily gained momentum, and he beat McCulloch in the Democratic primary in August 2018.

“You don’t need the entire city to win the DA’s office,” notes Adam Foss, founder of the training and advocacy group Prosecutor Impact. ‘If you are motivated enough and have the grassroots relationships to make it work, you can take an election and surprise everyone.’

But not everyone was pleasantly surprised. In St. Louis County, a long history of “law and order” prosecutors working in tandem with police departments had blurred the line of agency independence. The result: Attorneys in Bell’s office voted to join the St. Louis Police Department’s union days before he took the oath of office.

‘Change always is scary,’ Bell says. ‘You have, for example, individuals
“EVERYTHING WE DO IS OF THE MIND OF CREATING A FAIR AND EQUITABLE JUSTICE SYSTEM. THAT’S HOW I MEASURE SUCCESS.”

—WESLEY BELL
who have made their career being promoted, taking care of their families based on a way of doing things. When someone comes in disrupting that—that can be scary to some people.”

***

It’s nearing 4 p.m., and Wesley Bell is huddling with staff at his office conference table for a late-afternoon meeting to prepare a response to a national news story about the police efforts to organize the county prosecutor’s office. “They have the right to organize,” Bell says. “Our concern is the choice of union. It’s a concern because, as prosecutors, one of our roles is to serve as a check on law enforcement.”

County civil service rules have made it difficult for Bell to replace many of the old guard attorneys in his office, so a realignment of values to focus on reform has been an ongoing process. But business as usual is not an option for Bell as he continues to roll out reforms. One of his first acts was to end cash bail requests for misdemeanor cases, and his office will no longer prosecute possession of less than 100 grams of marijuana. Other priorities include expansion of the county’s diversion and treatment programs for drugs and mental illness, along with the veterans and DWI courts. Bell says “tough on crime” hasn’t worked—he wants his office to be smart on crime.

“The criminal justice system is broken, and it needs to be reformed, it needs to be changed,” Bell says. “And myself, my team, this office will be a change agent. And so the policies we researched are on mission—everything we do is of the mind of creating a fair and equitable justice system. That’s how I measure success. And the lack of that will be considered failure. And we’re not going to fail.”

THE FUTURE OF REFORM

Irrespective of the politics on the ground, criminal justice reform has crossed party lines as politicians, philanthropists and activists direct time and resources at an intractable issue that affects communities everywhere.

Concerted, coordinated efforts propelled dozens of reform prosecutors into office in cities and counties across the country. But after the first wave—what’s next?

What’s clear is, despite measurable success and bipartisan buy-in, there’s no silver bullet.

There is hope that progressive change in pockets across the country will have a trickle-down effect, impacting the culture globally. But others worry that enclaves of reform don’t reflect what’s happening on the ground in hundreds of prosecutors’ offices, large and small, in jurisdictions that aren’t facing the same pressure to transform.

“Really, those rural places suffer from injustice even more,” notes Prosecutor Impact’s Foss. “Poor whites, immigrants, natives. Using new language why reform is necessary—safety, economy, redemption, forgiveness, Christianity. There are ways to talk about this issue in a way that’s appealing to those people who are feeling those effects.

“This is happening everywhere—it’s a natural evolution. You have to understand and speak the language that people can get behind. This is about victims and safety and communities.”

Michael Moore, state’s attorney in Beadle County, South Dakota, and co-chair of the ABA Criminal Justice Section’s Prosecution Function Committee, says he’s seen ideas that appeared radical 10 years ago to many small-town prosecutors—such as diversion programs—become mainstream. He believes education and training are key.

“I think how a prosecutor views what a positive result is, is different now,” Moore says. “A lot of prosecutors before thought the only positive result is a conviction, and a conviction on the maximum charge. Some still think that. But it’s becoming more debated. We can do some things differently that keep public safety in mind but maybe are better for that particular defendant in that particular case.”

In addition to prosecutorial reform, advocates are urging change at the legislative level through aggressive decriminalization efforts and winnowing down chargeable offenses. Others argue that instead of attempting to reform prosecutors’ offices, the goal should be to limit their power and make them more accountable under the law.

“No one mechanism is going to be effective on its own,” says FIU’s Kutateladze. “There has to be community pressure, political pressure, funders need to continue their work, researchers need to provide meaningful assistance to prosecutorial offices. My limited experience shows me all that can make a difference. But it takes awhile.”

Expectations for the new crew of reformers may be unfairly high, but as decades of cultural inoculation about how we “do” justice in America steadily crumble, most activists in the trenches are bullish on the future.

“I am a believer in dramatic change,” Fair and Just Prosecution’s Krinsky says. “At times, one should proceed with caution and not set the house on fire, but we also need to realize a lot of those rooms are burning right now. I believe elected DAs can do some pretty dramatic things pretty quickly. They have the wind of reform at their back.”
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Advantage
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Attorneys with side gigs as TV commentators are always on call

By Darlene Ricker
Lawyers have to be available when the phone rings, but few go to the lengths Danny Cevallos has gone. He installed a Bluetooth speaker in his bathroom so he won’t miss a call when he’s in the shower. It’s part of what he calls being “relentlessly available,” which is how he rose from practicing law in a small firm to high-profile legal analyst for NBC News and MSNBC.

A criminal defense attorney whose broadcast career began on a local TV program, Cevallos, a partner at Philadelphia-based Cevallos & Wong and of counsel at Edelman & Edelman in New York City, is among a growing legion of attorneys who combine an active law practice with news broadcasts. Legal commentating became a cottage industry in the mid-1990s during O.J. Simpson’s double-murder case. The story dominated the news for several years, fueling a demand for experts to explain the legal twists to a hungry TV audience. With celebrities’ and political figures’ legal controversies feeding the insatiable appetite of social and traditional media consumers, the need for analysts is escalating.

Ari Melber practiced four years with legendary First Amendment lawyer Floyd Abrams before joining MSNBC. He became the network’s chief legal correspondent in 2015 and has anchored the daily program The Beat with Ari Melber since 2017. As the Mueller investigation heated up, viewership mushroomed. In 2018 The Beat averaged 1.5 million viewers per night, up 35% from 2017, according to an MSNBC spokesperson.

“We are going through a period of history where it feels like a lot of America is going to law school together,” says Melber, who won an Emmy in 2016. “I think about that as we explain the concepts and try to walk through what it means when the government arrests and charges someone, what rights they are afforded and why
“We are going through a period of history where it feels like a lot of America is going to law school together.”

—Ari Melber

we have this system. It’s an imperfect system, and reporting could help improve the many things that we know don’t work as well as they should in American justice.”

Melber didn’t pursue a career in broadcast journalism—it found him. His articles on politics, law, public policy and the media for *The Atlantic* and *The Nation* drew the attention of media execs who recruited him. Being a superior writer and/or litigator doesn’t guarantee success on camera, but Melber turned out to be a natural.

Others, including Cevallos and fellow NBC News/MSNBC legal contributor Katie Phang, manage to juggle a full caseload and frequent TV commitments. But it’s not easy. As the saying goes, the law is a jealous mistress.

**CLIENTS FIRST**

“I love doing legal commentary, but my work for the network is subject to my work as a lawyer. The clients have to come first, and they do,” says Phang, a partner with Berger Singerman in Miami who practices complex commercial litigation, family law, criminal defense and corporate governance/internal investigations. She is asked to analyze a wide range of topics but declines any that are outside her expertise.

Others are game for almost any legal issue, but that multiplies the research time needed. Cevallos found himself immersed in South African legal procedure during the 2014 trial of Oscar Pistorius, the South African Olympic and Paralympic runner who was convicted of killing his girlfriend.

“In the Trump era, we’re dealing with really interesting constitutional issues, some of which have never been dealt with before,” he says. “I don’t know of a single ‘emoluments clause lawyer.’ You have to talk about things that just a few years ago were hypothetical.”

Phang says that sometimes she can’t accept a TV booking because of a hearing or another legal commitment. Couldn’t a colleague make the appearance for her?

“Yes, but I find that when a client hires you, they want you,” she says.
“Ninety-nine percent of my clients do.”

In some practice areas, clients don’t have that latitude. “The nature of criminal defense is to have several cases on the same day in different courthouses and different counties. I have stepped in for colleagues in court, and they have stepped in for me. There’s always someone who will help you out,” Cevallos says.

“In my world, you develop a list of what you can cancel to rush to a ‘hit’ [industry lingo for a TV appearance] and what you can’t,” he says. “I very quickly created a hierarchy. If it’s a doctor appointment, I’ll go to the studio and keel over dead another day. If it’s a trial, I have to decline.”

CNN/HLN (Headline News) legal analyst Joey Jackson, a partner at Watford Jackson in New York City, was in the middle of a murder trial in New York when Judge Judy invited him to Los Angeles to try out for a position as a judge on *Hot Bench*, a show she was creating. She needed him that Friday, which was two days away, and it would have him back in court by Monday, missing one trial day.

How understanding were the judge and opposing counsel? “Zero!” says Jackson, laughing. The prosecutor “pitched a fit,” he says, calling it “an outrage” because he had witnesses lined up to testify. The judge initially concurred but relented after Jackson persisted. “They could hold me in contempt, do whatever they wanted with me, but I was not going to pass up that opportunity,” he says.

Cevallos has designed his life to minimize logistical conflicts. His home and office are two blocks apart and just a jump to the studios in Manhattan. “I’ve got the subway timed down to the second. If I catch the 2-3 [train] right on time, I can get to 30 Rock in about 25 minutes,” he says.

“They could hold me in contempt, do whatever they wanted with me, but I was not going to pass up that opportunity.”

— Joey Jackson
Daliah Saper, a sole practitioner in Chicago, can walk to most of the local TV studios from her office. For example, she says, describing a recent morning, “I have a deposition and an appearance on Fox 32’s Good Day Chicago morning program. I’m going to be at the studio at 8:45. I’ll be on air at 9:17 for a segment that will be no longer than five minutes, and then I’ll walk to my depo [that starts] at 10.”

**FAST PACE, QUICK STUDY**

It doesn’t always stack up that neatly. “The law and news are both a lot of research, fact-checking, making sure the product is right—except with the news it’s done at about 90 times the speed as the law. You’re being very careful, double-checking everything, but with a deadline that’s much shorter than most litigation deadlines,” Cevallos says.

The staccato pace of the news “can feel quite overwhelming at times,” Melber says. “When I was practicing law, the hours were long but highly planned and predictable. I think that’s the biggest difference between law and broadcast journalism.”

Unpredictability has an upside, though. It’s called adrenaline. “I love being around breaking news,” Cevallos says. “It’s like the excitement of skydiving for people like me who would never go skydiving.

“Often when an indictment or a court ruling comes out, someone on the team prints it out and hands it to you while we’re on set. When you’re seeing us reading it on air, we’re reading it for the first time. I’ll tell ya, nothing gets your adrenaline going like being on live TV and getting a document that the whole world is getting at exactly the same time, and trying to make sense of it.”

The effect a reporter’s stories can have on society can also be a rush, but with it comes a weighty responsibility.

“When you’re practicing law, you certainly have a high impact on a small number of people, and you have a very serious obligation to your client, but the day-to-day can be fairly narrow in scope,” Melber says. “With a nightly news program, particularly in this era, we have a bigger obligation in what stories we pick and who we interview. Sometimes we’re doing original reporting that becomes part of the public facts of the story. We have broken advance stories that we later learned were being watched by the prosecutors and defense counsel.”

Expertise in a hot-topic area can give an attorney an edge in getting hits. Some lawyers can comment generally on social media law, but few can explain in-depth the emerging issues of anonymous online defamation, sexting, revenge porn, cyberbullying and catfishing. Saper’s expertise in those areas propelled her into prominence when she took a headline-grabbing case in 2008 that went to the Illinois Supreme Court in 2012 (*Bonhomme v. St. James*). Her client claimed she was the victim of an
elaborate social media hoax in which a woman posed as a man online and defrauded her of thousands of dollars in gifts.

Requests for Saper to speak poured in from media outlets "all over the planet," she says, including Europe, Asia and North America. That put her on the fast track as a broadcast legal commentator on ABC, CNBC, Fox News and local Chicago stations.

"Once I got on the 'short list,' I didn't really have to do anything. The offers just keep coming in," she says.

Abed Awad, a partner with Awad & Khoury of Hasbrouck Heights, New Jersey, is a leading authority on Islamic law and the laws of Muslim countries. His native fluency in Arabic and English and his specialized legal expertise have landed him appearances on PBS, ABC, CNN and the BBC.

His first hit in the United States came a few days after the 9/11 terrorist attacks, when ethnic hate crimes erupted in New Jersey. He and a group of community leaders reached out to the Passaic County prosecutor's office and the police in Paterson, New Jersey, and held a press conference. "That was really the start of it," he says. "Then I started getting calls from the media."

During the 2004 presidential campaign, Awad had a one-year contract with Al-Jazeera to commentate on American politics from a democratic perspective. He had to travel from New Jersey to the studio in Washington, D.C., weekly. "It took me away from my practice a lot, and that definitely hurt my bottom line," he says.

In the long run, though, he found it worthwhile. "For any lawyer, being a media commentator is a good thing. It forces you to be sharper, more refined and articulate. It makes you be a better lawyer," Awad says. "It can also brand you. As lawyers in this very crowded market, how do you shine? How do you distinguish yourself from others?"

CREDIBILITY MATTERS

Television may or may not increase an attorney's book of business. "It helps, but not as much as you might think," Jackson says.

He says his television appearances generate calls, but they don't necessarily turn into cases. The reason is largely geographic. "New York is a sliver of the country," he says. "We [also] get calls and social media inquiries from the 49 states I don't practice in, and a lot of the issues are outside my wheelhouse," says Jackson, a trial lawyer who practices criminal defense, government investigations, regulatory enforcement, labor union arbitration, wrongful death and complex litigation. He says attorneys who appear on local TV stations are more likely to get calls from prospective clients in their jurisdiction.

Some attorneys decide to use their legal skills in full-time broadcast journalism. Others toy with the idea but don't act on it. Phang says she had an opportunity early in her legal career to become a full-time general assignment reporter for a local CBS affiliate on which she had appeared as an expert on legal issues.

"I turned them down, but I was so tempted to take it because I was definitely bitten by the TV bug," she says. "I felt it would be much better for me to focus on honing my craft as a lawyer because frankly, it gives you street cred."

Credibility is a reporter's stock in trade, and that's what gets an attorney invited to give legal commentary. "I can use current examples, like, 'That issue came up when I was at the Southern District [of New York] making a proffer for a client last year, and let me explain what a proffer means,' or 'Yesterday when I was in front of judge whoever, here was the concern about that issue,' " Jackson says. "It makes what I say more authentic than me drawing upon stale experiences or saying, 'when I was in a courtroom 10 years ago.'"

Jackson says his entree into legal commentating
was a “fluke.” About 10 years ago, before he started his own firm, he was driving to court when the phone rang. An editorial producer from Fox News had seen his website and asked if he would comment on a breaking case. Jackson was stunned because he had no connection to the case, but he accepted. That led to frequent TV appearances on Fox and eventual calls from other networks, including MSNBC. Jackson refers to his early years as a “five-year internship at Fox News” because there was no pay.

He finally got the call he had been waiting for: an invitation to try out for an anchor position on *In Session* on Court TV. He was hired, but the network was disbanded a few months later. Next came a series of consecutive contracts with HLN that started as 90-day deals, followed by a one-year contract with the network. The arrangement was later combined with sister network CNN under a series of renewed two-year contracts. Today Jackson appears daily on CNN/HLN.

Phang’s on-air debut came in 2005 when she was a homicide prosecutor with the Miami-Dade State Attorney’s Office and was trying a lot of cases that drew headlines. A reporter from the local CBS affiliate told her the station’s news director wanted to talk to her about doing a point-counterpoint segment on the morning shows. The subject dominating the news then was Michael Jackson’s child sex abuse trial.

“I started doing day-to-day coverage of the Jackson trial. I would get to the station at 4 in the morning, do the show and then go to my job,” Phang says.

One day a friend who was working for Fox News called and said, “Can you do the Greta Van Susteren show tonight?” That launched Phang’s broadcast career.

Cevallos’ break came after a social event where he chatted with the producer of a local TV program about her work. He followed up with an email that basically said, “Listen, if you ever need a lawyer on the show, let me know and I’d be happy to come on.” He got the call, and two days later Cevallos appeared on *It’s Your Call With Lynn Doyle*, a program on local issues in Philadelphia. “Before the show I was terrified, during the show I was terrified, and afterward I was despondent because I thought I did a bad job,” he says. “But yet, all I could think about was, ‘When do I get to do that again?’ ”

He didn’t have to wait long. A local network affiliate reached out, and it eventually turned into a multiyear arrangement at a cable network. “I couldn’t believe how fortunate I was. I never dreamed this was a real job that people could have,” he says.

Cevallos spent four years as a CNN legal analyst, where he became a regular on shows including *Erin Burnett OutFront* and *AC 360* with Anderson Cooper.
He also appeared as a guest host of In Session on Court TV. (After a decade off the air, Court TV was relaunched in May.) His work for Court TV was “a very exciting time and a very terrifying time,” Cevallos says.

“Guest hosting was a thrill, but it was a crash course in TV because anchors have a really challenging job. It’s not just reading the teleprompter. You have to be able to respond to breaking news,” he says. “It’s like [being] an air traffic controller. There are lots of spinning plates for anchors, and they have to make it look effortless—and they do. It’s a really tremendous skill set.”

**IT’S ALL ABOUT PREPARATION**

Jackson’s CNN/HLN handlers helped him develop skills as a legal anchor and assigned a coach to work with him so he could also fill in as an anchor on other shows. He didn’t have to weed “legalese” out of his vocabulary because as a trial lawyer and an adjunct professor of civil rights and business law, he knew how to explain complex legal concepts. His challenge was to master the delivery of on-air commentary (such as the pitch of his voice and the speed of his speech).

Those coaching sessions cut even more hours out of Jackson’s day. He works seven weeks a day (12 to 14 hours on weekdays, eight on Saturdays and four on Sundays), dividing his time equally between his practice and broadcast work.

Putting in the time is essential, Phang says. “Just like in law, if you’re overprepared, then you should have some comfort that you won’t be asked a question you don’t know the answer to,” she says. “In court I’ll say, ‘Your honor, I cannot intelligently answer that question, but if you’ll afford me the opportunity to look into it, I will.’ You can’t do that on TV. But I can say, I don’t know specifically what the law says in that jurisdiction, but for example, in Florida we do x, y and z.”

Cevallos points to another common thread between the courtroom and the newsroom. “If you’re going into court, you’re preparing to tell a judge or jury something; if you’re going into a network, you’re preparing to tell an audience something. Either way, you’ve got to get your facts straight,” he says.

Being readily available earns a commentator more hits.

“My goal early on, and still today, is for the producers to know if there’s a breaking news situation they can call me on my cell anytime. I don’t mind the phone ringing at 3 a.m.; I don’t mind it ringing at 10 at night. And it has rung at those times,” says Cevallos, who has an air traffic controller. “No problem. We’ll fly you here and give you a hotel room.”

She expected a phone or Skype interview, but the producers wanted her to do a live interview in the studio in New York. She told them she’d have to decline because she was in Mexico, but the network solved that pronto: “No problem. We’ll fly you here and give you a hotel room.” When Saper said she didn’t have business clothing with her, they asked what size she wore. After a brief hold, they said she could borrow an outfit from one of the producers. And off she went.

“It was a fun, whirlwind adventure out of that simple email, based on the relationship I had built,” she says.

**YOU, TOO, CAN BE A COMMENTATOR!**

Not everyone has relationships with networks, but Jackson says that shouldn’t stop you from reaching out. “If you want to get into legal commentary, it’s 100 percent [sure] that you can. It’s [always] open season,” he says, adding that there are a variety of ways to get into the business.

For example, he says, “You can contact a commentator you’ve seen on-air and say, ‘I admire your work, and I’d like to hear your story. Could we have a cup of coffee?’ I find that most of my colleagues here and at other networks are pretty accommodating. They’ll give you five or 10 minutes of their time, and thereafter they may make introductions.”

Cevallos is also encouraging. “You can get your start anywhere. There are so many avenues to it, no matter where you live,” he says. “You can start right away. Contact your local TV station. Write for academic journals, your firm’s newsletter, a bar association publication. Just start creating. When I started out, I didn’t know if anyone would see the stuff I wrote. It didn’t matter to me. It was the excitement of creating.”

His drive hasn’t waned.

“I’m just as hungry as I was when I was appearing on local TV. I still pitch ideas; I still want to be involved. It’s the only job that I don’t consider work at all. Any litigator will tell you they do hard, hard work, but this is hard work that I can’t wait to do.”

Darlene Ricker, a legal affairs writer and book editor based in Lexington, Kentucky, is a former staff writer and editor for the Boston Globe and the Los Angeles Times.
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Julie Abbate didn't hesitate when members of the ABA Criminal Justice Section asked her to draft a resolution about prisoners' access to tampons and sanitary pads in 2018. She had spent most of her 25-year legal career advocating for prisoners' rights—particularly female prisoners' rights—and knew from experience that they often lack access to feminine hygiene products.

Even if state prisons and county jails provide sanitary pads to women, quantities are often limited and not always available when needed. Tampons and extra sanitary pads can be purchased at a commissary, but that isn't a realistic option for many female prisoners. The consequences of restricting access to these products can be severe. Women are often forced to barter with other inmates or even correctional staff in an underground economy, sometimes for coveted items but sometimes for sexual favors. They can be left with no choice but to visibly bleed for five to seven days in front of everyone around them.

"It's a basic dignity issue, it's a human rights issue, it's a women's issue and it's also a safety issue," Abbate says. "It should be a no-brainer."

The House of Delegates agreed, and at the ABA Midyear Meeting in January, it overwhelmingly approved Resolution 109C, which calls on governments to enact legislation, and correctional and detention facilities to enact policies, that provide all female prisoners with unrestricted access to free toilet paper and a range of free feminine hygiene products.

Abbate, the national advocacy director of Just Detention International, is now working with state correctional agencies and county sheriffs to help implement the ABA policy in the field.

In less than six months, she has heard from corrections officials in Oregon and Arizona who plan to adopt changes. She expects facilities in Georgia and California to follow and join those in Alabama and Nebraska that have already implemented policies. Several states, including Colorado and Maine, also recently introduced legislation that would provide more access to feminine hygiene products in their prisons and jails.

"We're trying to do outreach with folks," Abbate says. "Let's talk about tampons. Here is this resolution that was adopted. Here is what it says. What are you going to do about it?"

"I'm optimistic that once they start implementing this, they'll see it's just the right thing to do."

DISCOVERING A CALLING

Abbate first discovered the plight of female prisoners during her undergraduate years at the University of Michigan, where she majored in women's studies.
She took a class that focused on women in prison and was paired with an inmate at the Women’s Huron Valley Correctional Facility in Ypsilanti, Michigan. Her class traveled to the prison regularly so students could get to know the prisoners.

Abbate later helped establish a program at Washtenaw County Jail in Ann Arbor that allowed its female prisoners to spend more quality time with their children during visitation.

Based on those experiences, she decided she wanted to help people get out of jail—or help them not end up there in the first place. She graduated from Howard University School of Law in 1993 but had a tough time finding a job as a public defender. She started at Covington & Burling in Washington, D.C., instead. She had been a summer associate at the firm and was drawn to its pro bono program.

One of her first assigned cases was Women Prisoners v. District of Columbia, a class action lawsuit that alleged a pattern of discrimination against female prisoners in the D.C. correctional system, including widespread sexual abuse by staff. In 1994, after a three-week trial, the district court held that abuses of female prisoners violated the Eighth Amendment and appointed an independent monitor to investigate all future allegations.

“That type of litigation, the large-scale, fact-based investigation, really allowed me to feel that I had an impact on people’s lives in a meaningful way, and not just the individuals in the current case, but the women that would come behind them,” Abbate says.

Abbate joined the Federal Trade Commission as a staff attorney in 1997 and continued working on large-scale investigations related to consumer fraud.

Three years later, she became a teaching fellow at the University of Baltimore School of Law’s civil advocacy clinic and then worked as an acting managing attorney at the Neighborhood Legal Services Program in Washington, D.C.

While Abbate appreciated the immediate gratification of helping those in need, she missed providing a long-term impact to people other than the actual clients.

A PASSIONATE ADVOCATE
She found her calling at the Department of Justice, where she first worked as a senior trial attorney and then as deputy chief in the Special Litigation Section of the Civil Rights Division.

“I was doing exactly what I always wanted to, which was prisoners’ advocacy on a large scale,” she says.

For 15 years, Abbate enforced the Civil Rights of Institutionalized Persons Act, focusing on the constitutional rights of female and transgender prisoners and custodial sexual abuse. She supervised more than 30 CRIPA matters involving more than 50 correctional facilities across the country.

She also became a member of the Attorney General’s Prison Rape Elimination Act Working Group, drafting and reviewing standards to prevent, detect and respond to prison rape.

In May 2018, Abbate moved to Just Detention International, a human rights organization that focuses exclusively on ending sexual abuse in detention. As part of her role in the Washington, D.C., office, she helps correctional facilities meet the national standards and uses her past experiences to educate them on prevention.

“It’s a closed system, a closed jail, a closed prison,” Abbate says. “There is no reason why you can’t completely eliminate sexual abuse in those facilities.”

MEETING A NEED
Carla Laroche, co-chair of the ABA Criminal Justice Section’s Women in Criminal Justice Committee, first read that women in prison were not ensured free access to feminine hygiene products in an article about an Arizona bill that aimed to supply them with more than 12 sanitary pads per month.

Laroche mentioned it to Patrice Payne, senior counsel in the Criminal Justice Section, who reached out to Abbate about drafting a resolution.

“She has been so heavily involved with this issue,” says Laroche, a clinical professor with the Public Interest Law Center at Florida State University College of Law. “She wanted it to succeed, and every time we mentioned some kind of criticism another group might bring up, she had already thought about it and addressed it in her report.”

Abbate points out that while female prisoners are the fastest-growing group in the incarcerated population, they only comprise about 10% of the country’s prisoners. As a result, women are living in correctional facilities that were designed for men.

Some facilities argue that unlimited access to feminine hygiene products would lead to women hoarding supplies, or—as Abbate writes in the report that accompanies Resolution 109C—using them to “clean cells or housing units, quiet squeaky doors, stabilize uneven chairs or tables, to protect blisters, or to pad cold metal toilet seats.”

Abbate has also heard concerns about security but says facilities that provide unrestricted access to feminine hygiene products have not reported any issues.

“Some women might abuse the privilege just like some prisoners might abuse any privilege, or any rule, and when that happens, you just deal with the specific problem at issue instead of taking everything away from everybody,” Abbate says.

Abbate, who was a member of the ABA in law school and rejoined in 2018, says the resolution was important to her because restricting access to tampons and sanitary pads illustrates the larger problem of assuming the same policies work for both male and female prisoners.

“This resolution highlights why they need to be responded to by different, gender-responsive policies,” Abbate says. “This is really the most clear-cut example of that, and by building on this example, we can help make other policies more gender-responsive as well.”
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The Master Plan
Judicial Division leads effort to increase use of special masters

By Amanda Robert

In a normal workday last year, Judge David Thomson of the 1st Judicial District in Santa Fe, New Mexico, faced more than 1,000 cases on his docket.

In addition to the sheer volume, because he presided in the seat of state government, there was a lot of complex civil litigation in his caseload. He didn’t work with magistrate judges or law clerks and would have handled most of the matters on his own—if it weren’t for special masters.

These court appointees managed various aspects of his cases, leading to quicker, more efficient resolutions. Sometimes they helped settle discovery disputes so he didn’t need to get involved. They also compiled reports for him to review that led to more comprehensive records for everyone.

Thomson, now a New Mexico Supreme Court justice, says that although he recognized the advantages of special masters, the parties in his cases were often hesitant to trust a process that was largely unknown to them.

“As a trial court judge, I’d be very open, tell them it’s a complex case, I’ve seen you once a month and we’ve had hearings for three hours,” he says. “I am going to get to this, but I also have 999 other litigants.”

Thomson and other members of the ABA Judicial Division began discussing how they could promote the use of special masters and the benefits they provide to busy trial judges and courts with limited resources.

The Lawyers Conference of the Judicial Division formed the Committee on Special Masters in 2016 and organized a diverse working group that included not only members of its division but also the Standing Committee on the American Judicial System, Section of Litigation, Business Law Section, Section of Dispute Resolution, Section of Intellectual Property Law, Tort Trial & Insurance Practice Section, and Section of Antitrust Law.

They created the ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation, which were adopted by the House of Delegates as Resolution 100 at the ABA Midyear Meeting in January.

They also recommended in the resolution that courts responsible for cases under the Bankruptcy Code be permitted to use special masters in the same way they are used in other federal cases.

Since then, the committee has been helping courts adapt the guidelines for their needs and establish criteria to use when building their rosters of special masters and evaluating them. The committee is also developing model rules and a model code of ethics for special masters.

MASTERMINDS

The work usually begins by outlining what a special master can do, says Merrill Hirsh, co-chair of the Special Masters Committee and owner of HirshADR and the Law Office of Merrill Hirsh in Washington, D.C.

“Special masters are the equivalent of a Swiss Army knife for judges,” he says. “Basically, there is an inherent authority to use special masters for almost any purpose that furthers judicial administration.”

According to the report that accompanies Resolution 100, every state except Illinois has rules or statutes that permit courts to appoint special masters or similar court adjuncts to assist with case management. Rule 53 of the Federal Rules of Civil Procedure also allows federal courts to appoint and delegate tasks to special masters.

In addition to resolving disputes between parties and assisting with discovery oversight, special masters can perform pretrial case management; coordinate cases in multiple jurisdictions or between federal and state courts; provide technical expertise; review accounting; and conduct trials or minitrials.

They can also be appointed to serve in nonjudicial roles, such as administering the September 11th Victim Compensation Fund.

“You have this array of different functions that historically haven’t been used,” Hirsh says. “You have courts making very good and effective use of other forms of alternative dispute resolution like mediation, but they haven’t used this function effectively.”

BROADENING THE POOL

Hirsh contends there has been a “historic distaste” for special masters, stemming partly from judges and attorneys having little experience with them, but also from courts bringing them in only after acrimony and delays get out of hand. While a special master can help in those situations, he says, they are not as effective.

He adds that since few courts have an official process for selecting special masters, the perception exists that they are friends of the judge or a specific party and may be unfair in managing the case.

A key element of the Special Masters Committee’s plan is to help courts develop a larger pool of qualified,
diverse special masters. The pool could include detail-oriented attorneys and retired judges who would serve well as case managers. It could also be categorized by specialty; for example, attorneys who have experience in issues with subcontractors could assist in construction cases.

As Thomson and other committee members help develop the rules, they stress the importance of an open and transparent process that provides everyone with equal opportunities.

“One of the advantages, quite frankly, of making this available to attorneys is that it may attract people who do not normally know what it’s like to be a neutral, and add some gender and ethnic diversity to the bench,” he says.

Hirsh agrees that they can help instill diversity among special masters from the outset. Since more traditional forms of alternative dispute resolution have experienced grandfathering, he says, they include mostly white men.

“Very few people do only special master work, so it’s kind of like we’re creating a profession from scratch,” he says.

**MASTERING THE CRAFT**

Henry duPont Ridgely, a former justice of the Delaware Supreme Court who is now senior counsel with DLA Piper in Wilmington, Delaware, offers his state as a model environment for special masters because of the willingness of courts to use them and the experience of lawyers and retired judges who serve in that role.

Ridgely, another member of the Special Masters Committee, recalls that he saw, as a trial judge, how special masters could assist the courts—and help experienced attorneys on both sides—after Delaware had an influx of complex insurance coverage cases in the 1980s.

“So the use of special masters has been a long tradition in Delaware, and it continues to this day,” he says.

Ridgely has also served as a special master since leaving the bench. He was contacted by one of the parties and asked whether he would assist with the case. Once he agreed, he was vetted by all counsels and appointed by the trial judge.

“I enjoy the work because the cases are challenging and interesting and provide the opportunity for me to again assist parties in resolving disputes and preventing disputes from escalating,” he says.

As the Special Masters Committee shares the ABA guidelines with courts and bars around the country, its members hope to inspire a greater and more systemic use of special masters.

“We shouldn’t say this is rare, we shouldn’t say this is odd; this should be a tool,” Hirsh says. “We don’t have to use it in every case, but it shouldn’t be any more surprising that a judge would consider using a special master than a judge would consider referring a case to a magistrate judge for a settlement conference or suggesting the parties use mediation.

“It should be on the table as an idea to be used creatively.”

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**NOTICE BY THE SECRETARY: NOMINATING COMMITTEE MEETINGS**

The Nominating Committee will meet in conjunction with the 2019 Annual Meeting in San Francisco, California, on Sunday, Aug. 11, beginning with the business session at 9 a.m. in the Golden Gate Ballroom A. Immediately following the business session, the Nominating Committee will hear from candidates seeking nomination at the 2020 Midyear Meeting. This portion of the meeting is open to Association members. If you have questions regarding the foregoing, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

Mary L. Smith, ABA Secretary

**NOTICE BY THE SECRETARY: MEETING OF THE MEMBERSHIP**

Pursuant to Section 6.11, the Secretary hereby gives notice to members of the American Bar Association that the meeting of the membership will be held in conjunction with the Nominating Committee Business Session and Coffee with the Candidates Forum on Sunday, Aug. 11, at 9 a.m. in the Golden Gate Ballroom A.

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CONGRATULATIONS to Peter B. Winterburn of Memphis, Tennessee, for garnering the most online votes for his cartoon caption. Winterburn’s caption, below, was among more than 70 entries submitted in the ABA Journal’s April cartoon caption-writing contest.

“Their final offer is no time at the pound but two months wearing a collar, on leash at the park at all times, and you have to tell them where you buried the bones.”
—Peter B. Winterburn of Memphis, Tennessee

Thanks for playing along. The ABA Journal will be unveiling a new design in the coming months, and we have decided to end the current cartoon caption contest. Look for the winner of May’s contest in our next issue.

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

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IN OCTOBER 1919, a young Justice Department staffer wrote a memo describing the activities of Marcus Garvey, a rising star in the politics of the nation's black community. The perfunctory, executive-length memo described Garvey’s efforts to finance the Black Star Line, a black-owned shipping company. What concerned the writer, a young J. Edgar Hoover, was not so much the shipping company but rather Garvey’s association with “radical elements.”

Hoover’s memo followed the “Red Summer” of 1919, when a spate of anarchist bombs—including one at the home of U.S. Attorney General A. Mitchell Palmer—short-circuited any domestic tolerance for radical politics. In the absence of specific links to the bombings, the government sought to harness immigration laws to expel prominent foreign-born radicals from the country.

The memo lamented that Garvey had broken no federal laws to warrant deportation. “It occurs to me, however, from the attached clipping that there might be some proceeding against him for fraud in connection with his Black Star Line propaganda.” And to that end, Hoover hired the FBI’s first black agents, who over the next three years were tasked with investigating and infiltrating Garvey’s emerging organization.

Jamaican-born Marcus Mosiah Garvey Jr. was certainly a radical—but one of his own peculiar brand. Neither anarchist nor Bolshevik, Garvey was drawn to Booker T. Washington’s self-reliance philosophy, which he sought to merge with Pan-Africanism and the “Back to Africa” movement. Widely read, charismatic and intellectually boundless, Garvey began attracting followers—and money—to his organization, the Universal Negro Improvement Association. As a prolific writer and electric public speaker, Garvey created a network of publications, lectured widely on black self-reliance and flirted throughout his career with white racists who supported his separatist philosophy. At the apogee of Garvey’s influence, in the early 1920s, the UNIA claimed 4 million followers.

At the time of Hoover’s memo, Garvey was appealing a New York state conviction for criminal libel. The charge grew from Garvey’s published rebuttals to accusations that the Black Star Line—the UNIA’s signature enterprise—was a fraud. Incorporated in June 1919, the Black Star Line was conceived as a hemispheric connection for black citizens. Its stock was sold at UNIA meetings and conventions for $5 per share. And whether or not it was the fraud Hoover perceived, it was a mismanaged mess.

The SS Yarmouth, a refurbished coal carrier and the line’s first ship, was in service to Caribbean ports within five months, but its schedules and routes were erratic and its cargoes uninsured. Bearing an unattended leak, the SS Shadyside sank in the Hudson River off New York City’s 157th Street. A boiler eruption on the SS Kanawha killed a man.

But it was advertising for the SS Phyllis Wheatley—named for the Colonial-era poet Phillis Wheatley—that caught Hoover’s attention. A photo of the Wheatley proved to be of the Orion, a ship the Black Star Line had tried—but failed—to purchase. And when Garvey and three others were subsequently indicted for mail fraud, Garvey critics such as W.E.B. Du Bois proved unsympathetic.

At trial, Garvey decided to act as his own attorney. Garvey was rightly indignant at the obvious government conspiracy, but by the trial’s end on June 18, 1923, his incompetent self-counsel and characteristic bombast left him the only defendant convicted among the four tried for fraud.

Garvey was sentenced to five years. After a failed appeal, he entered federal prison in Atlanta, serving 33 months before his sentence was commuted by Calvin Coolidge. He was released and deported to Jamaica.

Before he died in London in 1940, Garvey spent the rest of his life lecturing across the globe. He sought, but never received, a presidential pardon.
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